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## *The Short Unhappy Life of the Negotiation Class*

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*University of Texas School of Law*

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## THE SHORT UNHAPPY LIFE OF THE NEGOTIATION CLASS

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Linda S. Mullenix\*

### ABSTRACT

*On September 11, 2019, Judge Dan Aaron Polster of the United States District Court for the Northern District of Ohio, Eastern Division, approved a novel negotiation class certification in the massive Opiate multidistrict litigation (MDL). Merely one year later on September 24, 2020, the Sixth Circuit reversed Judge Polster's certification order. While the Opiate MDL has garnered substantial media and academic attention, less consideration has been directed to analyzing the significance of the negotiation class model and the appellate repudiation of this innovative procedural mechanism.*

*This Article focuses on the development and fate of the negotiation class and considers the lessons to be gleaned from its attempted use in the Opiate MDL. The short unhappy life of the negotiation class raises questions whether its failure was a consequence of implementation or design. This is an important question because if the failure was the result of problematic implementation in the context of idiosyncratic circumstances, then the negotiation class model may live to see another day. On the other hand, if the failure was the consequence of deficient design and judicial overreaching, then the negotiation class may be consigned to the museum of good intentions gone awry.*

*The novel proposal for a negotiation class did not come out of nowhere but was another chapter in a five-decade struggle between aggregationist attorneys and judges seeking creative solutions to mass litigation, pitted against jurists repudiating adventurous use of the class action rule. This Article provides the definitive narration of the historical evolution of expanding novel uses of Rule 23, anchored in the mass tort litigation crisis that emerged on federal court dockets in the late 1970s. The article illustrates how Judge Polster's negotiation class was the logical culmination of decades of judicial and academic experimentation with innovative procedural means to accomplish the fair and expeditious resolution of aggregate litigation. It traces the role of the American Law Institute in advancing pro-aggregation initiatives, laying the groundwork for the Opiate negotiation class proposal. The discussion elucidates how the debate over the settlement class concept in the 1990s presaged the same debate over the negotiation class three decades later, and how criticisms of the ALI aggregate litigation proposals resurfaced in opposition to the Opiate negotiation class.*

*The negotiation class model promised to ameliorate numerous problems inherent in heterogenous group litigation by infusing class litigation with collective action theories and democratic participatory features. The centerpiece of the negotiation class was to bring class claimants to the table and provide them with meaningful voice*

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through group design of a settlement allocation metric, coupled with a franchise vote to approve or disapprove any offered settlement. Its other defining feature was to provide defendants at early juncture in proceedings with an accurate assessment of the class size as an incentive to enable defendants to secure global peace.

The attempted implementation of the negotiation class in the Opiate litigation revealed numerous fault lines in the proposal. The negotiation class as applied failed to provide many claimants with comprehensible information regarding the devised allocation formula. Some claimants believed that it failed to ameliorate the kinds of intraclass conflicts it was designed to remedy. State attorneys general raised the specter of interference with state prerogatives. Furthermore, rather than empowering class members at the negotiation table, the development of the Opiate litigation defaulted to a traditional model of attorney empowerment and dominance in the resolution of aggregate proceedings. The promise of collective action and democratization proved illusory.

The deployment of the negotiation class concept in the Opiate MDL also entailed problematic questions concerning the role of judicial surrogates in aggregate litigation and the increasing power and influence that courts delegate to non-party actors. Judge Polster's embrace of the negotiation class in the Opiate litigation placed the judge, his court-appointed surrogates, and the array of plaintiff and defense attorneys in tension with the Supreme Court admonition to federal judges, at the end of the twentieth century, to cease adventurous use of the class action rule.

It may well be that the Opiate MDL was a poor vehicle to test the negotiation class proposal and so the problem was one of implementation, rather than design. The failure of the Opiate negotiation class leaves open the question of whether those who crafted it could have done a better job to avoid appellate reversal. Nonetheless, if the array of special masters, expert academic professors, a seasoned senior judge, and highly experienced complex litigation attorneys were unable to successfully shepherd the first negotiation class, this experience raises doubts about its prospects. It should be remembered that the settlement class of the 1990s was a novel procedure in its day, yet it subsequently became a stock device in the class action toolbox. The history of the settlement class may foreshadow better days for the negotiation class or inspire further rulemaking by the federal judiciary to legitimate the negotiation class model.

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*As the stewards of rules which the Judicial Branch brings into existence, federal courts must construe Rule 23 in ways that avoid constitutional objection. . . . the Rules Enabling Act and the general doctrine of constitutional avoidance provide further counsel against adventurous application of Rule 23.<sup>1</sup>*

*Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved.<sup>2</sup>*

## INTRODUCTION

When scholars ultimately write the definitive account of the sprawling national *Opiate* litigation, it no doubt will be assessed as either the apotheosis or the nadir of MDL litigation generally. But that is an epic story for another day. In the interim, one special *Opiate* litigation subplot — the saga of the ill-fated negotiation class — deserves scrutiny for the lessons it teaches about the boundaries and limitations of judicial authority. Ultimately, the chronical of the *Opiate* negotiation class raises legitimate questions about the role of democratic process in the resolution of complex litigation through MDL or class action auspices. It also raises questions of the limits of judicial authority to infuse legal proceedings with quasi-democratic procedures.

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1. *Monument Builders of Pa., Inc. v. American Am. Cemetery Assoc.*, 206 F.R.D. 113, 121 (E.D. Pa. 2002) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999)). The Court's comment in *Ortiz* critical of adventurous use of Rule 23 was in reference to expansive application of Rule 23(b)(1)(B) limited fund class actions.

2. *Matthew* 9:17 (King James); see also *Mark* 2:22 (King James), *Luke* 5:37 (King James) (same).

Nurtured in the groves of academe, endorsed by the American Law Institute, and birthed in full measure in the *Opiate* MDL, Judge Dan Aaron Polster gave the negotiation class official judicial imprimatur in September 2019.<sup>3</sup> One year later, the Sixth Circuit Court of Appeals resoundingly repudiated the negotiation class Judge Polster had certified.<sup>4</sup> Since the appellate repudiation of the negotiation class, no other federal court has taken up the invitation to innovate in the class action arena by endorsing another negotiation class.

This article traces the development of the negotiation class in the context of evolving adventurous expansions of class action litigation since the late 1970s. Part I sets forth the historical antecedents of the negotiation class that laid the groundwork for class action advocates to push the boundaries of procedural law to effectuate collective redress. This portion of the article chronicles the emergence of a cohort of aggregationist attorneys and judges in the 1980s and their efforts to reshape collective redress. It focuses on the development of the concept of the settlement class and how the settlement class experience informed the debate over the negotiation class three decades later. It illustrates how the federal courts' attitudes toward class actions and other forms of collective redress seesawed from one decade to the next.

Part II discusses the genesis of the negotiation class concept by its authors and sponsors. This section discusses the American Law Institute's 2010 publication of the *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION*<sup>5</sup> laying the intellectual groundwork for the negotiation class proposal in 2017. This portion of the paper illustrates how the ALI's novel proposals for resolving non-class aggregate litigation subsequently inspired two law professors — Francis McGovern of Duke University Law School and William Rubenstein of Harvard University Law School — to propose the negotiation class model in a law review article. It analyzes how arguments and counterarguments supporting and opposing the non-class settlement proposal in the ALI *Principles* project anticipated the same arguments for and against the negotiation class.

Part III addresses Judge Polster's embrace of the negotiation class in his supervision of the *Opiate* MDL. It briefly surveys the advent of the national opiate crisis, the initiation of litigation by public entities seeking redress for harms to public health systems, the creation of the MDL, and Judge Polster's various unorthodox measures in his supervision of the MDL. This portion of the article discusses Judge Polster's class certi-

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3. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019).

4. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020).

5. *PRINCIPLES OF THE L. OF AGGREGATE LITIG.* (AM. L. INST. 2010) [hereinafter *PRINCIPLES*].

fication of the negotiation class in September 2019 and the immediate appeal of that order. It canvasses the arguments of the appellants, appellees, and amici, pointing out that many of the arguments they advanced were well-worn arguments from earlier eras in the history of mass tort litigation. This section discusses the Sixth Circuit's decision reversing the negotiation class and the majority's rejection of this expansion of class action procedure.

Part IV examines the reaction to the Sixth Circuit's decision, focusing on a scholarly, positive post-mortem suggesting that the failure of the negotiation class was a consequence of flawed implementation rather than design. It reflects on the strength of the bankruptcy law analog that the proponents of the negotiation class relied on as a precedent for the voting procedures in the negotiation class model. More generally, it considers the uncertain future of the negotiation class focusing on the question of whether the failure of the *Opiate* negotiation class was a problem of implementation or design.

Finally, this section reprises the discussion of the negotiation class in the context of the five-decade long debate concerning the best procedural means for resolving mass tort litigation, pitting theories of litigant autonomy against aggregationist views. It raises basic questions of the role of democratic process in the resolution of aggregate litigation and asks what democratic procedure in civil litigation means, and what democratic involvement requires. The article suggests that the experience of the negotiation class represents just another chapter in the long history of mass tort litigation, with this chapter concluding in favor of litigant autonomy and agreeing with the admonition to federal judges to cease adventurous uses of the class action rule that potentially violate the Rules Enabling Act.<sup>6</sup> Ultimately, the central issue may not be the wisdom of the negotiation class, but whether district court judges have the authority to create novel procedures in aggregate litigation.

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6. 28 U.S.C. §§ 2071–, 2072.

## I. HISTORICAL ANTECEDENTS FOR ADVENTUROUS EXPANSION OF CLASS LITIGATION

### A. *The Era of Innovative Initiatives in Class Litigation*

The modern era of American class action litigation effectively began with the 1966 amendment of Rule 23, which restructured the class action rule to create simplified and functional class action categories.<sup>7</sup> At that time, the centerpiece of class action procedural reform was the creation of the Rule 23(b)(2) injunctive relief class action. This amendment ushered in a decade of institutional reform litigation with injunction as the primary form of group relief.<sup>8</sup>

By the end of the 1970s, federal courts began to be inundated with a new form of class litigation not contemplated by the 1960s rulemakers: namely, the mass tort class action.<sup>9</sup> The seminal mass tort litigation of this era embraced aggregate litigation concerning asbestos exposure, Agent Orange syndrome illnesses, the Dalkon Shield IUD, Bendectin, and DES birth defect cases.<sup>10</sup>

The chief conundrum that challenged federal courts concerned the suitability of these proposed mass tort cases for class certification under the Rule 23(b)(3) damage class action category. With the emergence of mass tort litigation, many federal courts resisted certifying such proposed class actions because the judges concluded that Rule 23 neither embraced nor contemplated these aggregate mass tort cases.<sup>11</sup> Many courts pointed to the 1966 Advisory Committee Note as support

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7. See generally David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang*, 1953-1980, 90 WASH. U. L. REV. 587 (2013).

8. See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 783 (2016) ("Rulemakers had desegregation litigation in mind as they revised Rule 23 in the early 1960s); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 327, 332-33 (2017) ("The rule itself is rooted in the turbulent history of the civil rights movement of the 1960s and was designed to enhance civil rights enforcement.").

9. See generally Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157 (1998); Greer Pagan, *Renewed Resistance? The Federal Circuit Courts and the Problem of Mass Tort Class Actions*, 34 HOUS. L. REV. 807 (1997).

10. See LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* 1-14 (3d ed. 2017).

11. See, e.g., *In re Northern Dist. Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (rejecting certification of nationwide punitive damage class); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (rejecting certification of structural collapse mass tort); *Mertens v. Abbott Labs.*, 99 F.R.D. 38 (D.N.H. 1983) (denying class certification in a proposed DES litigation); *Yandle v. PPG Indust., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (denying class certification to proposed asbestos class).

for the conclusion that mass tort class actions were not suitable for class certification.<sup>12</sup>

By the mid-1980s, several federal judges with substantial mass tort dockets concluded that it was necessary to find a way to manage and adjudicate aggregate mass tort litigation.<sup>13</sup> Thus began a decade of creative innovation by aggregationist federal judges applying Rule 23 to mass tort litigation. These innovations included liberal, expansive class certification orders,<sup>14</sup> the introduction of multi-phase trials,<sup>15</sup> the use of damage sampling techniques,<sup>16</sup> recourse to limited issues classes,<sup>17</sup> increased reliance on special masters in novel roles,<sup>18</sup> and glossing over applicable law problems in multi-state or nationwide mass tort class actions.<sup>19</sup> A cohort of aggregationist federal judges would continue to experiment with pioneering uses of the class action rule well into the mid-1990s, when judicial reaction against mass tort class litigation emerged and signaled a temporary denouement of innovative mass tort class litigation.<sup>20</sup>

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12. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (stating Rule 23(b)(3), which stated:

“[a] “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”)

13. See Melissa Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 552--53 (2002).

14. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (1987) (upholding class certification of Agent Orange settlement class); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986) (upholding asbestos class certification); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (upholding nationwide School Asbestos class certification of asbestos property damage cases brought by school authorities).

15. MULLENIX, *supra* note 10, at 29-30 (citing Order, *Cimino v. Raymark Indus., Inc.*, Order (E.D. Tex. Dec. 29, 1989)) (certifying three-phase trial in asbestos class action).

16. *See Id.*

17. *See, e.g.*, *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (upholding limited issues class certification); *In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985) (certifying limited issue class).

18. *See Cimino v. Raymark Indus., Inc.*, No. 86-0456, 1989 WL 253889 (Sept. 23, 1989) (report of Special Master Jack Ratliff to Judge Robert Parker recommending class certification of multi-phase asbestos trial).

19. *See, e.g.*, *Castano v. The Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court certification of nationwide tobacco mass tort litigation in part because of applicable law issues); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (same regarding nationwide class certification of tainted blood products litigation); *cf. In re Copley Pharm., Inc., “Albuterol” Prods. Liab. Litig.*, 161 F.R.D. 456 (D. Wyo. 1995) (upholding prior nationwide class certification of albuterol mass tort).

20. *See Richard A. Nagareda, In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295 (1996).

### B. *The Development of and Controversy Relating the Settlement Class*

Another signal development of the innovative mass tort era of the late 1980s and early 1990s was the attorneys' development and the judiciary's endorsement of a new concept: the settlement class. The nationwide class settlement of asbestos claims in *Georgine v. Amchem Prods., Inc.*<sup>21</sup> in 1994 inspired a decade-long controversy concerning the use and approval of settlement classes. The debate surrounding the legitimacy of the settlement class in the 1990s anticipated the controversy surrounding the legitimacy of the negotiation class nearly thirty years later. As will be seen, many of the contentions that supporters and opponents of the settlement class advanced during that earlier debate over settlement classes would be revisited and reargued concerning the negotiation class.<sup>22</sup>

The Fourth Circuit anticipated the controversy over the legitimacy of settlement classes with its approval of a settlement class in the *Dalkon Shield* mass tort litigation.<sup>23</sup> The resolution of the *Dalkon Shield* litigation set forth the contours of the ensuing settlement class debate during the 1990s. In the *Dalkon Shield* litigation, after protracted proceedings, the parties agreed to a settlement that was conditioned on class certification. The district certified the class as part of the approval process and approved the settlement.<sup>24</sup>

On appeal, the appellants argued that Rule 23 did not authorize or permit a judge to certify such a settlement class. The Fourth Circuit considered this then-novel question whether the "class certification for settlement purposes is permissible under Rule 23." The court noted that the federal judge supervising the *Bendectin* litigation had issued the only extant decision at that time approving a settlement class in a mass tort litigation. Notwithstanding the paucity of judicial precedents, the Fourth Circuit found support for the settlement class concept in academic commentary and a few judges managing other mass tort cases.<sup>25</sup>

Surveying the authority for settlement classes, the court alluded to the equitable foundations of Rule 23 and class action litigation. The court concluded that "the lessons to be gleaned from the authorities already cited and discussed to be that the 'trend' is once again to give Rule

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21. 157 F.R.D. 246 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591, 117 S. Ct. 2231 (1997).

22. See discussion *infra* at notes 314–385.

23. See *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989).

24. *Id.* at 711–23 (setting forth procedural history of *Dalkon Shield* litigation and its resolution in a settlement class).

25. *Id.* at 738–40.

23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and promote judicial efficiency . . .'"<sup>26</sup> The court further noted the well-established use of settlement classes in other contexts and could find no reason why the concept should not be extended to mass tort cases.<sup>27</sup> And finally, the court indicated that while a settlement was not a *per se* reason for certifying a class, the existence of a settlement certainly was a factor that a court legitimately could take into account when considering whether to certify a class.<sup>28</sup>

The controversy over the legitimacy of the settlement class sharpened with the 1994 settlement of the *Georgine* nationwide asbestos class action.<sup>29</sup> The procedural history of the *Georgine* litigation has been well-rehearsed in judicial decisions<sup>30</sup> and extensive academic commentary.<sup>31</sup> After the parties reached a settlement of all existing and future asbestos claims nationwide, a Texas attorney — with his own inventory of asbestos claimants — objected to the settlement.

In addition to challenging the substantive terms of the settlement, the objector also challenged the procedural development of the *Georgine* deal. In particular, he argued that the settlement class was illegitimate, that the request for approval of the settlement and class certification were filed on the same day, and that the plaintiff and defense attorneys had engaged in collusion in negotiating and finalizing the agreement. After extensive testimony at the fairness hearing concerning the *Georgine* settlement, District Court Judge Lowell Reed approved the settlement and certified a Rule 23(b)(3) opt-out settlement class. Judge Reed's lengthy opinion was noteworthy for its lack of attention to the settlement class issue.<sup>32</sup> Unhappy with this result, the objector appealed to the Third Circuit.

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26. *Id.* at 740.

27. *Id.*

28. *Id.*

29. *Georgine v. AmChem Prod., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. AmChem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

30. *AmChem Prods. Inc. v. Windsor*, 521 U.S. 591, 597–613, (1997); *Georgine*, 83 F.3d at 617–22.

31. *See generally*, Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) (symposium issue on *Georgine* litigation); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

32. *Georgine*, 83 F.3d 610.

### C. *The Settlement Class Triumphant*

Two successive decisions by Third Circuit Judge Edward R. Becker played a significant role in the emerging settlement class controversy. These decisions laid the theoretical, jurisprudential, and practical groundwork for the ensuing debate over settlement classes that the Supreme Court ultimately would resolve at the end of the decade. The contours of the settlement class debate in the 1990s is instructive for the debate over the negotiation class that its advocates and detractors argued some thirty years later.<sup>33</sup> Many of the same contentions that were advanced in favor and against the negotiation class in 2019 were urged during the settlement class controversy of the 1990s.

#### 1. The GMC Pick-Up Truck Fuel Tank Settlement Class

While the district court's approval of the *Georgine* settlement was pending, Judge Becker issued an opinion concerning a settlement class of GMC pick-up truck purchasers that numerous objectors opposed.<sup>34</sup> Although the court would find fault with the settlement on substantive grounds, Judge Becker's opinion carefully canvassed the issues enmeshed in the novel settlement class concept and ultimately endorsed the legitimacy and practicality of settlement classes.<sup>35</sup> Judge Becker's discussion of the settlement class concept in the *GMC* and *Georgine* appeals laid the jurisprudential grounds for ultimate Supreme Court review.

The nature of a settlement class, Judge Becker explained in *GMC*, was a request to the court from the plaintiffs and defendants for a settlement class after the parties provisionally settled the case and before they would otherwise seek formal class certification. Using the settlement class device, parties moved for simultaneous class certification and settlement approval.<sup>36</sup> Judge Becker noted that this process was "removed from the normal, adversarial, litigation mode."<sup>37</sup>

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33. See discussion *infra* at notes 314–85.

34. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). The GMC settlement was a coupon settlement whereby class claimants were to be issued coupons for purchase of a future GMC vehicle. *Id.* at 780. The coupon settlement ultimately was repudiated. *Id.* at 822–23.

35. *Id.* at 778–79. Judge Becker's opinion set forth the arguments favoring settlement classes and opposing settlement classes in considerable detail. *See id.* at 786–92.

36. *Id.* at 778, 786.

37. *Id.* at 778.

Although the GMC objectors raised multiple issues on appeal, Judge Becker singled out the problem of the settlement class for special attention: “While all the issues we have mentioned are significant, the threshold and most important issue concerns the propriety and prerequisites of settlement classes.”<sup>38</sup> Regarding the propriety of a settlement class, Judge Becker noted that the settlement class device was not mentioned in the class action Rule 23, but neither did the rule preclude it. Instead, the settlement class device was a judicially crafted procedure. Searching for authoritative support for the settlement class, Judge Becker located this possibly in the Rule 23(d) delineation of powers afforded to judges, or alternatively, by a court’s “temporary assumption” of powers to facilitate settlement. For Judge Becker, settlement classes represented “a practical construction of the class action rule.”<sup>39</sup>

Having determined the propriety of settlement classes, Judge Becker turned attention to the prerequisites for approval of a settlement class. He announced that there was no lower standard for certification of a settlement class than for a litigation class.<sup>40</sup> Thus, “a class is a class,” and “there is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.”<sup>41</sup> A proposed settlement class had to satisfy two necessary fundamentals for judicial approval. First, a proposed settlement class had to satisfy all the threshold Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy, as well as the additional Rule 23(b)(3) requirements for predominance and superiority if the settlement agreement was proposed under that provision.<sup>42</sup> Second, a judicial finding that a settlement was fair and reasonable could not serve as a surrogate for class findings.<sup>43</sup> However, unlike the Fourth Circuit’s opinion in the Dalkon Shield settlement, Judge Becker did not resolve the issue whether, in the case of settlement classes, the fact of settlement might be considered in applying the Rule 23(b)(3) requirements.<sup>44</sup>

Turning to policy considerations, Judge Becker acknowledged that the Federal Judicial Center’s *MANUAL FOR COMPLEX LITIGATION (FIRST)* strongly disapproved of settlement classes. In addition, critics challenged the use of settlement classes as a device for collusive settlements that benefitted plaintiff and defense counsel mutually, to the detriment

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38. *Id.* at 777.

39. *Id.* at 794.

40. *See id.*

41. *Id.* at 799.

42. *Id.* at 778.

43. *Id.* at 778.

44. *See id.* at 796.

of claimants.<sup>45</sup> But judicial resistance to flexible applications of Rule 23 had diminished over time.<sup>46</sup> Thus, with the influx of complex national and international class actions onto the federal court dockets, the FJC and several federal judges relented and endorsed the settlement class concept “under carefully controlled circumstances.”<sup>47</sup> The increased use of settlement classes – particularly in the mass tort context – had proven valuable in disposing of these major cases.

Like the Fourth Circuit’s allusion to the equitable foundation of Rule 23, Judge Becker invoked similar underlying rationales for the settlement class: “Courts have also relied on the more general policies of Rule 23 – promoting justice and realizing judicial efficiencies – to justify this arguable departure from the rule. The hallmark of Rule 23 is flexibility.”<sup>48</sup> Significantly Judge Becker’s detailed analysis of the perceived problems of settlement classes — as well as his canvass of the arguments favoring the settlement class device — would resonate in the subsequent controversy over the proposed negotiation class.

Judge Becker identified at least fourteen problematic issues relating to settlement classes: (1) Rule 23 did not authorize a separate category for class certification that would permit a dilution or dispense with the Rule 23(a) requirements, (2) Rule 23 did not authorize deferral of class certification pending settlement, (3) deferral of class certification created practical problems, (4) deferral of class certification impeded the court’s ability to protect the interests of the absentees during the disposition of the action, (5) deferral of certification impaired the court’s performance of its role as supervisor/protector of class members’ interests without the benefit of full adversarial briefing, (6) deferral of class certification impeded the judge’s ability to effectively monitor for collusion, (7) settlement classes deprived judges of the structural devices of Rule 23 and the presumptions of propriety generated by the rule, such as adequacy of representation, (8) settlement classes could be used to evade the processes intended to protect absentees’ rights, (9) settlement classes might compromise the fiduciary duties of class counsel or the class representatives, (10) early achievement of a settlement class might lead to inadequate consideration in exchange for release of the class members’ claims, (11) class members as a consequence of information deficiencies might not be in a fair position at an early stage to evaluate whether a settlement represented a superior alternative to litigation, (12) settlement classes created an opportunity for one-way intervention,

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45. *See id.* at 784–85, 786, 787–90.

46. *See id.* at 793–94.

47. *Id.* at 778, 794.

48. *Id.* at 793 (internal quotations omitted).

(13) the possibility of pre-certification negotiation and settlement might facilitate the filing of strike suits, and (14) use of settlement classes risked transforming courts into mediation forums.<sup>49</sup>

Judge Becker counterbalanced his discussion of the problems of settlement classes with a litany of arguments in support of the procedure. He suggested that “By using the courts to overcome some of the collective action problems particularly acute in mass tort cases, the settlement class device can make settlement feasible.”<sup>50</sup> Settlement classes increased the actions amenable to resolution by increasing the rewards of a negotiated settlement and they enhanced defendants’ incentive to settle because settlements bound claimants and barred further litigation. Settlement classes might reduce the probability of subsequent successful challenges and reduce litigation costs by allowing defendants to stipulate to class certification. Settlement classes might palliate claimants by equalizing payment amounts to class members. Critics had underestimated that due process safeguards still inhered in the process, because objectors could challenge certification with contentions not based solely on the settlement’s terms. Due process also was preserved because class members could opt-out from Rule 23(b)(3) settlement classes. Moreover, no matter when the certification issue arose, the judges’ duties to ensure fairness and adequacy were the same.<sup>51</sup>

## 2. The Georgine Settlement Class

Judge Becker gained a second opportunity to set forth his views on settlement classes in the *Georgine* objector’s appeal from Judge Reed’s approval of the *Georgine* settlement class.<sup>52</sup> In essence, the Third Circuit adopted and applied Judge Becker’s prerequisites for settlement classes in its review of the *Georgine* settlement class, noting that the GMC panel had held that class actions might be certified for settlement purposes only.<sup>53</sup> Judge Becker spent no further time discussing the propriety of settlement classes. However, he answered the issue left open in GMC, now asserting that courts could not take the settlement into account when applying the Rule 23(b)(3) requirements.<sup>54</sup>

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49. *Id.* at 787–90.

50. *Id.* at 790 (discussing collective action problems in settling mass tort claims).

51. *Id.* at 790–91.

52. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996); see discussion *supra* discussion at accompanying notes 29–32.

53. *Id.* at 625.

54. *Id.*

Judge Becker's opinion focused on the *GMC* holdings that parties had to satisfy the Rule 23(a) and Rule 23(b)(3) requirements as if the case were going to be litigated.<sup>55</sup> He noted that District Judge Reed did not have the benefit of the Third Circuit's *GMC* decision when he approved the *Georgine* settlement. Consequently, the district court had applied an incorrect standard. The district court erred in its view that Rule 23 requirements for settlement classes were lower than for litigation classes. In addition, the district court erred by relying in significant part on the presence of the settlement itself to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy. Judge Becker reminded that the settlement proponents had to satisfy each of these requirements without considering the settlement.<sup>56</sup> In applying the Rule 23 factors, the court reversed approval of the *Georgine* settlement, holding that the settlement failed to satisfy the Rule 23(a) requirements for typicality and adequacy, and the Rule 23(b)(3) requirements of predominance and superiority.<sup>57</sup>

By the *Georgine* appeal, the settlement class issue was percolating throughout the judiciary. Judge Becker recognized that his settlement class views might not prevail, suggesting that the Advisory Committee on Civil Rules, Congress, or the Supreme Court might weigh in with countervailing judicial or legislative initiatives.<sup>58</sup>

### 3. The Supreme Court Speaks on Settlement Classes: The Amchem and Ortiz Settlement Classes

Judge Becker recognized that the Supreme Court ultimately would resolve the settlement class issue, which may explain his ambivalence in the final paragraphs in his *Georgine* opinion. The Court engaged with the settlement class debate with its *Amchem* and *Ortiz* decisions.<sup>59</sup> By the time the settlement class issue reached the Supreme Court, Judge Becker had extensively vetted the question.

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55. *Id.* (noting that strict application of the criteria was mandated; “. . . the rule in this circuit is that settlement class certification is not permissible unless the case would have been ‘triable’ in class form.” (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 799 (3d Cir.))).

56. *Id.* at 626.

57. *Id.* at 626–34.

58. *Id.* at 625 (“Whatever the Advisory Committee on Civil Rules (and, of course, Congress) may ultimately determine the better rule to be, we do not believe that the drafters of the present rule included a more liberal standard for Rule 23(b)(3).”); see also *id.* at 634–35 (discussing pending possible initiatives before Congress and the Advisory Committee on Civil Rules).

59. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *AmChem Prods. Inc. v. Windsor*, 521 U.S. 591, 597–613 (1997).

In *Amchem*, the Court upheld the legitimacy of settlement classes,<sup>60</sup> suggesting that in the decades since the 1966 amendment of Rule 23, courts had become more “adventuresome” in the means to resolve mass claims.<sup>61</sup> The “settlement only” class had become a stock device that enhanced the “just, speedy, and inexpensive” resolution of complex cases. However, although all federal courts accepted the utility of settlement classes, they were divided on the extent to which settlement classes affected judicial oversight of class certification requirements.<sup>62</sup> The nub of the Court’s settlement class discussion centered less on the legitimacy issue, but more on the Rule 23 criteria for approval of a settlement class.

Regarding Rule 23 prerequisites, the Court disagreed with Judge Becker’s view that proponents had to satisfy all class certification requirements. Instead, a court did not need to evaluate the manageability of the proposed class action when asked to approve the Rule 23(b)(3) settlement, precisely because the case would never be tried.<sup>63</sup> Other criteria of Rule 23 demanded “undiluted, even heightened, attention in the settlement context.”<sup>64</sup>

However, the Court agreed with Judge Becker that the alleged fairness of a proposed settlement could not be used to bootstrap a determination that class certification requirements were satisfied. Federal courts were not authorized to substitute for the Rule 23 criteria a standard that the Advisory Committee had never adopted: namely, that if a settlement was fair, then certification was proper.<sup>65</sup> Applying Rule 23 standards to the *Georgine* settlement approval, the Court concluded that the district court erred in finding that the Rule 23(b)(3) predominance requirement was satisfied.<sup>66</sup> In addition, the Court concluded that the *Georgine* settlement failed to satisfy the Rule 23(a) adequacy requirement because of an inherent conflict of interest among class members.<sup>67</sup>

The Court sounded cautionary notes about the limits of judicial power in the class action arena. The Court noted that the Advisory

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60. *Amchem*, 521 U.S. at 619 (“We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification.”).

61. *Id.* at 617–18.

62. *Id.* at 618.

63. *Id.* at 620.

64. *Id.* The Court added that “[t]he safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments – checks shorn of utility – in the settlement-class context.” *Id.* at 621.

65. *Id.* at 622.

66. *Id.* at 622–24.

67. *Id.* at 625–28.

Committee was considering a proposed amendment to Rule 23 — but had not yet acted on the proposal — that would specifically authorize settlement class certification even though the proposed settlement class did not meet the requirements for a Rule (b)(3) certification.<sup>68</sup> The Court also noted that Congress had not adopted a nationwide asbestos claims processing regime as an efficient means for resolving these mass tort cases, suggesting that the federal judiciary could not on an ad hoc basis adopt just such an approach and solution. In addition, the courts were required to interpret and apply Rule 23 with fidelity to the Rules Enabling Act, which prohibited federal courts from abridging, enlarging, or modifying substantive rights.<sup>69</sup>

The Court's 1999 *Ortiz* decision tacitly, but not explicitly, affirmed the propriety of settlement classes. Because the *Ortiz* Court must have considered that its *Amchem* decision definitively decided the legitimacy of settlement classes, the *Ortiz* decision added little to the jurisprudence of settlement classes. In reversing the Fifth Circuit's approval of a Rule 23(b)(1) limited fund settlement class, the Court indicated that the appellate court had "[fallen] short in its attention to *Amchem's* explanation of the governing legal standards."<sup>70</sup> Reviewing the district court's approval of the settlement class, the Court indicated that it had erred by focusing on the settlement terms in assessing the Rule 23(a) requirements for commonality and typicality. In addition, the district court had taken no steps at the outset to ensure that potentially conflicting interests were afforded structural due process protections.<sup>71</sup>

The Court in *Ortiz* again sounded cautionary notes about the trend towards adventurous uses of the class action device to resolve mass tort cases. "The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge, or modify any substantive right.'"<sup>72</sup> The Court again pointed out the limits of judicial power regarding expansive use of the class action device: "The nub of our position is that we are bound to follow Rule 23 as we understood it

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68. *Id.* at 619.

69. *Id.* at 628–29 ("As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.'" (quoting C. WRIGHT, LAW OF FEDERAL COURTS 508 (5th ed. 1994))).

70. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

71. *Id.* at 831–32, 856–59.

72. *Id.* at 845. (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b))).

upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”<sup>73</sup>

#### D. *The Advisory Committee’s Rejection of the Settlement Class Proposal*

In deciding *Amchem*, the Court was well-aware that the Advisory Committee on Civil Rules had a pending proposal to amend Rule 23 to add a specific Rule 23(b) category that authorized settlement classes, which proposal it had forwarded to the Judicial Conference’s Standing Committee on Rules of Practice and Procedure.<sup>74</sup> In May 1996, six months before the Court granted certiorari in *Amchem*, the Standing Committee received “voluminous” public comments, many of which were opposed to adding a new provision for a settlement class.<sup>75</sup> When the Advisory Committee, in turn, learned that the Supreme Court granted certiorari in *Amchem*, the Advisory Committee decided to await the Court’s decision before proceeding with the proposed settlement class amendment.<sup>76</sup>

The proposed revision to Rule 23 would have added a new subdivision to the Rule 23(b) categories.<sup>77</sup> The Rule 23(b)(4) provision would have allowed courts to certify a class when “the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.”<sup>78</sup> The Advisory Committee Note stated that “[a] single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation.”<sup>79</sup> The Advisory Committee Note further indicated that the intent of the proposed new subdivision was to overrule Judge Becker’s strict approach to certifying settlement classes, and to allow for more relaxed satisfaction of the adequacy, typicality,

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73. *Id.* at 861.

74. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 619 (1997).

75. *Id.*

76. *See* Christopher J. Willis, *Collision Course of Coexistence? Amchem Products v. Windsor and Proposed Rule 23(b)(4)*, 28 CUMB. L. REV. 13, 14 n.10 (1998).

77. *See generally id.*; Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 622–34 (1997).

78. Proposed Rules, 167 F.R.D. 523, 559 (1996).

79. Proposed Rule 23(b)(4), Advisory Committee’s Note, April 1996 Draft.

and predominance requirements to be evaluated with reference to the settlement fairness.<sup>80</sup>

In the aftermath of the Court's *Amchem* decision, the Advisory Committee did not act on the proposed Rule 23(b)(4) settlement class proposal.<sup>81</sup> However, as one commentator noted, some issues just don't seem to go away.<sup>82</sup> This has certainly been true for the settlement class. In 2012, the Advisory Committee created a sub-committee to consider further amendment of Rule 23,<sup>83</sup> which included possibly resuscitating a settlement class proposal to circumvent strict application of the Rule 23(a) and (b) requirements for certification of a settlement class. Taking a page from the 1966-97 debate over settlement classes, the Advisory Committee Minutes recorded the inquiry put to the subcommittee: "Should there be criteria for certifying a settlement class different from the criteria for certifying a litigation class?"<sup>84</sup>

The controversy over amending Rule 23 to add a settlement class category foreshadowed the ensuing debate thirty years later concerning the negotiation class. By the early 1990s, an emerging cohort of aggregationist lawyers, judges, and academicians aligned as proponents of the settlement class concept. They viewed the settlement class as an efficacious device to assist in the just, speedy, and inexpensive resolution of mass tort litigation.<sup>85</sup> They sought to establish the legitimacy of the

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80. Proposed Rules, *supra* note 78, at 563-64; Willis, *supra* note 76, at 15 n.12; *see also* Daniel N. Gallucci, *The Aftermath of General Motors and Georgine: Are Settlement Classes Doomed?*, 102 DICK. L. REV. 575 (1998) (commenting on the split among the circuits regarding the standards for certification of a settlement class and concluding that the Third Circuit's rigid standard should be rejected by the Supreme Court in the *Amchem* appeal).

81. *See* CIVIL RULES ADVISORY COMM., MINUTES (Oct. 6-7, 1997) (on file with the University of Michigan Journal of Law Reform) ("Because the Committee cannot be confident of what the Court intended, cannot be confident whether the published proposal means something else, and cannot be confident of the ways in which an adopted amendment might be interpreted against the background of the Court's opinion, further work is necessary if Rule 23 is to be amended to address settlement classes."). The Advisory Committee abandoned a wide-reaching wholesale package of proposed reforms to Rule 23, which included the proposal for the settlement class.

82. *See generally* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014).

83. JUD. CONF. Comm. On Rules of Prac. & Proc., Report of the Judicial Conference Comm. On Rules of Practice & Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 26 (Sept. 2012), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf> [<https://perma.cc/Q88H-MBYE>].

84. CIVIL RULES ADVISORY COMM., MINUTES 32 (Mar. 22-23, 2012), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-2012-min.pdf> [<https://perma.cc/AUZ9-JBWG>]. Like the Advisory Committee's inaction on the settlement class proposal in 1997, the Advisory Committee did not bring forward another settlement class proposal as part of its 2018 package of Rule 23 amendments.

85. *See, e.g.*, Edward H. Cooper, *The ("Cloudy") Future of Class Actions*, 40 ARIZ. L. REV. 923, 933-34 (1998) (noting that there was a persuasive case for gradual but cautious expansion of the settlement class practice); Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS

settlement class through the amendment of Rule 23, rather than leaving this question to judicial construction.<sup>86</sup> Essentially the same cohort of aggregationists would reappear in the early twenty-first century to advocate for the novel concept of the negotiation class, again sounding rationales of procedural fairness and judicial efficiency. Between 2004 and 2010, the aggregationists would propose and endorse the negotiation class concept through the auspices of the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION project,<sup>87</sup> and by urging expansive judicial interpretation of Rule 23 in class and MDL litigation.

During the 1990s, an array of opponents aligned against the settlement class construct. These included several academics<sup>88</sup> as well as defense counsel and corporate interests that opposed artificially diluting Rule 23(a) threshold requirements for Rule 23(b)(3) damage class actions.<sup>89</sup> They contended that a textual reading of Rule 23 did not include or support the concept of a settlement class and proponents could not simply create a new category of class actions that effectively accomplished an end run around class certification requirements. They argued that the settlement class proposal would increase the possibility of collusion between defense and plaintiffs' attorneys.<sup>90</sup> They further grounded their opposition by reference to the Rule Enabling Act mandate, alleging that the authorization of a separate category of settlement class action with different certification requirements would vio-

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L. REV. 791, 793 (1997) (favoring enactment of Rule 23(b)(4) to enhance individual due process by expanding aggregate settlement remedies).

86. Green, *supra* note 85, at 793 (arguing that Proposed Rule 23(b)(4) is a necessary and desirable improvement to clarify uncertainty about legitimacy of settlement classes).

87. See PRINCIPLES, *supra* note 5; see discussion *infra* notes 105–127.

88. See Letter from Steering Committee to Oppose Proposed Rule 23 to Hon. Alicemarie H. Stotler (May 28, 1996), in 2 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 3 (June 1, 1997); see also Cooper, *supra* note 85 (discussing the case against the settlement class proposal); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 Into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1783, 1787–88 (1997) (noting the opposition of academic community but rejecting this opposition as “cloistered, unduly conservative, and an unrealistic view of mass torts and the federal courts”); Green, *supra* note 85, at 794–96 (discussing basis for the academic community's opposition to the proposed settlement class rule); Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 FED. RULES DECISIONS. 328, 433–34 (1999) (noting the opposition of law professors).

89. See Green, *supra* note 88, at 1783–84 (noting the corporate, insurance and financial sectors; suggesting that this opposition was curious since these groups often voluntarily engaged in class action settlements). Professor Green also noted that a separate cohort that opposed the settlement class proposal consisted of those who generally opposed any kind of settlement. See *id.* at 1784; Willging, *supra* note 88, at 434.

90. See *e.g.*, G. Chin Chao, *Securities Class Actions and Due Process*, 1995 COLUM. BUS. L. REV. 547, 563 (1996).

late the Rules Enabling Act.<sup>91</sup> Essentially these same defense and corporate interests would reappear to oppose the novel concept of the negotiation class, advancing similar arguments against both the ALI *Principles* proposal, as well as Judge Polster's approval of the negotiation class in the *Opiate* MDL litigation.<sup>92</sup>

## II. THE ORIGINS AND GENESIS OF THE NEGOTIATION CLASS

### A. *The Gathering Storm for Twenty-First Century Class Action Reform*

The class action jurisprudence at the end of the twentieth century manifested a more cautious and cabined approach to both litigation and settlement classes. The Court's *Amchem* decision imported criteria requiring heightened scrutiny of settlement classes, with an especial focus on adequacy, intraclass conflicts, typicality of class representatives, and satisfaction of the predominance requirement.<sup>93</sup> The *Amchem* standards provided defendants with amplified arguments with which to oppose class certification as well as settlement class approval; defendants deployed the *Amchem* standards effectively to defeat an array of proposed Rule 23(b)(3) class litigation and settlements. The *Ortiz* decision effectively hobbled the efficacy of limited fund class settlements, which decision set forth stringent requirements for certification and approval of Rule 23(B)(1)(b) settlement classes.<sup>94</sup> In addition, the *Ortiz* decision embraced the same principles of adequacy of representation the Court endorsed two years earlier in *Amchem*.<sup>95</sup>

Moreover, the Court anchored its *Amchem* and *Ortiz* decisions in fundamental concerns about the limits of attorney advocacy and judicial authority to create novel class action procedure. The Court's invocation of the Rules Enabling Act sounded a warning concerning the limits of judicial activism in the class action arena.<sup>96</sup> A signal consequence of the dual settlement class decisions was the Court's emerging distaste for any further adventuresome forays into inventive Rule 23 procedures.

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91. Willging, *supra* note 88, at 432–33.

92. See discussion *infra* notes 182–99, 295–301.

93. See *supra* text accompanying notes 60–67.

94. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–42 (1999).

95. *Id.* at 856–59.

96. See *supra* text accompanying notes 69–73.

Thus, while the Court endorsed the general concept of the settlement class, the Court created new hurdles for plaintiffs and defendants in prosecution of class litigation. The Court's articulation of more stringent Rule 23 requirements benefitted defendants who now had doctrinal ammunition with which to oppose certification of litigation classes. The plaintiffs' bar reacted to the post-1995 federal retrenchment of class action jurisprudence by abandoning federal forums for more favorable state courts with liberalized class procedure.<sup>97</sup> As events would unfold, the *Amchem* and *Ortiz* requirements would come to affect plaintiffs and defendants alike regarding settlement approval, where judges could apply those same rigorous standards to defeat judicial approval of negotiated settlements.

At the beginning of the twenty-first century, then, several events converged to spur efforts to seek reform class action procedure. Corporate and defense interests turned to Congress for legislative relief from the vagaries of state class action litigation and aligned to sponsor the Class Action Fairness Act of 2005.<sup>98</sup> The chief aim of CAFA was to remove class litigation from disadvantageous state courts and to allow defendants to take advantage of more favorable federal class jurisprudence.<sup>99</sup> CAFA created new federal diversity class action jurisdiction and provided a new removal provision for state-based class actions.<sup>100</sup>

While CAFA's enactment represented a victory for defense interests, it co-relatively had a negative impact on class plaintiffs. Plaintiffs now found themselves having to pursue their class litigation in federal forums subject to the restrictive Rule 23 jurisprudence that had spurred them to abandon federal courts after 1995.<sup>101</sup> Discontent with the strictures of *Amchem* and *Ortiz* motivated plaintiffs' attorneys and their allies

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97. See generally Linda S. Mullenix, *Abandoning the Federal Class Ship: Is There Smoother Sailing for Class Actions in Gulf Coast Waters?*, 74 TUL. L. REV. 1709 (1999-2000) (discussing post-1995 trend of plaintiffs to institute class litigation in state courts to seek advantageous class jurisprudence).

98. Class Action Fairness Act of 2005, Senate Report 109-14, S. Rep. No. 14, 109th Cong., 1st Sess. 2005, 2005 WL 627977, 2005 U.S.C.C.A.N. 3 (Leg. Hist.); Cong. Rec. 151 (Feb. 28, 2005).

99. The legislative history accompanying the CAFA bill set forth a long litany of class action abuses. Among these were forum-shopping for desirable plaintiff-friendly venues (to the detriment of corporate defendants), excessive attorney fee awards in class litigation or settlements, class settlements that returned negligible benefits to class members, including so-called "coupon" settlements, judicial blackmail inducing defendants to settle frivolous lawsuits rather than litigate, due process violations of defendants' rights by denying out-of-state defendants the opportunity to contest plaintiffs' claims, wasteful copycat duplicative class actions, and lax class certification requirements in state court venues. See *id.*

100. 28 U.S.C. § 1332(d); 28 U.S.C. § 1453; see also Class Action Fairness Act of 2005, *supra* note 98. CAFA effectively "federalized" class action litigation.

101. See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 428 (2014) (canvassing various Rule 23 doctrinal restrictions on mass tort and other class actions; documenting shift to MDL auspices to resolve these cases).

to turn to institutional auspices other than the Advisory Committee on Civil Rules to reform Rule 23.

While the plaintiffs' bar began to seek a more liberalized and elastic class action procedure, they began shifting towards more frequent use of the multidistrict procedural umbrella for resolution of class litigation.<sup>102</sup> The recourse to MDL procedure had significant implications for class action reform, as the resolution of class litigation relied on the more concerted use of negotiated settlements.<sup>103</sup> With this shift, plaintiff and defense interests aligned in dissatisfaction with the constraints of the *Amchem* and *Ortiz* jurisprudence, as a barrier to judicial approval of settlement classes.<sup>104</sup>

### B. *The ALI Principles of the Law of Aggregate Litigation*

A cohort of aggregationist actors – attorneys, judges, and academicians – converged in the early twenty-first century to reform class action procedure. They turned to the American Law Institute to accomplish this end. Frustrated by the resistance or the inertia of many federal judges and the Advisory Committee on Civil Rules to liberalize class action procedure through doctrinal or rulemaking means, the aggregationists hoped to leverage the ALI's considerable prestige and influence to accomplish what they failed to succeed through litigation.<sup>105</sup> The unstated, not-so-veiled aim of the ALI project was to articulate doctrinal principles and rule amendments that would carry the ALI imprimatur, to influence judges (and perhaps the Advisory Committee on Civil Rules) to modify the constrained views of many federal judges on class litigation.

The chronicle of the ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, launched in 2004, is best understood as reform pursued by repeat stakeholders with an agenda in the class action and complex litigation universe. At the time of its approval as an ALI undertaking, the ALI Council and membership was populated with numerous aggrega-

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102. See 28 U.S.C. § 1047 (multidistrict transfer of litigation statute; hereinafter "MDL" litigation).

103. See generally Abbe R. Gluck and Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021) (documenting shift to MDL procedural auspices for resolving aggregate litigation in the twenty-first century).

104. Issacharoff & Rave, *supra* note 101.

105. See Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1403 (2019) (noting that the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION did "not come out of nowhere," but represented a continuing convergence of aggregation models).

tionist litigators, judges, and academicians.<sup>106</sup> The Council chose Reporters with plaintiff sympathies and affiliations who aggressively sought the most liberal reform of Rule 23 to make it easier for plaintiffs to seek certification or settlement of aggregate litigation.<sup>107</sup> Class action defense attorneys had countervailing stakes in the *Principles* project: to maintain defendant-favoring restrictive class action jurisprudence for litigation classes, but to liberalize aggregate litigation principles for negotiated settlement approval.

From the outset, the *Principles* project was an ALI undertaking with an agenda to prod the judiciary and the rulemakers to a more flexible view of Rule 23 and its application in class litigation. Although for all appearances the *Principles* project ostensibly was to adhere to ALI norms

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106. The ALI judicial Advisers to the *Principles* project who might fairly be described as aggregationists included: Judge Lee H. Rosenthal (S.D. Tex), Chief Judge Anthony J. Scirica (3d Cir.), Shira A. Scheindlin (S.D.N.Y.), Judge Jack B. Weinstein (E.D.N.Y.), Judge Diane P. Wood (7th Cir.) and two retired judges: Judge Marina Corodemus (N.J. state court) and Judge Sam C. Pointer, Jr. (N.D. Ala.).

The ALI practicing attorneys who might fairly be described as aggregationists included plaintiffs' attorneys Elizabeth J. Cabraser, Dianne Nast, Joseph F. Rice, and Stephen D. Susman. Judge Polster would appoint Elizabeth Cabraser and Joe Rice as lead plaintiffs' attorneys in the *Opiate* MDL. Practicing attorneys involved in aggregate litigation on behalf of defendants included John H. Beisner, Sheila A. Birnbaum, Sheila Carmody, and Jeffrey E. Stone. Judge Polster would appoint Sheila Birnbaum as one of the lead defense attorneys in the *Opiate* MDL. Kenneth Feinberg served as the Special Master for administration of the World Trade Center Victims' Compensation Fund and many other such funds and might be fairly characterized as favoring models of aggregate claims resolution.

ALI academic members whose scholarship manifested aggregationist support and who joined as Advisers on the *Principles* project included Professor Deborah R. Hensler, Stanford Law School, May Kay Kane, University of California, Hastings College of Law, Professor David F. Levi, Duke University School of Law, Arthur R. Miller, New York University School of Law, Geoffrey P. Miller, New York University School of Law, Judith Resnik, Yale Law School and William B. Rubenstein, Harvard Law School. Professor Arthur Miller and Mary Kay Kane were Co-Reporters on a previous ALI project dealing with complex litigation in the 1980s. Judge Polster appointed Professor Rubenstein as a legal expert advisor to the court in the *Opiate* MDL. Professor Francis McGovern, a member of the Consultative Group to the ALI project, would join with Professor Rubenstein in proposing the negotiation class based on § 3.17 of the *Principles*.

107. Professor Sam Issacharoff, New York University School of Law (Chief Reporter), Professors Robert H. Klonoff, Lewis and Clark Law School, Richard A. Nagareda, Vanderbilt University Law School, and Charles Silver, University of Texas School of Law (Associate Reporters). Professor Klonoff joined as an Adviser in 2005. Chief Justice John G. Roberts appointed Professor Klonoff to the United States Judicial Conference Advisory Committee on Civil Rules in 2011. Professor Klonoff was appointed for a second three-year term ending in 2017. During his service on the Advisory Committee Professor Klonoff subsequently used his position on the Advisory Committee to lobby for adoption of the *Principles* recommendations, thereby validating the theory that a non-so-veiled purpose of the *Principles* project was to obtain the ALI imprimatur for Rule 23 reforms that the judiciary previously had been unwilling to consider or implement.

Professor Issacharoff and Professor Klonoff both served as appellate attorneys in the *Opiate* MDL appeal of Judge Polster's certification of the negotiation class.

of neutrality and non-partisanship,<sup>108</sup> it quickly became apparent from the first draft proposals that the Reporters had wholesale reform of Rule 23 as their goal.<sup>109</sup> Moreover, from the outset, the *Principles* project was imbued with the self-interests of prominent ALI Council members, Advisers, and the Reporters in relaxing the principles of class litigation.<sup>110</sup>

When the ALI launched the *Principles* project in 2004, the avid aggregationists had distilled their central grievances to several prime reform goals, including

- (1) endorsement of liberalized, expansive judicial consideration of adequacy requirements, (2) restriction or reversal of the Supreme Court holdings in *Amchem* and *Ortiz*, (3) restriction or reversal of the Second Circuit's post-judgment collateral attack

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108. AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 1–2 (rev. ed. 2015) (“The official voice toward which the Institute aspires through its membership is that of an informed consensus of all components of the profession—practitioners, judges, and scholars—on what the law is, or should be, for a given subject. It aims to speak with an authority that transcends that of any individual, no matter how expert, and any segment of the profession, standing alone. Similarly, the Institute’s style, the manner in which its voice is presented, must transcend the styles and idiosyncrasies of its individual Reporters to make that asserted authority credible.”).

109. See Bexis, *31 (or More) Reasons to Watch ALI’s Principles of the Law of Aggregate Litigation*, DRUG & DEVICE LAW (Feb. 8, 2007), <https://www.druganddevicelawblog.com/2007/02/31-or-more-reasons-to-watch-alis.html> [<https://perma.cc/U9RY-4FK9>].

110. Professors Issacharoff, Silver, and Klonoff frequently collaborated in mass tort and other class litigation. Professors Issacharoff and Klonoff – Yale law classmates – similarly often referred lucrative class litigation engagements with plaintiffs’ attorneys to one another. Professors Issacharoff and Silver, former colleagues of the Author at the University of Texas School of Law, primarily worked with plaintiffs’ counsel. Professor Silver developed a specialty justifying class attorneys’ fees and modification of the aggregate settlement rule. While in private practice as a partner at Jones, Day, Professor Klonoff defended corporate clients in class litigation, but after entering academic life, Professor Klonoff switched his allegiances to the plaintiffs’ side of the docket. By the time he joined the ALI *Principles* project as an Associate Reporter he became heavily involved in plaintiff-side class litigation. Professor Issacharoff regularly was retained by plaintiff’s class action attorney Elizabeth Cabraser, an ALI Council member, and Issacharoff continued to collaborate with her during the entire period of drafting the *Principles*.

A critic noted:

[U]nlike most ALI reporters, Prof. Issacharoff has rather more irons in the fire than the average law professor. He very well-respected, evidently quite in demand, and has quite often represented litigants in court. We can only go on what the computerized searches tell us – but what they tell us is that, for the last five years or so, Prof. Issacharoff seemed to have limited his practice to representing plaintiffs in class actions . . . These representations include products liability class actions. . . . They extend to various class actions of other sorts.

See Bexis, *supra* note 109 (citations to Issacharoff cases omitted).

holdings in *Stephenson v. Dow Chemical*,<sup>111</sup> (4) endorsement of restrictive intersystem preclusion of duplicative class litigation, (5) endorsement of liberalized, expansive judicial application of predominance requirements, including expansive views of choice-of-law principles, (6) endorsement of liberalized, expansive use of the limited issue class, (7) endorsement of a presumption of settlement fairness, (8) endorsement of unified criteria to assess settlement fairness, (9) endorsement of appropriate use of cy pres relief, (10) endorsement of contractual non-class settlement agreements, (11) endorsement of alternatives to the aggregate settlement rule, and (12) endorsement of limited judicial review for non-class aggregate settlements.<sup>112</sup>

Against the backdrop of this list of grievances, the Chief Reporter's very first memorandum to the Advisers in August 2004 took direct aim at the Court's Rule 23 jurisprudence, which he viewed as an annoying barrier to class litigation.<sup>113</sup> The Reporter's manifest pursuit of a wholesale root-and-branch revision of Rule 23 jurisprudence quickly raised the ire of critics, who noted that there appeared to be only one guiding principle to the *Principles*, which was "to change the law in numerous ways to facilitate the creation of ever more class actions and other forms of mass litigation."<sup>114</sup>

Like all ALI RESTATEMENT and other law reform projects, the *Principles* went through several years of drafting, comment, and revision between 2004-2010. The project formulated principles or proposed rule amendments to address all the targets that were the focus of the aggregationists' quest for a more liberalized class action practice.<sup>115</sup> The final approved *Principles* set forth thirty-five sections with black-letter principles citing judicial authority and illustrative examples.<sup>116</sup> Each section concluded with Reporters' Notes that assessed of the effect of proposed

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111. 346 F.3d 19 (2d Cir. 2003).

112. Linda S. Mullenix, *Aggregationists at the Gate: The ALI Principles of the Law of Aggregate Litigation*, in AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY (Andrew S. Gold & Robert W. Gordon, eds., forthcoming May 2023) (manuscript at 19), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4206520](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206520) [<https://perma.cc/HNL3-BK5B>].

113. See PRINCIPLES, *supra* note 5, Reporter's Memorandum at 1 (Aug. 9, 2004). The Reporter announced that the project would introduce "the discomfort of all the Reporters (Professors Nagareda and Silver, in addition to me) with the current inquiry into predominance and superiority found in the current Federal Rules of Civil Procedure."

114. Bexis, *supra* note 109. This included "consciously breaking with the prevailing terminology found in almost all class action jurisprudence, dispensing with predominance and superiority and the rest of the analytical framework used by courts."

115. Mullenix, *supra* note 112, at 2, 19.

116. See generally PRINCIPLES, *supra* note 5.

modifications to current law.<sup>117</sup> The introductory provisions broadly defined aggregate litigation and general principles. Subsequent sections addressed granular topics such as the handling of common issues, substantive law, preclusion doctrines as constraints on aggregation, judicial case management, remedies such as *cy pres*, and class and non-class settlements.<sup>118</sup>

Two central points may be suggested about the *Principles'* final work product and its reception by the legal community. First, the multi-layered ALI review process served to temper the Reporters' initial extreme aggregationist goals. The final *Principles*, however, clearly reflected the Reporters' intentions to advance the law towards a more plaintiff-friendly class action jurisprudence.<sup>119</sup> While the Reporters acknowledged disputes relating to existing jurisprudence, the Reporters nonetheless pervasively advocated for more elastic aggregationist principles, often supporting their preferences with assertions of arguable trends in developing law. And throughout the *Principles*, the Reporters rejected the more constrained formalism of existing Rule 23 jurisprudence, instead articulating a more "functional" and hence liberal approach to achieve aggregation.<sup>120</sup>

Second, in the decade after its final publication, the *Principles* had scant impact on judicial decisionmaking or rulemaking reform of the class action rule.<sup>121</sup> The Supreme Court cited the *Principles'* concerning

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117. *Id.* Principles §§ 1.01–1.05 contain no discussion of the effect on current law (definitions and general principles). *Id.* The Reporters noted that courts would not necessarily be required to make changes to existing rule language to implement certain sections. *See id.* § 2.03 (relationship of liability and remedy issue); § 2.12 (adjudication plan for aggregation); § 3.09 (court-designated special officers, special masters, experts, and other adjuncts, except to the extent that a particular jurisdiction does not authorize the types of court-appointed adjuncts described); § 3.15 (recognition that class and non-class settlements distinct as to warrant different treatment); § 3.16 (definition of non-class aggregate settlement).

118. *Id.*

119. In various sections the Reporters created new terminology to provide broad leeway to judges and litigants to assist in aggregationist ends. *See, e.g.*, Principles § 2.04 (divisible and indivisible remedies). The Reporters' efforts to create a language of divisible and indivisible remedies was to inspire a functional approach to class certification issues. *See* Reporters' Notes § 2.04, Effect on Current Law (but noting that that amendment of Rule 23 was not necessary for courts to implement the approach of § 2.04).

120. Principle § 2.05 cmt. bd. The *Principles* suggested that in litigation involving multiple bodies of law, "[t]he real question for the court is not a formal one (whether multiple bodies of law apply to the claims for which aggregate treatment is sought) but, rather, a *functional* one (whether bodies of law are relevantly the same in functional content)."

121. *See generally* Linda S. Mullenix, *Aggregationists at the Barricades: Assessing the Impact of the Principles of the Law of Aggregate Litigation*, in AM. LAW. INSTIT., (forthcoming ALI Centennial book publication) (draft article on file with the law review) (canvassing in detail various provisions of the *Principles*).

intersystem preclusion, albeit in a footnote reference.<sup>122</sup> The Court has not cited any other provisions. More than one-third of reported federal citations reference the *Principles*' recommendations for cy pres relief.<sup>123</sup> However, although a few courts embraced the ALI cy pres recommendations completely, other courts qualified their endorsements.<sup>124</sup> No other section of the *Principles* garnered as much attention as the cy pres provision. Instead, courts have made scattered references to various principles, often in footnotes.<sup>125</sup> Some courts have cited the *Principles* for unremarkable statements of law relating to the adequacy and fiduciary duties of class representatives.<sup>126</sup>

Moreover, judges have not embraced the core reform proposals and recommendations set forth in the *Principles*.<sup>127</sup> For example, judges have not weakened the application of the central *Amchem* and *Ortiz* holdings. They have not embraced the recommendation that courts apply a functional approach to class litigation. Judges have not modified existing jurisprudence of mandatory Rules 23(b)(1)(A) and (b)(2) classes consistent with ALI suggestions. Nor have the *Principles* affected prevailing applications of the predominance requirement for class certification. Courts have eschewed the terminology of divisible and indivisible remedies. While some judges have found guidance in the *Principles* with regarding limited issues classes, most continue to rely on existing jurisprudence that cabins the use of this device to circumvent predominance requirements. Judges have not embraced the concept of an opt-in class. While a few courts have cited the *Principles*' views on preclusion, judges have not wholesale overruled the *Stephenson* decision. Finally, courts have not relied on the *Principles*' recommendations concerning non-class aggregate settlements.

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122. *Smith v. Bayer*, 564 U.S. 227, 317-316 n. 11, 131 S. Ct. 2368, 2381 n.11 (2011). The Court noted that the RESTATEMENT (SECOND) OF JUDGMENTS § 41(1) p. 393 (AM. L. INST. 1980) and 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4455 (2d ed.2002) 458 supported this same proposition.

123. Mullenix, *supra* note 121, at 26, 30.

124. *Id.* at 30-32.

125. Mullenix, *supra* note 112, at 44. While citing to the *Principles*, courts frequently noted similar support in existing jurisprudence in the MANUAL FOR COMPLEX LITIGATION (FOURTH) or the Wright and Miller treatise on federal procedure.

126. *See e.g.*, *Monk v. Wilkie*, 30 Vet. App. Rptr. 167, 196 (Ct. App. Vet. Claims 2018) (citing §§ 1.04 cmt. a and § 1.05 cmt. c); *LaRocque v. TRS Recovery Servs., Inc.*, 285 F.R.D. 139, 152 n.28 (D. Me. 2012)(2012) (citing § 1.05 cmt. 1).

127. Mullenix, *supra* note 121, at 44.

### C. *The Fundamental Principles of the Negotiation Class*

#### 1. The Evolution of the Negotiation Class From the MDL Non-Class Aggregate Settlement Provisions of the ALI Principles Project

The negotiation class that Judge Polster certified in the *Opiate* MDL litigation was based on a draft law review article by two law professors – Professor Francis E. McGovern of Duke Law School and Professor William B. Rubenstein of Harvard Law School.<sup>128</sup> Judge Polster appointed Professor McGovern as a special master in the litigation, and Professor Rubenstein served as an advisor to the judge.<sup>129</sup> Their proposal for a novel negotiation class that they advocated to Judge Polster, however, was not original to the *Opiate* litigation. Between 2004 and 2010, both participated during the drafting stages of the ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION.<sup>130</sup> Consequently, the negotiation class authors were aware of similar proposal set out in § 3.17 of the *Principles*.<sup>131</sup> Thus, the negotiation class may be understood as part of an “organic procedural evolution” from earlier developments of the settlement class as well as the non-class aggregate settlement model that developed under MDL auspices.<sup>132</sup>

The *Principles*’ primary focus addressed myriad issues concerning reform of existing class action jurisprudence. The final four sections of the *Principles*, however, turned to a consideration of and recommendations for judicial treatment of non-class aggregate settlements: an emerging trend on the aggregate litigation landscape. During the first decade of the twenty-first century, attorneys involved with large group claims gradually turned to the MDL procedure as a possible alternative mechanism for resolving aggregate litigation.<sup>133</sup> This nascent recourse

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128. The Texas Law Review subsequently published the draft article. See Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2010).

129. *Id.* at 1; see *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 667–68 (6th Cir. 2020).

130. Professor Rubenstein was an Adviser to the *Principles of the Law of Aggregate Litigation* project; Professor McGovern served as part of the consultative group. See PRINCIPLES, *supra* note 5, at v, vii.

131. PRINCIPLES, *supra* note 5, § 3.17 (Circumstances Required for Aggregate Settlements to be binding).

132. See Deborah Hensler, *Opioid Negotiation Class May Be Organic Procedure Evolution*, LAW360.COM (Sept. 30, 2019, 4:05 PM EDT) <https://www.law.360.com/articles/1204097/opioid-negotiation-class-may-be-organic-procedure-evolution> [<https://perma.cc/P9Q7-PBBK>].

133. 28 U.S.C. § 1407 (multidistrict litigation statute); see generally Andrew D. Brandt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. (2017); Abbe

to the MDL procedural umbrella to resolve mass claims subsequently burgeoned in the post-2010 era and came to dominate federal litigation aggregate.<sup>134</sup>

One explanation for attorneys' accelerating embrace of the MDL model was the freedom it afforded litigants from the requirements of formal class litigation and the accompanying jurisprudential constraints of Rule 23.<sup>135</sup> Although many cases transferred and consolidated under MDL auspices continued to be resolved through class action settlements,<sup>136</sup> attorneys turned to an innovative alternative model of non-class aggregate settlements accomplished under the MDL umbrella.<sup>137</sup> Both plaintiffs and defense attorneys aligned in interest in understanding the substantial benefits that MDL procedure provided attorneys in controlling, negotiating, and settling their cases free from the doctrinal constraints of traditional Rule 23 class litigation.<sup>138</sup>

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R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Civil Procedure*, 165 U. PA. L. REV. 1669 (2017); Howard M. Erichson, *MDL and the Lure of Side-stepping Litigation*, 53 GA. L. REV. 1287 (2019); Issacharoff & Rave, *supra* note 101; Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1245 (2013); Rhonda Wasserman, *Future Claimants and the Quest for Global Peace*, 64 EMORY L.J. 531, 560 (2014) ("In light of the constitutional challenges that bedevil mass tort class actions, attorneys handling mass torts have largely abandoned class actions as the principal vehicle for achieving global peace and have turned to nonclass aggregate settlements instead.").

134. See *Judicial Panel on Multidistrict Litigation – Judicial Business 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019> (statistics on cases transferred and consolidated under MDL statute since its enactment) (last visited February 5, 2022); U.S. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DOCKET TYPE SUMMARY (Dec. 15, 2020), [https://www.jpml.uscourts.gov/sites/kpml/files/Pending\\_MDJL-Dockets\\_By\\_MDJL\\_Type-December\\_15-2020.pdf](https://www.jpml.uscourts.gov/sites/kpml/files/Pending_MDJL-Dockets_By_MDJL_Type-December_15-2020.pdf) (identifying active MDL cases on federal dockets); see generally Gluck & Burch, *supra* note 103 (proliferation of MDL proceedings); see *Judicial Panel on Multidistrict Litigation – Judicial Business 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019> [<https://perma.cc/6UVN-6A3Z>] (statistics on cases transferred and consolidated under MDL statute since its enactment) (last visited February 5, 2022).

135. Jay Tidmarsh, *Auctioning Class Settlements*, 56 WM. & MARY L. REV. 227, 232–36 (2014)(2014) (noting that procedural safeguards that are present in class action litigation and settlement are not present in on-class aggregate settlements); Marc S. Werner, *The Viability and Strategic Significance of Class Action Alternatives Under CAFA's Mass Action Provisions*, 103 GEO. L.J. 465, 482–84 (2015) (jurisprudential constraints on conventional class action litigation).

136. See *e.g.*, *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016) (Rule 23(b)(3) class settlement of concussive injury claims).

137. Werner, *supra* note 135, at 484–85 (trend towards non-class aggregate settlements); see generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386 (2000) (citing prominent examples of aggregate settlements); Werner, *supra* note 135, at 484–85 (trend towards non-class aggregate settlements).

138. Mullenix, *supra* note 121, at 11–12 (describing how plaintiff and defense interests aligned to support increased use of the MDL auspices to resolve aggregate litigation); see generally Samuel Issacharoff and Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009); Mullenix, *Aggregationists at the Barricades*, *supra* note 121, at 11–12 (describing how plaintiff and de-

## 2. The Impact of the Vioxx and Other Non-Class Settlements on Rethinking and Reforming the Aggregate Settlement Rule

The *Vioxx* pharmaceutical litigation, which the Judicial Panel on Multidistrict Litigation approved as an MDL in 2005,<sup>139</sup> illustrates a prototype of the twenty-first century MDL non-class aggregate dispute-resolution paradigm.<sup>140</sup> The resolution of the *Vioxx* litigation provided a problematic blueprint for other non-class aggregate settlements such as the *Zyprexa* MDL litigation.<sup>141</sup> The *Vioxx* settlement raised an issue concerning the requirements of the aggregate settlement rule when multiple law firms with inventories of individual clients negotiated an aggregate non-class settlement. The *Vioxx* settlement created a payment grid for claimants based the nature and severity of their injuries. The multiple plaintiffs' law firms had signed contracts with the defendant Merck to secure all the clients' acceptances to the settlement. The resulting *Vioxx* deal was an "all-or-nothing" settlement.<sup>142</sup> Each signatory law firm was obligated to recommend the deal to each of its *Vioxx* clients and to resign from representing any client who might decline the firm's advice to ac-

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fense interests aligned to support increased use of the MDL auspices to resolve aggregate litigation).

139. *In re Vioxx Prods Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (148 total actions pending in 41 federal district courts sought to recover from a drug company for damages because of alleged increased health risks caused by taking a certain anti-inflammatory drug. The panel found that "centralization under Section 1407 in the Eastern District of Louisiana will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.* at 1353–54. The panel also noted that consolidation was "necessary in order to eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *Id.* at 1354);

see Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 274–281 (2011) (describing *Vioxx* litigation); see also Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1000–05 (2010) (describing *Vioxx* non-class aggregate settlement).

140. See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1111 (2010). Other scholars noted the trend towards aggregate settlements even before the *Vioxx* settlement. See generally Erichson, *supra* note 137, at 386 (citing prominent examples of aggregate settlements); Erichson, *supra* note 139, at 1000–05 (describing multiple non-class aggregate settlements).

141. *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006) (non-class aggregate settlement approval); see David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949 (2008); see also Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008). The *Vioxx* and *Zyprexa* settlements also inspired the concept of the quasi-class action which was intended to ameliorate problems engendered by the lack of judicial oversight of fee arrangements in MDL settlements. See generally Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589 (2012); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2012).

142. See Erichson & Zipursky, *supra* note 139 (discussing all-or-nothing settlements); Wasserman, *supra* note 133, at 560–64 (discussing the *Vioxx* "all-or-nothing" settlement).

cept the settlement.<sup>143</sup> Without a law firm's commitment to secure all its Vioxx clients, Merck could reject the firm's enrollment in the Vioxx payment program and none of the firm's clients would be eligible to participate. This settlement placed tremendous pressure on the plaintiffs' law firms to induce all their clients to accept the settlement.<sup>144</sup>

The Vioxx settlement represented an idiosyncratic approach to MDL non-class aggregate settlements; the contractual nature of the arrangements between the law firms and the defendant generated substantial criticism.<sup>145</sup> As the MDL non-class model evolved, the contractual nature of the parties shifted. Individual claimants signed contractual retention agreements with counsel, who might then represent hundreds or thousands of claimants in negotiations with a defendant or defendants.<sup>146</sup> The aggregate settlement rule required counsel to present a settlement to individual claimants and obtain the consent and agreement of each to the settlement.<sup>147</sup> Thus, attorneys negotiated and crafted a complex settlement agreement based on contract principles with individual claimants rather than with the defendant. These non-class aggregate settlements were not subject to Rule 23 class action requirements.<sup>148</sup>

The application of the aggregate settlement rule proved problematic in the MDL non-class setting. In massive group litigation, the defendants' chief goal is to accomplish "global peace," that is, to secure a settlement or judgment binding all claimants. Defendants want global peace to obtain complete closure of the defendants' litigation liabilities.<sup>149</sup> The defendants' quest for global peace may result in unfairness when attorneys reduce the amount paid to some plaintiffs in order to

143. Rave, *supra* note 133, at 1207–08; Erichson & Zipursky, *supra* note 138, at 266 (“A client wishing to decline the settlement . . . faced the prospect of losing her lawyer and finding that every other lawyer handling Vioxx claims was similarly unavailable.”).

144. Nagareda, *supra* notes 20, 139; Rave, *supra* note 133.

145. See generally Sybil L. Dunlop and Steven D. Maloney, *Justice is Hard, Let's Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN'S L. REV. 521, 522–27, 541–42 (2009); Erichson & Zipursky, *supra* note 139; see 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).

146. Kerrie M. Brophy, *Consent Waivers in Non-Class Aggregate Settlements: Respecting Risk Preference in a Transactional Adjudication Model*, 22 GEO. J. LEGAL ETHICS 677, 679 (2009) (contractual relationship of attorneys and clients in MDL non-class settlement arrangements).

147. See MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS'N 1983) (“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 writing signed by the client. The lawyer's disclosure shall include the existence and the nature of all the claims involved and of the participation of each person in the settlement.”).

148. See Nagareda, *supra* note 140, at 1111, 1154.

149. Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 526, 526 n.27 (2015); Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1407–08 (2019).

induce others to join the settlement by paying them more.<sup>150</sup> This quest for closure causes defendants to predicate final settlement on the plaintiffs' attorneys securing the consent of all individual claimants to the deal. This need for universal claimant approval often proves difficult to secure and provides individual hold-out claimants with a veto that effectively jeopardizes a settlement that most other claimants would approve.<sup>151</sup> In addition, the need for universal approval places pressure on attorneys to persuade their clients to accept a proffered settlement. In some egregious instances, attorneys – in violation of the aggregate litigation rule – provide inaccurate or misleading information to individual clients to encourage their acceptance of a settlement.<sup>152</sup>

Significantly for the conceptual development of the negotiation class, the ALI *Principles* Reporters — Professors Issacharoff, Silver, Nagareda, and Klonoff, as well as ALI consultative member Prof. Francis McGovern — embraced the non-class aggregate MDL modality for resolving aggregate litigation.<sup>153</sup> In doing so, they recognized the difficulties posed by the aggregate settlement rule in resolving non-class aggregate litigation. Early in drafting the ALI *Principles*, Professors Issacharoff and Klonoff advocated for a reform or modification of the aggregate settlement rule in large scale non-class litigation,<sup>154</sup> based on Professors Charles Silver and Lynn Baker's critique of the rule.<sup>155</sup> This critique suggested that while the aggregate settlement rule made sense in non-complex cases involving few claimants — such as a car crash —

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150. Lahav, *supra* note 149, at 526.

151. See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *Fordham L. Rev.* 1177, 1184–85 (2009).

152. See, e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2009 WL 5195841 (D. Minn. Dec. 15, 2009) (Order Sanctioning Patrick J. Mulligan, Esq. for violation of the aggregate settlement rule); *Kentucky Bar Ass'n v. Chesley*, 393 S.W. 584, 585–86 (Ky. S. Ct. 2013) (sanctioning attorneys for violations of the Kentucky Code of Responsibility Code of responsibility, including aggregate settlement rule in fen-phen litigation).

153. See, e.g., Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 *Sup. Ct. Rev.* 183, 212–21; Issacharoff & Klonoff, *supra* note 151, at 1185; Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 *Tul. L. Rev.* 1809, 1809–10 (2006); Nagareda, *supra* note 140, at 1106; Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 *Pepp. L. Rev.* 301, 301–04 (2004); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *Vand. L. Rev.* 107, 111–13 (2010).

154. *PRINCIPLES OF THE L. OF AGGREGATION LITIG.: REPORTER'S MEMORANDUM 1* (AM. L. INST. Aug. 9, 2004). Critics noted that there appeared to be only one guiding principle to the *Principles*, which was “to change the law in numerous ways to facilitate the creation of ever more class actions and other forms of mass litigation.” See Bexis, *supra* note 109.

155. See Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 70 *GEO. WASH. L. REV.* 734, 744–45 (2011) (noting Baker & Silver article as basis for § 3.17); see generally Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 *WAKE FOREST L. REV.* 733 (1997) (critique of the aggregate settlement rule in the non-class aggregate settlement context).

the aggregate settlement rule impeded settlement in the non-class context involving hundreds or thousands of claimants.<sup>156</sup> The criticisms centered on the unfairness of the veto power of a few holdout claimants to scuttle a settlement for everyone else.<sup>157</sup> Silver and Baker proposed that the aggregate settlement rule be liberalized to permit aggregate settlements to proceed without universal agreement of all individual claimants to the settlement. This proposal became the basis for the ALI's §3.17 of the *Principles*.

### 3. Section 3.17 of the ALI Principles of the Law of Aggregate Litigation

The ALI Reporters drafted the final four sections of the *Principles* with the *Vioxx*, *Zyprexa*, and other non-class aggregate settlements as a template for an innovative model for resolving group claims.<sup>158</sup> While the *Principles*' thirty-one preceding sections were devoted to revising traditional class action jurisprudence, Sections 3.15 through 3.18 proposed authorization of non-class aggregate settlements. The Reporters were committed to an agenda of reforming Rule 23 to unburden class litigation from doctrinal constraints. Beyond liberalizing traditional class jurisprudence, the Reporters and Professor McGovern — who had been involved in non-class aggregate settlements — had a more radical agenda in mind. They used the opportunity presented by the *Principles* project to gain the ALI's imprimatur for a departure from traditional class litigation, but also to offer an alternative MDL modality that afforded optimal attorney control over aggregate settlements while minimizing judicial intervention and oversight of contractual agreements.

The *Principles*' centerpiece for resolving non-class aggregate settlements was § 3.17, the precursor of the negotiation class.<sup>159</sup> Section 3.17 created an aggregate settlement model based on claimant consent, implemented through two alternative procedures. First, attorneys were authorized to negotiate settlements that would be governed by the ex-

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156. See Silver & Baker, *supra* note 155, at 743–44, 755–66; see also PRINCIPLES, *supra* note 5, § 3.17 Reporters' Notes to cmt. a.

157. See Silver & Baker, *supra* note 155, at 743–44, 755–66; see also PRINCIPLES, *supra* note 5, § 3.17 Reporters' Notes to cmt. a.

158. Topic Three was labeled “Non-Class Aggregate Settlements.”

159. Principle § 3.15 described the difference between class and non-class settlements, and the need for special treatment of non-class aggregate settlements; Principle § 3.16 set forth a definition of the non-class aggregate settlement; and Principle § 3.18 set forth “limited judicial review for non-class aggregate settlements (a provision consistent with the underlying theory that courts should play a very limited role in overseeing contractual arrangements negotiated and agreed to by parties to the litigation). See generally Lahav, *supra* note 149, at 529 (describing ALI proposed §§ 3.17, 3.18).

isting aggregate settlement rule. Claimants would have the opportunity to receive individual settlements negotiated by attorneys, provided each claimant gave informed consent in writing. Claimants could give informed consent by review of all other claimant settlements, or by agreement to a settlement formula for division among the claimants.<sup>160</sup> The Reporters acknowledged that this non-class settlement proposal incorporated the requirements of the aggregate settlement rule.<sup>161</sup> They suggested that implementing this regime would not require a departure from existing law, but that professional responsibility codes would need to add the provision that the aggregate settlement rule could be satisfied if the individual claimants were allowed to review the formula by which a settlement would be allocated.<sup>162</sup>

Second, as an alternative and in advance of any settlement offer, claimants could waive the requirement of individual settlement approval, and substitute instead an *ex-ante* agreement to be bound by a voting procedure. The Reporters indicated that the purpose of this provision was to address the problem of individual hold-out claimants who “could exercise control over a proposed settlement and to demand premiums in exchange for approval.”<sup>163</sup> In essence, by agreeing to be subject to this alternative regime, claimants were waiving their right to individual decisionmaking over a settlement approval.<sup>164</sup>

In this alternative, individual claimants would agree in writing to a voting procedure: namely, to be bound by a substantial majority vote of all claimants concerning a settlement proposal. If the settlement entailed different categories of claimants, then a claimant would agree to be bound by a substantial majority vote of each category.<sup>165</sup> Claimants could agree to the voting procedure at any time after formation of an attorney client relationship.<sup>166</sup> However, attorneys were duty-bound to inform their clients of the option to settle by the non-voting option.<sup>167</sup> If claimants chose to bind themselves to a settlement through a voting procedure, the power to approve a settlement rested with the claim-

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160. See PRINCIPLES, *supra* note 5, § 3.17(a).

161. See *id.* § 3.17 cmt. a, Reporters' Notes to cmt. a.; *id.* § 3.17 cmt. a.; Reporters' Notes to cmt. a.

162. See *id.* § 3.17 Reporters' Notes to cmt. a.

163. See *id.* § 3.17 cmt. b.

164. See *id.* The Reporters suggested that waivers of important rights were valid in several areas, including “the most cherished constitutional rights.” “Subsection (b) rejects the view that individual decisionmaking over the settlement of a claim is so critical that it cannot be subject to a contractual waiver in favor of decisionmaking governed by a substantial majority rule.” See also *id.* § 3.17 cmt. d. (citing authority for classes of voting claimants in bankruptcy).

165. See *id.* § 3.17(b). This provision was modeled on a similar voting procedure requirement in bankruptcy proceedings. See *id.* § 3.17 Reporter's Notes to cmt. a.

166. *Id.* § 3.17(b)(2).

167. *Id.* § 3.17(b)(4).

ants, who could assign their power to an independent agent. This approval power could not be assigned to the claimants' counsel.<sup>168</sup>

The voting alternative was permissible only in cases involving a substantial amount in controversy, many claimants, and where an agreement required approval by a substantial majority of claimants. A legislative or rulemaking body was to determine these minimum requirements for a voting resolution of claims.<sup>169</sup> Section 3.17 set forth provisions for implementing the voting alternative, requiring the agreement to specify the procedures to approve a settlement offer, the manner of allocating proceeds among claimants, or the future development of an allocation mechanism.<sup>170</sup>

The voting procedure alternative imposed duties on attorneys to provide full disclosure to assist clients to decide whether to enter into a settlement agreement, challenge the fairness of the settlement agreement, or seek advice of independent legal counsel.<sup>171</sup> Lawyers were required to inform their clients that they could not terminate their relationship because the client declined to enter into a voting procedure agreement.<sup>172</sup> If an attorney simultaneously had clients who opted for the non-voting and voting procedures, the attorney was required to inform the non-voting clients that they would continue to exercise independent control over their own cases and could refuse a settlement after the terms were disclosed.<sup>173</sup>

A voting agreement was enforceable upon a determination that the agreement was procedurally and substantively fair and reasonable.<sup>174</sup> Facts and circumstances determining procedural reasonableness included sophistication of the claimants, information disclosed to the claimants, review of the settlement terms by a neutral or special master, whether the claimants had some prior common relationship, and similarity of the claims.<sup>175</sup> Facts and circumstances determining substantive fairness included costs, risks, probability of success, delays in obtaining a verdict, equitable treatment of claimants relevant to one

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168. *Id.* § 3.17(b)(1).

169. *Id.* § 3.17(c).

170. *Id.* § 3.17(b)(3).

171. *Id.* § 3.17(b)(2)(A)-(D).

172. *Id.* § 3.17(b)(4). However, the Reporters indicated that clients remained free to terminate the attorney-client relationship at any time. *See id.* § 3.19 cmt. b.

173. *Id.* § 3.19 cmt. B.

174. *Id.* §§ 3.17(d)-(e). Attorneys were tasked with complying with the requirements for procedural and substantive fairness. *See id.* § 3.17(f).

175. *Id.* § 3.17(d).

another, and disadvantage to certain claimants by the settlement as a whole.<sup>176</sup>

The Reporters left several issues unresolved relating to their alternative settlement proposals. They left to legislative drafting to define the minimum number of claimants or the amount in controversy sufficient to invoke § 3.17( b).<sup>177</sup> They did not determine what would constitute a substantial majority vote for approval of a settlement.<sup>178</sup> In addition, they did not address what law would apply under § 3.17 in an action involving claimants from multiple jurisdictions, instead defaulting to the application of existing choice-of-law rules.<sup>179</sup> Finally, the Reporters acknowledged that the aggregate settlement proposal in §§ 3.17(b)-(e) departed from existing law and professional responsibility codes in all jurisdictions would be needed to implement the voting alternative to the aggregate settlement rule.<sup>180</sup> In so doing, the Reporters pointed to analogous voting procedures in the bankruptcy code.<sup>181</sup>

#### 4. Reactions to Section 3.17 as a Precursor to the Negotiation Class

During the composition of Principle § 3.17, the Reporters' successive drafts received substantial commentary and criticism from ALI members.<sup>182</sup> The final publication of the *Principles* in 2010, elicited an

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176. *Id.* § 3.17(e)Principle § 3.17(e).

177. *Id.* § 3.17 cmt. c (1).

178. *Id.* § 3.17 cmt. c (2).

179. *Id.* § 3.17 cmt. f.

180. *Id.* § 3.17 Reporters' Notes Effect on Current Law.

181. *Id.* (citing § 524(g) of the Bankruptcy Code.); see generally Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 520–24 (2008)(2008) (voting procedure in bankruptcy law and supporting its application to mass tort settlements); see discussion of the bankruptcy voting analogy *infra* text accompanying notes at 439–48.

182. See e.g., Morgan, *supra* note 155, at 743 *et seq.* (details of evolutionary drafting of § 3.17 and criticisms of it). Professor Morgan capably documented the early debate among proponents and opponents of reforming Model Rule 1.8 to allow for voting in mass tort settlements. See Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998). Morgan notes that Professor Samuel Issacharoff joined the debate in 2004, looking historically at how tort law addressed the increase in personal injuries during and after the Industrial Revolution. He and Professor John Fabian Witt described what they called the increasing “inevitability” of an increasing number of aggregate settlements, citing Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004). See also Erichson & Zipursky, *supra* note 139, at 294–96 (noting that the first draft of the § 3.17 proposal was so controversial that the ALI members garnered enough votes to reject the proposal; the ALI tabled the motion which induced the Reporters to rework their proposal).

array of critical commentary.<sup>183</sup> In spite of the negative reactions to § 3.17, the proposal nonetheless garnered support from many ALI members, academicians, and practicing attorneys.<sup>184</sup>

The core criticisms of § 3.17 centered on several objections. First, commentators pointed out that it was unfair to seek the advance consent from clients before clients had sufficient information to bind themselves to a voting procedure.<sup>185</sup> Scholars questioned whether clients' advance consent to aggregate settlements could ever be sufficiently authentic to justify the imposition on clients' rights.<sup>186</sup> Requiring clients to consent even before negotiations commenced meant that clients rarely would be fully informed at the time they had to agree to a waiver under Model Rule 1.8.<sup>187</sup> Moreover, even if litigants and courts could address the problems of inauthentic consent, the advance-consent proposal "would place lawyers in a fundamentally untenable position."<sup>188</sup> If claimants contested allocation awards to other claimants, the conflicts among clients of a not-yet-negotiated aggregate settlement would place the lawyer in the role of adjudicating clients' conflicting awards vis-à-vis other claimants.<sup>189</sup> The most extreme argument against the ALI §

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183. See generally Erichson & Zipursky, *supra* note 139 (criticizing the attorney empowering model embraced by § 3.17 in derogation of clients' interests); Victoria Duke, *A Silk Purse Does Not Come From a Sow's Ear: Non-Class Aggregate Settlements Based on Public Law Erode the Model of Private Remedies*, 8 SETON HALL CIR. REV. 309, 340–41 (2012) (criticizing the ALI proposal as antithetical to historical monetary compensation schemes); Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 402–16 (2008) (critiquing the advance consent proposal in an earlier draft of the Principles); Rave, *supra* note 133, at 1247–55 (discussing three major objections to the § 3.17 proposals); Wasserman, *supra* note 133, at 564 (discussing critical responses).

184. See e.g., Brophy, *supra* note 146, at 677, 683–85 *et seq.* (noting controversial nature of the ALI § 3.17 proposal but arguing that non-class consensual waivers were not so unique as to make them ethically unacceptable; § 3.17 proposal more acceptable when viewed in the different context of transactional adjudication and claimant risk preferences); Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 507 (2011) ("Section 3.17(b) increases transparency and legitimacy by bringing aggregate settlements into the light and pulling them away from the silent accords of the past. Accordingly, its recommendations for majority voting and section 3.18's safety valve of limited judicial review have much to commend;" praising the § 3.17 proposal for providing non-class settlements with much needed transparency); Rave, *supra* note 133, at 1245–56 (responding to objections to the § 3.17 proposal and generally favoring the proposal).

185. Erichson & Zipursky, *supra* note 139, at 296 *et seq.*; Morgan, *supra* note 155, at 745.

186. Erichson & Zipursky, *supra* note 139, at 299–300.

187. See Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 181 (1999). Professors Silver and Baker responded critically to Professor Moore. See Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227 (1999).

188. Erichson & Zipursky, *supra* note 139, at 299–300.

189. *Id.* at 300.

3.17 proposal posits that claimants cannot consent to the types of conflicts that are inherent in aggregate settlements.<sup>190</sup>

Second, commentators contended that the attorneys' and judicial judges' interests were not sufficiently aligned with claimants' interests to justify the tradeoff between individual client representation and efficient case administration, one goal of aggregate dispute resolution.<sup>191</sup> The participation requirements of non-class aggregate settlements placed substantial pressure on the plaintiffs' lawyer to obtain consent from all or a large majority of their clients. The failure to obtain the agreement of the required percentage of participating clients therefore could ruin the deal for the entire group and for the attorney's interest in recovering fees. A lawyer's duty of loyalty might cause the attorney to pressure the attorney's clients to accept a settlement deal, accompanied by the threat to withdraw as counsel if the client declined the settlement. Thus, lawyers might "provide less-than complete-and-honest disclosures about the terms of the overall deal."<sup>192</sup>

Third, plaintiffs' lawyers might take advantage of the disparity of sophistication between clients and their attorneys in mass tort litigation to induce their clients to accept a less-than-optimal individual award.<sup>193</sup> Scholars suggested that the viability of the § 3.17 advance consent model depended on each client's level of sophistication and comprehension. Thus, clients inexperienced with legal services might be unlikely to base their advance consent on genuine understanding of the trade-offs.<sup>194</sup> "Clients often sign whatever retainer agreement the lawyer gives them; the fact that a client signed the lawyer's standard retainer agreement would offer little reason to be confident that the client knowingly gave up the right to decide whether to accept a settlement offer."<sup>195</sup> More fundamentally, the advance consent procedure at the

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190. *Id.* at 304–311.

191. Morgan, *supra* note 155, at 752 (disagreeing with Professor Silver's rejection of Rule 1.8(g) as providing client with protection in causing Prof. Morgan to conclude that Rule 1.8(g) provides clients with protection that the *Principles of the Law of Aggregate Litigation* are ultimately too eager to reject); Brophy, *supra* note 146, at 684–685 (describing attorney opportunism as jeopardizing loyalty to clients' interests); see generally Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation Over Ethics*, 79 GEO. WASH. L. REV. 700 (2011) (commenting on the relationship between ALI Principle § 3.17 and the as a modification of Model Rule 1.8 aggregate settlement rule and; arguing that the powerful influence of attorney's fees and attorney greed trumps ethical protection of client interests).

192. Erichson, *supra* note 139, at 1018.

193. Moore, *supra* note 187, at 181; see also Burch, *supra* note 184, at 509 (noting possibility of attorneys manipulating settlement information to the attorneys' own advantage).

194. Erichson & Zipursky, *supra* note 139, at 301.

195. *Id.*

heart of § 3.17 shifted too much settlement power from the claimants to their lawyers.<sup>196</sup>

Commentators noted additional issues with the § 3.17 proposal. For example, some suggested that the veto power that minority of claimants supposedly held — the so-called “hold-out” problem — was greatly exaggerated. Therefore, there was no compelling need to create a new rule to mitigate the problem of minority holdout claimants.<sup>197</sup> Other scholars suggested that Model Rule 1.8 embraced the concept that non-economic values should not be lightly discarded by attorneys during negotiations to a settlement. The implementation of § 3.17, however, might encourage or induce attorneys to undervalue certain claims, in derogation of clients’ interests.<sup>198</sup> Finally, some critics claimed that the § 3.17 proposal could not be employed to resolve the claims of exposure-only or contingent future claimants.<sup>199</sup>

### 5. Judicial Reception of the ALI § 3.17 Proposal

The ALI § 3.17 proposal for a non-class settlement based on a voting procedure failed to gain judicial traction. Although many federal and state judges had served as advisers to the ALI project, after publication the judiciary — even the known aggregationist judges — were not buying into the novel proposals in the *Principles’* concluding sections. Since the publication of § 3.17 in 2010, no federal or state court has adopted the non-class settlement proposal and its supermajority voting mechanism.<sup>200</sup> Indeed, until Judge Polster approved a negotiation class in the *Opiate* litigation based on the § 3.17 proposal, only one federal court cited § 3.17 in a concurring opinion, in a footnote to an antitrust class action.<sup>201</sup> The footnote citation to § 3.17 had nothing to do with endorse-

196. *Id.* at 299–300.

197. See Moore, *supra* note 183, at 155, 164–66; Brophy, *supra* note 146, at 680–83 (canvassing the competing arguments about the impact of hold-out claimants; concluding that *ex ante* waivers and super-majority voting rules adequately address the holdout problem and assist in maximizing awards to claimants).

198. Moore, *supra* note 183, at 171–74; Brophy, *supra* note 146, at 681.

199. Wasserman, *supra* note 133, at 568–70.

200. See Hon. Marina Corodemus & Richard J. Arsenault, *Aggregate Settlement Ethics*, 2012 ANNUAL AMERICAN ASSOCIATION FOR JUSTICE PAPERS 5 (2012) (noting that after publication of § 3.17 the American Bar Association and the courts had “yet to budge on the strict requirements of Rule 1.8(g)”; Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys’ Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 515 (2012) (noting that no state had adopted the ALI voting mechanism); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175–77 (2017) (same).

201. PRINCIPLES, *supra* note 5, § 3.17 Case Citations - by Jurisdiction; see *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 340 n.11 (3rd Cir. 2011) (Scirica, J., concurring).

ment of the concept of a negotiation class; rather, the footnote referred to § 3.17 Comment (e) for the proposition that the ALI requirements for non-class settlements were analogous to those applied to class action settlements.<sup>202</sup>

### III. THE NEGOTIATION CLASS IMPLEMENTED

#### A. *The McGovern-Rubenstein Negotiation Class Proposal*

##### 1. The Opiate MDL Litigation

The § 3.17 proposal for a non-class settlement based on consensual waiver and a voting mechanism lay dormant for nearly a decade, lurking in the shadows of numerous MDLs, awaiting a propitious aggregate litigation for the § 3.17 advocates to resuscitate this novel idea. The advent of the opiate crisis and the attendant MDL litigation provided just such a vehicle for breathing life into § 3.17. The same cluster of academic proponents of § 3.17 — Professors Issacharoff, Klonoff, McGovern, and Rubenstein — now united in the *Opiate* litigation to advocate for implementation of a model based on § 3.17.<sup>203</sup> They now gave the § 3.17 concepts a name and an explanatory law review article: the negotiation class.<sup>204</sup>

A great deal has been written documenting the opiate addiction and overdose crisis in American cities and the advent of litigation concerning remediation for the public health harms resulting from the conduct of alleged bad actors responsible for the crisis.<sup>205</sup> A summary of the

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202. *Id.* (“The ALI Principles analogizes these proposed requirements to those applied to class settlements.”) (citing § 3.17 cmt. e.”).

203. Both Professor Issacharoff and Professor Klonoff were retained by Seeger, Weiss LLP, a major law firm representing plaintiffs in the *Opiate* litigation. Professor Issacharoff argued for the appellees on appeal of the class certification to the Sixth Circuit. *See In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 666 (6th Cir. 2020).

204. McGovern & Rubenstein, *supra* note 128. When Professors McGovern and Rubenstein were advising Judge Polster to adopt the negotiation class model, their paper was not yet published, but was in draft form. The final article that provided the basis for Judge Polster’s certification of a negotiation class was published after the class certification.

205. *See generally* Zachary Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, 70 DEPAUL L. REV. 245 (2020); Erichson, *supra* note 133; Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285 (2021); Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. U. L. REV. 297 (2021); Abbe Gluck,

conduct of the *Opiate* litigation provides context for understanding the role of the negotiation class in attempting to resolve this MDL. The development and evolution of this massive MDL provides insight into the influence that a few behind-the-scenes academic advisers and judicial surrogates can exert over a managerial MDL judge. These events raise questions concerning the legitimacy of such unparalleled influence from non-party advisers, who nonetheless have their own agendas as well as of their allies.

The *Opiate* litigation was distinctive in that the plaintiffs who pursued litigation consisted of hundreds of cities and counties. These public-entity plaintiffs contended that the opiate manufacturers, distributors, pharmacies, retailers, and medical professionals acted in concert to manufacture, prescribe, and distribute opiates to millions of Americans. Consequently, millions of individuals became addicted to opiates, often resulting in overdose deaths.<sup>206</sup> The defendants' actions harmed these public entities by forcing the cities and counties to divert significant funding to emergency public health and safety responses to overdose victims. The plaintiffs sought "reimbursement for monies they have expended – and continued to expend" on opiate-related costs, and other relief from the defendants for the harms caused by their actions.<sup>207</sup>

The plaintiffs alleged claims based on the Racketeer Influenced and Corrupt Organization Act (RICO) and its state analogues; state statutory public nuisance law, and several state common law claims.<sup>208</sup> The Judicial Panel on Multidistrict Litigation authorized an *Opiate* MDL on December 12, 2017, and all the individual opiate lawsuits were trans-

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*MDL Nationalism, Federalism, and the Opioid Epidemic*, 70 DEPAUL L. REV. 321 (2020); Rebecca L. Haf-fajee & Michael R. Abrams, *Settling the Score: Maximizing the Public Health Impact of Opioid Litigation*, 80 OHIO ST. L.J. 701 (2019); Paul L. Kennan, Note, *Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s*, 52 NEW ENG. L. REV. 69 (2017); Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175 (2019); Morgan A. McCollum, Note, *Local Government Plaintiffs and the Opioid Multidistrict Litigation*, 94 N.Y.U. L. REV. 983 (2019); Samantha Pannier, *Litigating an Epidemic: California Plaintiffs in the National Opioid Litigation*, 54 LOY. L.A. L. REV. 275 (2020); and Michelle L. Richards, *Pills, Public Nuisance, and Parens Patrie: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405 (2020).

206. The plaintiffs alleged that approximately 350,000 individuals died from an opiate overdose between 1999 and 2016. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020). The plaintiffs alleged that approximately 350,00 individuals died from an opiate overdose between 1999 and 2016.

207. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019).

208. See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667; see 18 U.S.C. §§ 1961–62 et seq. (RICO claims); Second Amended Corrected Complaint ¶¶ 958–68, 1011–54, *In re Nat'l Prescription Opiate Litig.* (N.D. Ohio May 29, 2018) (No. 1:17-md-02804); see also *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018).

ferred to the Northern District of Ohio, under the MDL supervision of Judge Dan A. Polster.<sup>209</sup> The *Opiate* MDL encompassed more than 2,000 individual actions.<sup>210</sup>

President Bill Clinton appointed and Congress confirmed Judge Polster to the federal bench in August 1998; Judge Polster assumed senior status on June 31, 2021.<sup>211</sup> Prior to the authorization of the *Opiate* MDL and transfer of cases to Judge Polster, he had relatively limited experience with Rule 23 class actions<sup>212</sup> and had managed two MDL litigations.<sup>213</sup> In February 2008 the Judicial Panel had authorized MDL 1909 and transferred cases to the to Judge Polster's supervision.<sup>214</sup> The plaintiffs alleged that gadolinium contrast dyes might cause nephrogenic systemic fibrosis in patients with impaired kidney function. Judge Polster presided over this gadolinium MDL for five years, but ultimately recused himself from further involvement with the MDL in 2013.<sup>215</sup> The hundreds of docket entries, case management orders, and motion practice in the *Gadolinium* MDL reflected the complications of this long-running unresolved MDL proceeding, including several bellwether trials spanning

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209. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019); see also Gluck & Burch, *supra* note 103, at 23.

210. Gluck & Burch, *supra* note 103, at 23. The court noted that in addition to the pending federal lawsuits, many municipalities were litigating similar opiate cases in state courts throughout the United States. Gluck and Burch note that as of 2021, the *Opiate* MDL included approximately 2,900 lawsuits. *Id.* at 24.

211. Polster, Dan A., FED. JUD. CTR., <https://www.fjc.gov/history/judges/polster-dan> [perma.cc/92MX-FJWM] (last visited Jan. 27, 2023). Judge Polster is a graduate of Harvard College and Harvard Law School. He served as an attorney in the Department of Justice Antitrust Division from 1976-1982, and as an Assistant U.S. attorney for the Northern District of Ohio from 1982-1998.

212. See *The Dep't of the Treasury of the State of New Jersey and Its Division of Investment v. Cliffs Nat. Res., Inc.*, No. 1:14 CV 1031, 2015 WL 6870110 (N.D. Ohio Nov. 6, 2015) (federal securities class action; motion to dismiss second amended complaint and motion to strike allegations); *Gawry v. Countrywide Home Loans Inc.*, 640 F.Supp.2d 942 (N.D. Ohio 2009) (denial of class certification to mortgagors suing mortgagees for violation of state law concerning mortgage prepayment or refinancing penalties); *Lotus v. GenCorp., Inc* No. 5:00 CV 2604, 2003 WL 27382938 (N.D. Ohio Dec. 2., 2003) (denying class certification to employee plaintiffs in suit against defendant employer for reduction in medical benefits; not reported in F.Supp).

213. See Transfer Order, *In re Bayer Healthcare LLC and Merial Ltd. Flea Control Prods. Mktg. and Sales Prac. Litig.*, 844 F. Supp. 2d 1369 (J.P.M.L. Feb. 7, 2012) (MDL No. 2319) (transfer order creating Bayer Healthcare MDL and assignment to Judge Polster); Transfer Order, *In re: Gadolinium Based Contrast Agents Prods. Liab. Litig.* MDL No. 1909, 536 F. Supp. 2d 1380 (J.P.M.D.L. Feb. 27, 2008) (MDL No. 1909) (JPML order authorizing *Gadolinium* MDL and assigned to Judge Polster).

214. Transfer Order, *In re Gadolinium Based Contrast Agents Prods. Liab. Litig.* 536 F.Supp.2d 1380 (J.P.M.D.L. 2008) (MDL No. 1909) (JPML order authorizing *Gadolinium* MDL and assigned to Judge Polster).

215. See Order, *In re Gadolinium Based Contrast Agents Prods. Liab. Litig.*, No. 08-mdl-1909, 2013 WL 12141250 (N.D. Ohio Nov. 21, 2013) (noting Judge Polster's original assignment and management of the *Gadolinium* MDL from 2008 through 2013, but Polster's subsequent recusal as presiding MDL judge because of heavy involvement with mediating another the case).

many months. This MDL was unresolved at the time Judge Polster recused himself from further supervision of the litigation.

In February 2012 the Judicial Panel on Multidistrict Litigation assigned MDL 2319 to Judge Polster.<sup>216</sup> This litigation related to alleged false and misleading assertions concerning flea control products marketed for use on cats and dogs.<sup>217</sup> Eleven months later Judge Polster granted the defendants' motion for summary judgment, terminated the case, and dismissed it as final.<sup>218</sup> Given the rapid disposition of this MDL on summary judgment, this flea products marketing MDL most likely did not provide Judge Polster with an in-depth experience of protracted adversarial MDL litigation.

It seems fair to suggest that Judge Polster's prior experience with the lengthy *Gadolinium* MDL litigation informed many of his views concerning the best way to expeditiously resolve mass tort actions when the *Opiate* MDL landed on his docket. In addition, Judge Polster had considerable experience with mediating disputes — contributing to his belief that disputes were better resolved through non-litigious means.<sup>219</sup> Indeed, Judge Polster had studied mediation techniques with Professors Francis McGovern and Eric Green, as well as Ken Feinberg.<sup>220</sup> It is unsurprising, then, that Judge Polster turned to Professor McGovern to assist in resolving the massive *Opiate* MDL.

During Judge Polster's initial teleconference with the parties in the *Opiate* litigation, he indicated that he had prior experience with two MDLs and that he believed the MDL panel had picked him to manage the *Opiate* MDL because he would expeditiously resolve the litigation.<sup>221</sup>

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216. Transfer Order, *In re Bayer Healthcare LLC*, *supra* note 214.

217. *Id.*

218. See Docket Entries, MDL 2319, U.S. DIST. CT. N.D. OHIO <https://www.ohnd.uscourts.gov/mdl-2319> [<https://perma.cc/4KKB-MWRB>] (last visited Jan. 20, 2023); Memorandum and Opinion Order, *In re Bayer Healthcare LLC* (N.D. Ohio Mar. 19, 2013) (MDL No. 2319) (grant of summary defendant's summary judgment motion because plaintiffs did not produce good faith basis for advertisement representations); Judgment Entry, *In re Bayer Healthcare LLC* (N.D. Ohio Mar. 19, 2013) (MDL No. 2319).

219. Judge Polster had mediated resolutions over the limits of protests at the 2016 Republican National Convention, and a settlement between Cleveland and the family of Tamir Rice, a 12-year-old black boy killed by a white policeman. Josh Gerstein, *Judge Reports Settlement in GOP Convention Protest Suit*, POLITICO: UNDER THE RADAR BLOG (June 24, 2016), <https://www.politico.com/blogs/under-the-radar/2016/06/repUBLICan-national-convention-protest-lawsuit-224770> [<https://perma.cc/N7HN-AQR2>]; Kim Palmer, *Cleveland to Pay \$6 million to Settle Police Killing of Black Boy*, REUTERS (Apr. 25, 2016), <https://www.reuters.com/article/us-ohio-police-shooting-idUKKCN0XM1LA> [<https://perma.cc/N7NR-VWAF>].

220. See Law Office of Ellie Wertheim, Family Mediation PLLC, *An Interview with Judge Dan Polster*, FAM. MEDIATION, PLLC (Apr. 11, 2018), <https://nyfamilymediation.com/news/an-interview-with-judge-dan-polster/www.familymediation.com> [<https://perma.cc/J8FM-LK9V>].

221. See Gluck & Burch, *supra* note 103, at 25 (citing transcript of teleconference proceedings). According to the teleconference transcript, Judge Polster stated to the parties:

Judge Polster's initial comments to the *Opiate* MDL attorneys telegraphed the way in which he intended to manage the sprawling litigation, which proved prophetic for his subsequent embrace of the McGovern-Rubenstein negotiation class proposal. He indicated that he would not allow the *Opiate* MDL to drag on for five to ten years, a lesson most likely learned from his *Gadolinium* MDL experience. He was not sanguine about bellwether trials (another lesson learned from the *Gadolinium* MDL), and he didn't believe the hundreds of lawsuits could be resolved through litigated trials. Consequently, he gave notice to the parties that he would immediately encourage settlement negotiations. Moreover, he signaled that he would not be bound by ordinary rules and procedures to conclude the litigation.<sup>222</sup>

It is perhaps useful to understand that at the time the MDL Panel handed Judge Polster the *Opiate* MDL, he was nearing retirement and senior status. Thus, resolving the opiate litigation would become a capstone accomplishment to his lengthy career on the bench. The *Opiate* MDL afforded Judge Polster the opportunity to demonstrate his mediation skills, judicial compassion, empathy, and benevolence to victims of the opiate epidemic that was devastating communities throughout the United States.<sup>223</sup> As the MDL limitation progressed, Judge Polster increasingly used his platform as the MDL judge to express personal views concerning the opiate crisis, the impact on families, and the culpability of defendant corporations.<sup>224</sup> His extrajudicial statements and perceived heavy-handed management of the MDL subsequently would lead defense lawyers to seek to disqualify Judge Polster from further management of the MDL, based on accusations of bias and prejudice towards the defendants.<sup>225</sup>

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I have had two substantial MDLs, and I know that you can't try your way out of them, even though we have excellent lawyers . . . I have used bellwethers, and it sounds good in concept, but they don't always work for various reasons. And this is a case where I think from both sides there is some good reasons to seriously explore some early resolution . . . I don't think it is in anyone's interests to have this dragging on for five or ten years, which it will if we don't come to some resolution . . . [Q]uite frankly, I think the best use of my time and my abilities will be to see if there is some sort of resolution we can reach. I think that's why the MDL panel picked me.

*Id.* (alteration in original).

222. See *id.* at 25–26 (describing Judge Polster's attitudes towards resolving the *Opiate* MDL); Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [<https://perma.cc/U43Q-JALP>].

223. See Hoffman, *supra* note 222.

224. See Gluck & Burch, *supra* note 103, at 25–26.

225. See Defendant Amerisource Berger Drug and American Berger Corp., et al.'s Motion to Disqualify Pursuant to 28 U.S.C. § 455(a), *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio Sept. 14, 2019) (granting defendant's motion to disqualify Judge Polster for prejudice

Turning to the actual work of managing the MDL, Judge Polster initially followed the Federal Judicial Center's playbook for judges supervising MDL litigation.<sup>226</sup> However, from the outset of the MDL, Judge Polster's efforts were laser-focused on accomplishing a swift settlement.<sup>227</sup> In a somewhat unorthodox initiative, on February 7, 2018 (only two months into his supervision of the MDL), Judge Polster authorized and approved special negotiation teams to discuss settlement.<sup>228</sup> Five months after he assumed supervision of the MDL, Judge Polster issued the first Case Management Order, creating several different tracks dealing with aspects of the litigation delineating routine matters such as pleadings, motions, electronic filing, document preservation, discovery, expert witnesses, trial settings, and coordination with state proceedings.<sup>229</sup>

Significantly, one month into his assignment of the *Opiate* MDL, Judge Polster appointed three special masters to assist him with various aspects of managing it.<sup>230</sup> The use of special masters to assist federal judges in complex litigation — especially mass tort litigation — had become an increasing phenomenon among federal court judges.<sup>231</sup> Again,

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and bias based on Judge Polster's extrajudicial statements about the litigation and his heavy involvement with the settlement; questioning Judge Polster's impartiality).

226. See generally BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUDICIAL CTR., *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES* (2011); see also FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* (4th ed. 2004).

227. Gluck & Burch, *supra* note 103, at 25–26.

228. Order, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio, Feb. 7, 2018) (order confirming composition of the negotiating team members). The plaintiffs' negotiation team included Joe Rice and Elizabeth Cabraser, who were both Advisers to the ALI *Principles of Aggregate Litigation* project, and one defense attorney, Sheila Birnbaum, who also was an adviser to the *Principles* project. Elizabeth Cabraser and Sheila Birnbaum also were members of the ALI Council. These negotiating team members would have been very knowledgeable about the *Principles* § 3.17 proposal for an aggregate settlement with a voting mechanism. Judge Polster subsequently approved the addition of other attorneys as part of the settlement negotiation teams. See, e.g., Amended Order, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio, Feb. 12, 2018) (adding negotiation team attorneys); Walgreens Boots Alliance, Inc.'s Motion to Add Negotiating Committee Counsel for the Defendants, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio, Mar. 21, 2018); Order, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio, Apr. 9, 2018) (establishing a separate negotiation team for retail chain pharmacies).

229. Case Management Order One, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio May 14, 2018), ECF No. 418. Notwithstanding Judge Polster's distaste for and skepticism about the efficacy of bellwether trials, he nonetheless created a track for bellwether trials against several opiate manufacturers and distributors).

230. Appointment Order, *In re Nat'l Prescription Opiate Litig.*, Case No. 17-md-02804 (January 11, 2018) (appointment of Special Masters David R. Cohen, Francis McGovern, and Cathy Yanni).

231. See generally Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2132–41, 2154–58, 2202–05 (2020); Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005); Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 486 (2009).

signaling his intention to focus on early and expeditious settlement, Judge Polster appointed Professor Francis McGovern and Cathy Yanni as special masters who were tasked with overseeing settlement negotiations.<sup>232</sup> He also appointed special master David R. Cohen who was tasked with overseeing all discovery matters. Although it was not unusual for Judge Polster to appoint a special master, it was unusual to appoint three.<sup>233</sup>

In another unorthodox action, Judge Polster engaged Professor William Rubenstein of Harvard Law School as an expert adviser on class action and other legal issues, apparently on the urging of Francis McGovern.<sup>234</sup> Federal Rule of Evidence 706 as well as the court's inherent authority authorizes judicial retention of court-appointed experts, who typically serve the court as a technical adviser concerning admissibility questions, or to assist the factfinder with merits decisions.<sup>235</sup> Presumably, however, federal judges do not need expert academic assistance on legal issues. Judge Polster's retention of an academic professor to advise on legal questions, then, was another boundary-stretching dimension of his management of the *Opiate* MDL.

## 2. The Negotiation Class Proposal

Consistent with the well-known tenets of complex litigation, the *Opiate* defendants refused to engage in any settlement proposal that would not assure them global peace; that is, complete closure and preclusion of future claims. To address and accommodate this reality, Judge Polster urged the parties to contemplate "novel solutions to a

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232. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536, 553 (N.D. Ohio 2019).

233. As further indication of Judge Polster's early antipathy towards the defendants, he revised his allocation of cost-sharing for the special masters' fees. Judge Polster originally imposed the special masters' costs equally on the plaintiffs and the defendants. On March 12, 2018, he revised this allocation, imposing a 75% cost of special masters' fees on the defendants and 25% cost on the plaintiffs, citing the "dramatically asymmetric access to unencumbered resources" of the defendants. *See Order, In re Nat'l Prescription Opiate Litig.*, No.17-md-02804 (N.D. Ohio Feb. 12, 2018) (Appointment Order).

234. *See* Francis McGovern, Elizabeth Burch & William Rubenstein, *The Negotiation Class*, 104 JUDICATURE 4 (2020) [<https://judicature.duke.edu/wp-content/uploads/2020/04/the>] [<https://perma.cc/P3LW-HQN5>] (enlistment of Professor Rubenstein to serve as the court's expert consultant on class certification issues in the *Opiate* MDL).

235. *See* Sophia Cope, Comment, *Ripe for Revision: A Critique of Federal Rule of Evidence 706 and the Use of Court-Appointed Experts*, 39 GONZAGA L. REV. 163, 165 (2003-2004). The most common, but not exclusive, use of court-appointed experts is to assist the court with highly technical scientific evidence.

novel problem.”<sup>236</sup> Given Judge Polster’s pre-disposition to settle the *Opiate* MDL quickly, combined with his immediate appointment of two special masters to oversee settlement along with a Harvard class action expert, it is unsurprising that Judge Polster was highly susceptible to the advocacy of his advisers for implementation of the novel procedure of the negotiation class.

A chronicle of federal mass tort litigation spanning fifty years suggests an evolutionary arc of aggregationist actors seeking to build ever-better models for group resolution of these massive, sprawling cases. It is a history of judicial experimentation and reinvention of procedural modalities—some successful and many not. The *Opiate* MDL triggered a convergence of aggregationist actors with aggregationist agendas seeking to implement a novel solution that would provide a template for future aggregate litigation. It brought together a senior federal judge with a bias towards mediated resolutions with academic advisers seeking to exploit the opportunity afforded by the *Opiate* MDL to convince the judge and litigants to implement an innovative solution.

Among the many unorthodoxies of the *Opiate* MDL, Professor McGovern and Rubenstein had unparalleled *ex parte* access to Judge Polster, which provided the academics with continuous opportunities to influence the judge and interact with the parties.<sup>237</sup> Sometime between Judge Polster’s appointment of the special masters in January 2018 and the plaintiffs’ motion for class certification in June 2019, Professor McGovern and Rubenstein advanced the concept of a negotiation class to the parties and Judge Polster. Professor McGovern indicated that the genesis of the negotiation class idea was a phone call from some MDL plaintiffs’ lawyers “wondering how they could participate in some type of overall settlement, even though they were not part of the Plaintiffs’ Executive Committee.”<sup>238</sup> “[T]he question was, ‘How do you put together a group of folks who could facilitate their bargaining power and still

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236. Transcript of Status Conference Proceedings at 7, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 2, 2019), ECF No. 1732 at 7; *see also* Gluck & Burch, *supra* note 103, at 29.

237. The Chamber of Commerce of the United States noted this unusual arrangement in its amicus curiae brief on appeal of Judge Polster’s negotiation class certification order. *See* Brief for Chamber of Commerce of the United States as Amici Curiae Supporting Defendants-Appellees, *in re Nat’l Prescription Opiate Litig.*, No. 19-4097 at 9 (“Brief of Amicus Chamber of Commerce”):

This disconnect of the negotiation class from ordinary practice is further suggested by the genesis of the idea in an article written by the very same people who serve as a special master and an expert witness in this case . . . . This is, to say the least, an unusual provenance for a rule of judicial decision. (citation omitted).

provide defendants the kind of closure they are looking for in the settlement of a case?"<sup>239</sup>

In response to this inquiry, the professors had ready a draft paper setting forth the negotiation class concept and the means of its implementation.<sup>240</sup> Unlike the ALI § 3.17 proposal that was formulated to address consent issues in non-class aggregate settlements, the McGovern-Rubenstein proposal sought to locate their negotiation class in traditional Rule 23 jurisprudence. As such, their model represented an amalgam of class action, non-class action, and bankruptcy jurisprudence.<sup>241</sup> This approach had much to recommend itself because it avoided the problems engendered by the aggregate settlement rule that bedeviled non-class aggregate settlements. Moreover, any settlement accomplished through the negotiation class would be subject to judicial approval in the first instance and appellate review in the second.<sup>242</sup>

The negotiation class was firmly anchored in the ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION. Thus, McGovern and Rubenstein explained:

In this Article, we offer heterogenous class members a mechanism for cooperation, a new form of class certification that we call *negotiation class certification*. The approach builds on a model that the American Law Institute has endorsed for aggregate (nonclass) litigation: a group of plaintiffs represented by a single lawyer agree on a formula for allocation of a lump sum settlement among themselves, negotiate with the defendants as a

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238. See McGovern et al., *supra* note 234 (a conversation with Professors McGovern and Rubenstein Spring 2020).

239. *Id.*

240. The final version of the McGovern-Rubenstein article on the negotiation class was published in late 2020, after Judge Polster certified the class and the Sixth Circuit reversed the certification. At the time leading up to the class certification in June 2019, McGovern and Rubenstein had their draft paper posted on SSRN, according to the *Judicature* conversation with the authors at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3403834](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834) [<https://perma.cc/CNN6-UMAX>]. The SSRN post would have been updated with the final version after publication in the Texas Law Review.

241. Professor Rubenstein suggested that Professor McGovern's negotiation class was a brilliant amalgam of the best features of both the trial litigation class and the settlement class. Hence, the negotiation class certified the class action up front, but as in a settlement class, the litigation was certified only for the purposes of negotiating a settlement. McGovern et al., *supra* note 234.

242. FED. R. CIV. P. 23(f)(discussing interlocutory appeal of class certification orders); Fed. R. Civ. Pro. 23(e)(discussing judicial approval of class action settlements).

group, and then take a vote on any proposed deal, with a supermajority binding everyone in the group.<sup>243</sup>

In addition to modeling their negotiation class on the ALI *Principles*, Professors McGovern and Rubenstein anchored the proposed negotiation class on a pastiche of economic, political, and sociological theories: the tragedy of the commons,<sup>244</sup> the collective action problem,<sup>245</sup> the social psychology of procedural law,<sup>246</sup> and quasi-democratic sounding principles.<sup>247</sup> It relied heavily on bankruptcy law principles to address the problems of litigation that entailed different classes of interest,<sup>248</sup> and it relied on bankruptcy law and the ALI § 3.17 as authority for its voting mechanism.<sup>249</sup>

The authors intended the negotiation class to address the problems engendered by heterogenous class actions that embraced claimants with varying interests and strength of their claims.<sup>250</sup> The model entailed several phases.<sup>251</sup> First, class members would work together to generate a distributional metric or allocation plan to distribute a lump sum settlement to class members, along with a voting procedure for any proposed settlement.<sup>252</sup> Second, the class attorneys would then ask the court to certify a Rule 23(b)(3) opt-out negotiation class for the sole purpose of negotiating a lump sum settlement.<sup>253</sup> The class certification process would be subject to all the ordinary Rule 23(a) and (b) requirements.<sup>254</sup> Third, if the court granted certification, then the court would direct notice to class members that explained the allocation metric, that any negotiated settlement would be put to a class vote, and a superma-

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243. McGovern & Rubenstein, *supra* note 128, at 78–79 (citing ALI Principle § 3.17). When the plaintiffs filed their motion for class certification of a negotiation class on June 14, 2019, the American Law Institute *Adviser* posted a notice “Opioid MDL Proposal Modeled on Aggregate Litigation Principles Section 3.17.” See *Opioid MDL Proposal Modeled on Aggregate Litigation Principles Section 3.17*, A.L.I. (June 17, 2019), <https://www.ali.org/news/articles/opioid-mdl-proposal-modeled-aggregate-litigation-principles-section-317/> [<https://perma.cc/KL5K-5MU9>].

244. McGovern & Rubenstein, *supra* note 128, at 93 n.66.

245. *Id.* at 81–82 nn.23 & 24.

246. *Id.* at 108 n.143.

247. *Id.* at 110; *see id.* at 113 (reference to “the franchise”); *id.* at 116 (“It adapts to class action law the use by a heterogenous group of the franchise as a means of generating agreement and moving as a bloc, while providing the stakeholders some participatory control over their litigation rights”).

248. *See id.* at 92 nn.62 & 65 (citing 11 U.S.C. § 1126(c) (2018)); *id.* at 113–14.

249. *See id.* at 115.

250. *Id.* at 74, 81–85.

251. *Id.* at 79, 90 (describing five stages of the negotiation class).

252. *Id.* at 74, 79, 91–95.

253. *Id.* at 74, 79.

254. *Id.* at 74, 79, 95.

jority vote would bind the entire class.<sup>255</sup> Any class member who did not wish to be bound to the distributional metric or the voting process could opt out.<sup>256</sup> Fourth, once the opt-out period ended and the size of the class was determined, settlement negotiations would ensue, with class counsel, class representatives, and the defendants negotiating a settlement.<sup>257</sup> Fifth, if the parties accomplished a settlement, it would be put to a classwide vote.<sup>258</sup> If a supermajority of class members voted in favor, then the parties would seek final judicial approval of the settlement.<sup>259</sup>

The negotiation class scheme envisioned class members assisting in generating a metric for distributing a settlement and a voting procedure.<sup>260</sup> The authors anticipated that the allocation method would be developed through bargaining between large stakeholders and their lawyers on the one hand, and putative class counsel and class representatives of smaller stakeholders on the other hand. The authors conceded that in practice it was likely that the lawyers themselves would do most of the negotiating, “so we do not want to oversell the democratic nature of the bargain.”<sup>261</sup> “Indeed,” they wrote, “the participants are surely driven by self-interest, and the process is just as surely messy, complex, and not perfectly democratic.”<sup>262</sup>

The authors viewed the negotiation class proposal as the most efficacious means to accomplish a fair and adequate settlement of heterogeneous classes involving class members with varying strength of claims.<sup>263</sup> They suggested that the negotiation class concept was beneficial to both plaintiffs and defendants, affording defendant at the outset “a precise sense of the scope of finality the settlement will produce, hence encouraging a fulsome offer by ensuring meaningful peace.”<sup>264</sup>

In justifying their novel proposal of a settlement class, McGovern and Rubenstein pointed out that historically the settlement class concept had been controversial and novel, suggesting that it was “developed out of whole cloth in the late nineteenth twentieth century.”<sup>265</sup> Yet

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255. *Id.* at 74, 79, 95–100.

256. *Id.* at 74, 79, 99.

257. *Id.* at 79, 100–01.

258. *Id.* at 79, 101–04.

259. *Id.* at 79, 104.

260. *Id.* at 110.

261. *Id.*

262. *Id.*

263. *Id.* at 79, 104–20.

264. *Id.* at 74; *see also id.* at 79, 104–20.

265. *Id.* at 74; *see also* discussion of the development of the settlement class concept, *supra* notes 21–92. Parts 1(B)–(D).

in spite of the relative novelty of the settlement class in its day, it had nonetheless become a “stock device” in class action practice.<sup>266</sup> The authors argued that their negotiation class proposal was less ambitious and superior to the settlement class, where lawyers negotiate on behalf of a class prior to class certification or judicial scrutiny of class cohesiveness or the adequacy of representation.<sup>267</sup> Echoing the same debate that surrounded the challenges to the settlement class during the 1990s, McGovern and Rubenstein argued that Rule 23 authorized the negotiation class, did not define or limit the purposes for which a class action might be certified, and did not textually require that class members be provided with a second opt-out opportunity.<sup>268</sup> Finally, they contended that their negotiation class secured and furthered an array of due process values in providing class claimants with conventional notice, an opportunity to be heard, participate, opt-out as well as adequate representation.<sup>269</sup>

#### B. Judge Polster’s Certification of a Negotiation Class

On February 7, 2018 — at the very outset of the *Opiate* MDL — Judge Polster appointed a Plaintiffs’ Settlement Committee and authorized a support committee.<sup>270</sup> On June 14, 2019, plaintiffs’ counsel filed a notice and motion for certification of a Rule 23(b)(3) negotiation class on behalf 51 cities and counties.<sup>271</sup> The notice indicated a negotiation class website had been created<sup>272</sup> and invited the cities and counties to participate as voluntary members of the negotiation class. The notice further explained that the cities and counties had the right to exclude themselves from the negotiation class, in which case they would not participate in the settlement or be bound by it. The cities and counties that remained in the class would have vested voting rights. A settlement would need to be approved by a supermajority vote of 75% or more of the litigating and non-litigating cities and counties; 75% of the populations,

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266. *Id.* at 74.

267. *Id.*

268. *Id.* at 120–29.

269. *Id.* at 129–35.

270. Order, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Feb. 7, 2018), 2019), ECF No. 118.

271. Plaintiffs’ Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio June 14, 2019), ECF No. 1683; corrected version ECF No. 1690.

272. The website listed is [www.Opioidsnegotiationclass.com](http://www.Opioidsnegotiationclass.com), although nothing has been posted as of the time of publication. *Id.* at 1.

and 75% of the allocations to the cities and counties.<sup>273</sup> Proposed settlements that received a supermajority vote would then be subject to judicial review for fairness, adequacy, and reasonableness.<sup>274</sup> All members of the proposed negotiation class were invited to comment on the proposal.<sup>275</sup>

The *Opiate* website contained a settlement allocation map and calculator, a detailed description of the voting procedure, a proposed class action notice, and FAQs. Prospective class members could evaluate whether to participate based on their knowledge of the portion of their cities' and counties' aggregate share of each proposed settlement that would be allocated to each county and its constituent cities. An intricate Settlement Allocation Model determined each class members' aggregate share.<sup>276</sup> After settlement approval, each county and constituent city would decide the internal allocation of the level settlement award among themselves.<sup>277</sup>

The negotiation class created six categories of claimants, each of which needed to accomplish a supermajority vote of 75% to reach a binding settlement.<sup>278</sup> Each class member would vote only once, and no settlement could be approved as binding unless all categories were in favor of the settlement at the 75% level.<sup>279</sup> The proposed negotiation class further provided that 75% of the class share of the settlement would be allocated to counties and cities; 15% would be set aside for a "Special Needs" fund, and 10% would be set aside to pay for attorneys

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273. Plaintiffs' Notice of Motion, *supra* note 271, at 3.

274. *Id.* at 6; FED. R. CIV. P. 23(e).

275. Plaintiffs' Notice of Motion, *supra* note 271, at 5.

276. *Id.* at 7

("This [Settlement Allocation Map] shows in dollars the pro rata shares for each county, utilizing a three-part formula that reflects the level of opioids-related harm. The formula uses three metrics for which existing, reliable, detailed, and objective data are available for each county: (1) morphine milligram equivalent ("MME") data, (2) overdose deaths, and (3) opioid use disorder cases. Sources for the allocation data are detailed in Section VIII of the accompanying Memorandum. The formula weights these three factors equally: 1/3-1/3-1/3. The formula is the product of prolonged and intensive research, analysis, and discussion by and among members of the court-appointed Plaintiffs' Executive Committee and Settlement Committee and their retained public health and health economics experts. The Settlement Allocation Model is described in detail in Section VIII of the accompanying Memorandum, which (i) explains the three factors used to determine how funds available to Class members under each Class settlement would be distributed at the county level, and (ii) the independent data, sources, and rationale used to determine each factor.").

277. *Id.* (The proposed negotiation class also provided a means by which cities and counties that did not agree on allocating awards could resolve their differences through adjudication by a special master or other neutral party).

278. *Id.* at 8.

279. *Id.* at 9 ("... in order to assure that the views and voices of all Class members, large and small, from all parts of the country, and affected by the Opioids epidemic in every degree, are heard and counted.").

fees and costs. Any unused portion of the latter two funds would revert to the benefit of the class.<sup>280</sup>

Judge Polster set a hearing date for June 25, 2019. On the same day that plaintiffs' counsel filed their notice and motion for certification of the negotiation class, Joe Rice — a lead plaintiff's attorney in the *Opiate MDL* and Adviser on the ALI *Principles of the Law of Aggregate Litigation* — published a blog post extolling the negotiation class and explaining why the negotiation class was both novel and needed.<sup>281</sup> Groups of distributor and pharmaceutical defendants responded to the motion, and two sets of State Attorneys General — representing 30 states, the District of Columbia, and Guam sent the court letters of disapproval of motion.<sup>282</sup> At the June 25 hearing, Judge Polster authorized the plaintiffs to re-brief their motion in light of the concerns and objections that had surfaced; they filed a renewed and amended motion for class certification on July 9, 2019.<sup>283</sup> In response to the renewed motion, various distributors, pharmacies, and cities filed briefs in opposition to class certification.<sup>284</sup>

In addition, thirty-seven State Attorneys General and the Attorney Generals of the District of Columbia and Guam strongly urged Judge Polster not to certify the negotiation class.<sup>285</sup> The state AGs contended that the negotiation class unconstitutionally impinged on state sovereignty and was unworkable because Judge Polster could not approve a settlement that purported to allocate settlement money among local governments without the states' approval. Moreover, the negotiation

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280. *Id.* at 10–11.

281. Joseph F. Rice, *Innovative Class Action Approach in Opioid Litigation Would Create a Beneficial and Coordinated Negotiating Class on Behalf of Communities Nationwide*, MOTLEYRICE (June 14, 2019), <https://www.motleyrice.com/news/opioid-litigation-class-action-approach> [https://perma.cc/G5AP-D63P].

282. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 537–38 (N.D. Ohio 2019); see Letter from the Hon. Ken Paxton, Office of the State Att'y Gen. of Texas and Xavier Becerra, Office of the State Att'y Gen. of Texas California to the Hon. Dan Aaron Polster, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (June 24, 2019) (objecting to the proposed negotiation class; June 24, 2019, contending if approved the negotiation class might generate uncertainty and impair state settlements; raising due process concerns, questioning whether the proposed class could meet the requirements of Rule 23(a) and 23(b)(3), and indicating misstatement of attorney generals roles); see also Alison Frankel, *State AGs Pose Big Obstacle for Novel Opioids Negotiating Class Proposal*, REUTERS: ON THE CASE (June 26, 2019, 5:31 PM) <https://www.reuters.com/article/us-otc-opioids/state-ags-pose-big-obstacle-for-novel-opioids-negotiating-class-proposal-idUSKCN1TR35R> [perma.cc/6556-GAVQ] (discussing state AGs letter objection to the negotiation class).

283. Plaintiffs' Renewed and Amended Notice of Motion and Motion for Certification of a Rule 23(b)(3) Cities/Counties Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (July 9, 2019), ECF No. 1820.

284. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 538 (N.D. Ohio 2019).

285. *Id.* (The plaintiffs replied to the oppositions).

class processes would add layers of complexity and delay thereby defeating the goal of streamlining settlement of the litigation.<sup>286</sup>

### 1. The District Court Order Certifying the Negotiation Class

On August 6, 2019, Judge Polster conducted a hearing on the class certification motion and on September 11 he issued his Memorandum Opinion Certifying the Negotiation Class.<sup>287</sup>

Judge Polster's opinion initially painted the opiate litigation crisis in sweeping terms. From the outset he favored swift settlement of the MDL to provide expeditious relief to the counties and cities across the country suffering from the opiate health crisis. He recognized that the defendants would settle for nothing less than "global peace" of all claims. This posed a problem because a significant number of counties and cities were already litigating, and if they opted-out of a settlement — leaving defendants to settle with only non-litigating claimants — this would subvert defendants' goal of a universal settlement of all claims. The solution to this situation, then, "required creative thinking," and the parties, their experts, and the special masters devised the innovative solution of the negotiation class.<sup>288</sup>

Judge Polster explained that the negotiation class — based on the McGovern-Rubenstein draft article — addressed procedural problems by providing for class certification and an opt-out prior to a settlement, which fixed the size of the class and informed the defendant of the scope of its responsibility. Class members' due process protections rights were accomplished protected both at the front end and back end the litigation in accordance with the requirements of Rule 23(a), (b)(3), (g), and (h).<sup>289</sup> Any settlement approved by a 75% supermajority vote was subject to judicial approval under Rule 23(e). Judge Polster discussed the granular details of the settlement class mechanism, and he largely endorsed the plaintiffs' processes set forth in their motion for class cer-

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286. See Frankel, *supra* note 282.

287. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019).

288. *Id.* at 536–37.

289. *Id.* at 536–37, 543–54 (applying Rule 23 class certification requirements and holding that the proposed negotiation class was ascertainable and satisfied the requirements for numerosity, commonality, typicality, adequacy, predominance, and superiority. Judge Polster further determined that although no settlement had been negotiated, the court at that time was likely to find that the allocation method was fair and adequate). Judge Polster also held that the proposed notice and exclusion plan were sufficient, satisfying due process protections of absent class members. *Id.* at 554–56.

tification — which substantially tracked the stages of the McGovern-Rubenstein negotiation class proposal.<sup>290</sup>

Judge Polster's certification order included a few modifications to the plaintiffs' proposal. He selected a case filed by Summit County, Ohio and declared that entity's case number would be attributed to the class action going forward.<sup>291</sup> He certified the negotiation class as to federal RICO claims, rather than the multiple state law claims alleged in class members' varying lawsuits.<sup>292</sup> The court also invoked Rule 23(c)(4) to certify two issues related to the federal Controlled Substances Act.<sup>293</sup> Notwithstanding the certifications of particular claims, Judge Polster indicated that the class was to negotiate "any . . . claims," federal or state, arising out of a common factual predicate."<sup>294</sup>

Judge Polster addressed and rejected several objections to the negotiation class. He noted the opposition of a majority of the state AGs, but he nonetheless stressed that no one involved in the *Opiate* litigation was being coerced into settling through the negotiation class. No defendant had to employ it and the states could continue their litigation if they wished. The certification of the negotiation class "simply provide[d] [the litigants] with an option, and in the Court's opinion it is a powerful, creative, and helpful one."<sup>295</sup>

Echoing the debates over the legitimacy of the settlement in the 1990s,<sup>296</sup> defendants challenged the negotiation concept, arguing that Rule 23 did not provide for such a novel procedure. Judge Polster indicated that Rule 23 authorized the negotiation class because the rule neither limited nor prescribed the uses to which the class action mechanism might be applied. Rule 23 did not textually refer to "trial" or "settlement" purposes, so by implication the rule encompassed negotiation uses as well. Judge Polster noted that Rule 23 contained no reference to the concept of the settlement class, but after many years the Supreme Court validated and upheld the settlement class concept.<sup>297</sup> Apart from the history and text of Rule 23, Judge Polster noted that class action litigation was

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290. See *id.* at 538–539.

291. See *id.* at 541–542. This was supposedly in response to defendants' arguments that Rule 23 permits class certification only in the context of a specific civil action.

292. *Id.* at 542, 548–50. Judge Polster acknowledged the prevalence of state-based claims that carried across the class.

293. *Id.* at 550–51.

294. *Id.* at 556.

295. *Id.* at 537.

296. See discussion *supra* text accompanying notes 21–92.

297. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 539–40 (N.D. Ohio 2019) (citing *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997)).

anchored in equity principles and courts had long recognized that as an equitable device it should be given flexible meaning and application.<sup>298</sup>

Judge Polster also dispensed with other objections to the negotiation class. He concluded that the requirement that class members opt-out prior to knowing the settlement did not violate due process because in normal litigation classes claimants must decide to opt-out in advance of knowing the result of the suit. If attorneys subsequently settle a suit class members may be afforded a second opt-out right, but Rule 23 does not require this. If this need arose during the negotiation class the court had the discretion to order a second opportunity to opt out.<sup>299</sup> Judge Polster quickly rejected the objection that other courts had repudiated 75% supermajority voting procedures in on-class litigation; he concluded that the representative nature of class litigation supported this means.<sup>300</sup>

Finally, Judge Polster denied the objection that the negotiation class violated Article III of the Constitution on the grounds that it was unrelated to a judicial function. Judge Polster concluded that in certifying a negotiation class, “the Court undertakes the familiar judicial function of ensuring that the class certification requirements are met, and the absent class members’ interests are protected by those who purport to represent them, *prior to those agents negotiating a settlement for absent class members.*”<sup>301</sup>

## 2. Post-Certification Developments in the Negotiation Class

The Ohio State Attorney General, who had spearheaded the state AGs opposition to the negotiation class, immediately attacked Judge Polster’s certification of the negotiation class. He issued a statement declaring: “[Judge Polster’s] process is fundamentally flawed because it binds people to buy a pig in a poke. Every community has to make a determination whether they’re in or out before they even know what the deal is.”<sup>302</sup> Shortly after approval of class certification, attorneys representing the State Coalition’s Opt-Out Working Group wrote to plaintiffs’ class counsel expressing concerns that they still had not received a

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298. *Id.* at 540.

299. *Id.*

300. *Id.*

301. *Id.* at 540–41. (emphasis in original).

302. Alison Frankel, *Opioid Judge OKs Novel Negotiating Class as “Likely to Promote Global Settlement”*, REUTERS (Sept. 12, 2019, 5:34 PM), <https://www.reuters.com/article/us-otc-opioids/opioid-mdl-judges-oks-novel-negotiating-class-as-likely-to-promote-global-settlement-idUSKCN1VX2RE> [perma.cc/99UN-TKJU].

list of the litigating entities.<sup>303</sup> This was important to the state opt-out coalition because it was essential to their ability to understand whether the clients represented by the MDL leadership already satisfied the 75% supermajority. In addition, the state opt-out coalition raised two other concerns concerning the allocation model and the methodology used to arrive at its calculations.<sup>304</sup>

On December 2, 2019, plaintiff's negotiating class counsel Chris Seeger submitted a status report on the negotiation class notice. Notice was sent by direct mail to 34,000 negotiation class members and 10,000 more notices were sent by email. Only 3% of notices were deemed undeliverable. The commercial vendor Epiq set up a website that was visited by 15,000 visitors. As of November 27, 2019, more than 98% of class members remained in the class and 1.6% requested to opt out. Epiq would continue to receive opt out requests through December 6, 2019.<sup>305</sup>

The report contained a footnote allowing entities that had opted out to rescind their opt out request.<sup>306</sup> On December 3, counsel for the State Coalition's Opt-Out Working Group again wrote to plaintiffs' class counsel objecting to the footnote allowing for rescission of opt-out requests, noting that they still had not received the identity of the litigating entities. They noted that having this information would put into context class counsels' representation that 98% of class members remained in the class.<sup>307</sup> On January 10, 2020, negotiating class counsel filed a request for entry of the negotiation class membership.<sup>308</sup>

### C. *The Appeal of the Negotiation Class Certification*

Two weeks after Judge Polster certified the negotiation class, various Ohio cities<sup>309</sup> and a coalition of manufacturers, distributors, retail-

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303. Letter of the Cicala Law Firm PLLC to Class Counsel (Sept. 19, 2022) (copy on file with the University of Michigan Journal of Law Reform).

304. *Id.*

305. Chris Seeger, Report on Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804, (N.D. Ohio Dec. 2, 2019), ECF No. 2959.

306. *Id.* at 3 n.1.

307. Letter from Shelly A. Sanford, Authorized Grp. Representative for State's Coal. Opt-Out Working Grp., to Chris Seeger, et al., Negot. Class Counsel (Dec. 3, 2019) (letter on file with the University of Michigan Journal of Law Reform); see Motion to Modify Report on Negotiation Class (Doc. 2959) or, In the Alternative, Objections to Order Certifying Negotiation Class and Approving Notice (Doc. 2591), *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (on file with the University of Michigan Journal of Law Reform).

308. Request for Entry of Proposed Rule 23(c)(1)(B) Negot. Class Membership Ord., *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio Jan. 10, 2020), ECF No. 3073.

309. Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f), *In re Nat'l Prescription Opiate Litig.*, No. 19-306 (6th Cir. Sept. 26, 2019); Petition for Permission to Appeal from the U.S.

ers, and pharmacies<sup>310</sup> filed petitions to appeal the class certification order pursuant to Rule 23(f). The state AGs of twelve states and the District of Columbia filed an amicus brief in support of the request for interlocutory appeal of Judge Polster's class certification order.<sup>311</sup>

The Rule 23(f) petitions argued that immediate review of Judge Polster's certification order was warranted because it raised a novel and unsettled question of class litigation.<sup>312</sup> In addition, the petitioners contended that the certification raised questions of the likelihood of the petitioner's success and whether the district court may later revisit its certification ruling.<sup>313</sup>

The Rule 23(f) petitions previewed the major arguments that the appellants would advance in their briefing to the Sixth Circuit. These arguments focused on five major overlapping contentions: that Rule 23 did not contemplate or authorize the certification of a negotiation class and contravened Article III jurisdictional limits,<sup>314</sup> that Judge Polster has misapplied the Rule 23 class certification requirements,<sup>315</sup> that the court's certification of a negotiation class violated due process,<sup>316</sup> and that the certification called into question the constitutionality of Rule 23.<sup>317</sup> The state AGs focused on an additional argument against Judge Polster's certification of the negotiation class; namely, that the certifi-

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District Court for the Northern District of Ohio, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02840 (N.D. Ohio Sept. 25, 2019), ECF No. 2674-1 (City of North Royalton, Ohio; City of East Cleveland, Ohio; City of Mayfield Heights, Ohio; City of Lyndhurst, Ohio; City of Huron, Ohio) as Plaintiffs-Petitioners [hereinafter Ohio Rule 23(f) Petition].

310. Joint Petition for Permission to Appeal Pursuant to Fed. Rule of Civ. Proc. 23(f), *In re Nat'l Prescription Opiate Litig.*, On Petition Pursuant to Fed. R. Civ. P. 23(f) for Permission to Appeal the Order of the United States District Court for the Northern District of Ohio, Eastern Division, Entered on September 11, 2019 (R.2591), Certifying Negotiation Class and Approving Notice, *In re Nat'l Prescription Opiate Litig.* (6th Cir. Sept. 26, 2019) (No.19-305) (McKesson Corporation, Cardinal Health, Inc., AmerisourceBergen Drug Corporation, Prescription Supply, Inc., Discount Drug Mart, Inc., Walmart, Inc., Walgreen Co., CVS Pharmacy Inc., Rita Aid of Maryland, Inc.) as Petitioners [hereinafter Corporate Defendants Rule 23(f) Petition].

311. Amicus Brief for Ohio, et. al. as Amici Curiae Supporting Petitioner's Motion Pursuant to Rule 23(f), *In re Nat'l Prescription Opiate Litig.* (6th Cir. Oct. 2, 2019) (No. 19-306) [hereinafter Amici Rule 23(f) Petition].

312. Ohio Rule 23(f) Petition, *supra* note 309, at 4; Corporate Defendants Rule 23(f) Petition, *supra* note 310, at 8-11.

313. Ohio Rule 23(f) Petition, *supra* note 309, at 4.

314. *Id.* at 6-14; Corporate Defendants Rule 23(f) Petition, *supra* note 310, at 8-11.

315. Ohio Rule 23(f) Petition, *supra* note 309, at 14-16, 18-20; Corporate Defendants Rule 23(f) Petition, *supra* note 310, at 11-22; Amici Rule 23(f) Petition, *supra* note 311, at 9-10 (lack of superiority).

316. Ohio Rule 23(f) Petition, *supra* note 309, at 5-6; Corporate Defendants Rule 23(f) Petition, *supra* note 310, at 13-17, 22-25.

317. Ohio Rule 23(f) Petition, *supra* note 309, at 16-20.

cation undermined state sovereignty and the structure of state government.<sup>318</sup>

The plaintiffs opposed the petitions for Rule 23(f) interlocutory review contending that the petitioners lacked standing because the district court's certification order did not require any defendant to engage with the negotiation class.<sup>319</sup> The plaintiffs asserted that Judge Polster had not abused his discretion in certifying the negotiation class, and defended the certification against all the constitutional, Rule 23, and policy arguments the appellees advanced in their petition for review. On November 8, 2019, the Sixth Circuit granted interlocutory appeal.

### 1. The Defendant Appellants

On appeal to the Sixth Circuit, the coalition of corporate distributors and pharmacies focused on three core arguments in opposition to Judge Polster's certification of the negotiation class, and requesting reversal:<sup>320</sup> (1) that the district court's certification of a negotiation class contravened Rule 23 and Article III of the Constitution, (2) that even if negotiation classes are permissible, Judge Polster's certification decision should be reversed because the proposed class failed to satisfy Rule 23 certification requirements, and (3) the class notice failed to satisfy due process.

The corporate appellants led their appeal with their most sweeping arguments. First, they pointed to the Supreme Court's warning to federal judges, in the 1990s, against judicial inventiveness in interpreting and applying Rule 23.<sup>321</sup> The Court's clear instruction was that Rule 23 was to be strictly applied according to its terms and without the invocation of judicial inventiveness.<sup>322</sup> Echoing the same arguments that litigants advanced in the 1990s, the appellants contended that the plain text of Rule 23 did not authorize creation or certification of a negotiation class.<sup>323</sup> Moreover, the fact that class action litigation had an equitable basis did not support a different conclusion.<sup>324</sup>

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318. Amici Rule 23(f) Petition, *supra* note 311, at 1–8.

319. See Brief of Plaintiffs-Appellees, *In re Nat'l Prescription Opiate Litig.* (6th Cir. Mar. 20, 2020) (Nos. 19-4097/19-4099), ECF No. 73 (contending that the Sixth Circuit improvidently granted appellate review under Rule 23(f)) [hereinafter Brief of Plaintiffs-Appellees].

320. Brief of Appellants, in *In re Nat'l Prescription Opiate Litig.*, Case No. 19-4097 (6th Cir. Feb. 7, 2020), ECF No. 44 [hereinafter Brief of Appellants].

321. See discussion *supra* text accompanying notes 72–73.

322. Brief of Appellants, *supra* note 320, at 17–18.

323. *Id.* at 23–28.

324. *Id.* at 27.

Furthermore, Judge Polster, in approving the *Opiate* negotiation class, had exceeded his Article III powers.<sup>325</sup> Article III limited federal court jurisdiction to the resolution of actual, concrete cases and controversies and therefore Rule 23 permitted class certification only for purposes of enabling judicial action. The negotiation class was not certified in support of any judicial function.<sup>326</sup> Nor was the “free-floating MDL” tethered to a specific civil action and the district court could not cure this defect by arbitrarily assigning the negotiation class to the Summit County case number.<sup>327</sup>

The corporate appellants further argued that established class action jurisdiction required Judge Polster to apply the rigorous analysis test to the class certification decision.<sup>328</sup> The plaintiffs failed to submit evidence in support of their motion for certification, and in absence of such an evidentiary record Judge Polster could not and did not conduct the required rigorous analysis.<sup>329</sup> The appellants contended that Judge Polster could not substitute his personal extensive knowledge of the litigation in absence of a record.

Judge Polster also erred in his conclusions that the proposed negotiation class satisfied the Rule 23(b)(3) requirements for predominance of common questions of law or fact,<sup>330</sup> relying on the possibility of the Rule 23(c)(4) issue class model.<sup>331</sup> The appellants argued that the tens of thousands of political subdivisions and the multiplicity of asserted claims doomed satisfaction of the predominance requirement. They noted that Judge Polster had not certified separate issues for adjudication, but rather had certified the negotiation of potential cases.<sup>332</sup> In addition, the appellants asserted that Judge Polster could not manufacture predominance by looking at a gerrymandered subset of claims and issues, such as the RICO and CSA claims.<sup>333</sup>

The appellants additionally contended that Judge Polster violated due process in finding that the class representatives and class counsel met the Rule 23(a) adequacy requirement; instead, the class abounded

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325. *Id.* at 28–34.

326. *Id.* at 17.

327. *See id.* at 18–19; 31–32; *see supra* text accompanying notes 291–92, (discussing Judge Polster’s modification to the plaintiff’s proposal for class certification).

328. *See* Brief of Appellants, *supra* note 320 at 19, 35–37.

329. *See id.* at 35–36

330. *See id.* at 20, 37–39.

331. *Id.* at 43–46.

332. The appellants argued that Judge Polster’s certification of a RICO-only claim sub-class was inappropriate as it “ignore[d] non-common issues for a court-invented class—a large proportion of which has not even asserted RICO claims.” *Id.* at 2.

333. *Id.* at 40–43.

with conflicts of interest among the thousands of counties and their constituent cities and towns. All these entities, the appellants argued, had differing priorities that impinged upon the negotiation settlement effort.<sup>334</sup> Moreover, the class representatives were not required to prioritize the interests of the class in negotiating a settlement over and above their own litigation interests.<sup>335</sup> The appellants pointed out that conflicts of interests existed across multiple dimensions of the litigation; for example, the negotiation class fixed settlement allocations at the county level only but allocations within counties were left to future negotiation of resolution by the court.<sup>336</sup>

Lastly, the appellants contended that Judge Polster's certification of the negotiation class failed to meet due process standards in approving defective notice.<sup>337</sup> The chief vehicle for proving notice was the website, which was not mandated by a court order or included in the record. In addition, the website and court-authorized notice failed to provide the class members with critical information necessary to assist in making an informed decision to remain in the class, or to opt-out.<sup>338</sup> Moreover, the website's content changed over time.<sup>339</sup>

## 2. The Amici

The Chamber of Commerce of the United States filed an amicus in support of the appellants.<sup>340</sup> The Chamber indicated that as the organization representing approximately 300,000 business and organizations, it had a substantial interest in the litigation. The Chamber expressed its concern over class actions generally, which was "uniquely

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334. *See id.* at 22.

335. *Id.* at 47.

336. *Id.* at 48–49 (identifying other conflicts of interest).

337. *Id.* at 21, 52–55.

338. *Id.* at 15–16, 52–55. The appellants contended that the approved notice was defective in that the website provided "no fixed and binding allocation formula beyond the county level, and the individual allocations provided on the website for each plaintiff within a county (and the county itself and its constituent cities and towns) are only *estimated*, based on a *possible* formula that might be used for such allocations." *Id.* at 16 (emphasis in the original). In addition, the appellants argued that "[t]he information that was lacking included the actual mechanics of this novel class structure, what a particular class member could reasonably expect, and what its options would be. The notice was defective in providing this critical information." *Id.* at 55.

339. *Id.* at 16.

340. Brief of Amicus Curiae Chamber of Commerce of the United States as Amicus Curiae in Support of Supporting Defendants-Appellants, *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838 (6th Cir. Feb. 14, 2020) (No. 19-4097) ECF No. 52 [hereinafter Brief of Amicus Chamber of Commerce].

expensive and time-consuming forms of litigation.”<sup>341</sup> Broadly, the Chamber sounded the theme that courts repeatedly had counseled against judicial inventiveness and the Supreme Court had disavowed adventuresomeness in class action practice.<sup>342</sup> Echoing the appellants’ brief, the Chamber indicated that Rule 23 courts were to construe and apply Rule 23 strictly according to its terms. Rule 23 did not authorize creation of a negotiation class and it was “not the province of the judiciary to create new laws to solve societal problems—however dire and urgent.”<sup>343</sup>

The Chamber contended that certification of settlement classes constituted an adjudicatory function of courts that resulted in a final judgment. In contrast, a negotiation class was not adjudicatory in nature because it was not intended to facilitate adjudication of claims or entry of a final judgment. Congress contemplated that Rule 23 would be used at the end of the litigation process and not to “coerce parties to the bargaining table” or to “provide judicial oversight of negotiations.”<sup>344</sup>

As a policy matter, acceptance of the negotiation class would distort class action practice; the Chamber warned that if the Sixth Circuit approved the *Opiate* negotiation class, it would become a template for all future class actions and would encourage burdensome class actions that litigants might otherwise not pursue.<sup>345</sup> Moreover, the negotiation class unfairly disfavored litigants who opposed the class and favored plaintiffs.<sup>346</sup> And, as Judge Polster’s class certification illustrated, the negotiation class would become a vehicle to circumvent the stringent Rule 23 certification requirements.<sup>347</sup> The Chamber also noted the dubious provenance of the negotiation class proposal derived from an unpublished draft law review article written by an appointed special master and law professor expert.<sup>348</sup>

The Lawyers for Civil Justice also filed an amicus brief in support of the appellants.<sup>349</sup> As a coalition of defense trial lawyer organizations, law firms, and corporations, the LJC had a history of advocating law reform of Rule 23 and class action practice. In asking for reversal of Judge

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341. *Id.* at 1.

342. *Id.* at 1, 11.

343. *Id.* at 2–3, 123–24.

344. *Id.* at 7–8.

345. *Id.* at 13.

346. *Id.* at 13–14.

347. *Id.* at 15.

348. *Id.* at 9.

349. Brief of Lawyers for Civil Justice as Amicus Curiae in Support of Defendants-Appellants at 1, *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838 (6th Cir. 2020) (No. 19-4097) ECF No. 47 [hereinafter Brief of Lawyers for Civil Justice].

Polster's class certification order, the LJC contended that federal judicial power did not extend to authorize judicial efforts "to solve national social crises untethered to the exercise of jurisdiction over specific cases and controversies as governed by governing statutes, case law, and court rules."<sup>350</sup> Echoing the central arguments advanced by the appellants, the LJC asserted that Article III of the Constitution, Rule 23, and the multidistrict litigation statute did not empower courts to certify a negotiation class generally, or in the manner in which Judge Polster had accomplished.<sup>351</sup>

A coalition of state entities that opted out of the negotiation class filed their own amicus brief requesting that Judge Polster's class certification order be vacated.<sup>352</sup> In addition to the general argument that Judge Polster's order contravened Rule 23, the opt out entities maintained that defects in the class notice left the opt outs with no other choice but to exit the negotiation class. The contended that the insufficient notice failed to provide them with sufficient details concerning the recommended allocations and failed to provide adequate information concerning the supermajority voting mechanism.<sup>353</sup> In addition, they argued that the plaintiffs' unilateral extension of the opt out period rendered the class fluid, so that it was uncertain who was in the class, or not.<sup>354</sup>

A coalition of state AGs also filed an amicus brief seeking reversal of Judge Polster's negotiation class certification order.<sup>355</sup> The state AGs raised issues of particular concern to the states; namely, that if the negotiation class succeeded in coercing a settlement from the defendants, this would deplete funds available to the states and frustrate their ability to secure meaningful statewide and national opiate relief.<sup>356</sup> Broadly, the state AGs argued that Judge Polster's order seized state power and ignored and overrode states' internal governing structures.<sup>357</sup> The court

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350. *Id.* at 2.

351. *See generally id.* at 5–19 (canvassing constitutional, statutory, and rule bases for MDL and class litigation, and; arguing that none authorizes creation of a negotiation class).

352. Brief Amicus Curiae of Certain Opted-Out Entities as Amici Curiae in Support of the the Appellants and Requesting a Reversal of the Certification Decision Below, *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838 (6th Cir. 2020) (No. 19-4097), ECF No. 47.

353. *Id.* at 3–6. The opt-entities also objected to the report of special master Cathy Yanni, as conclusory in nature and not probative of the court's class certification burden. *Id.* at 8–9.

354. *Id.* at 6–7.

355. Brief for Amici States of Arizona et al. as Amici Curiae Supporting Appellants and Reversal, *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838 (6th Cir. 2020) (Nos. 19-4097/19-4099), 2020 WL 957048.

356. *Id.* at 12–15. Along with the appellants and other amici, the state AGS contended that the class did not satisfy the Rule 23(b)(3) requirements for predominance and superiority. *Id.* at 15–22.

357. *See id.* at 5–12.

had seized power from the states to dictate rights and responsibilities of political subdivisions.<sup>358</sup>

The appellees only responded to the state AGs' amicus brief. The appellees countered that the state sovereignty argument was not properly before the court because neither appellant had raised that issue. In any event, the appellees suggested that the state sovereignty argument was flawed and meritless.<sup>359</sup> Pursuant to Judge Polster's class certification order, the states remained free to resolve their own cases or to pursue relief to directly foreclose their local governments' cases if the states believed they were entitled to control them. Moreover, under various state constitutional and statutory home rule provisions, states were likely to be overstating their sovereign interests.<sup>360</sup>

### 3. The Plaintiffs-Appellees

On March 30, 2019, the co-lead counsel for the negotiation class responded with a brief contesting all the appellants' arguments and claims.<sup>361</sup> At the threshold, the appellees contested the Sixth Circuit's appellate jurisdiction arguing that Rule 23(f) did not contemplate appellate review of non-final certification orders,<sup>362</sup> that the appellants had waived any challenges to Judge Polster's certification order,<sup>363</sup> and that the appellants lacked standing to appeal.<sup>364</sup>

The appellees cited Sixth Circuit precedent for the proposition that the court had recognized that "the aims of Rule 23 are advanced by innovations that 'will achieve economies of time and expense.'"<sup>365</sup> The appellees also invoked the proposition that courts had long used Rule 23

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358. *Id.* at 7–12.

359. Brief of Plaintiffs-Appellees, *supra* note 319, at 77.

360. *Id.* at 78–79.

361. Brief of Plaintiffs-Appellees, *supra* note 319.

362. *Id.* at 2–3, 27–31 (noting 2018 amendment to Rule 23 prohibiting appeal that myriad procedures in class litigation leading to final settlement approval are not immediately appealable). *See* FED. R. CIV. P. 23(f), 2018 Advisory Comm. Note ("an appeal under this rule is not permitted until the district court decides whether to certify the class.")

363. *Id.* at 31–37 (contending that the appellants waived their right to challenge the certification order under Rule 23(c)(4)). The appellees further argued that because the appellants had waived their rights to challenge the (c)(4) certification, the Sixth Circuit need not consider the certification of the RICO claims. *See id.* at 35.

364. *Id.* at 37–39. The appellees renewed their argument that no one was being compelled to join the negotiation class and the appellants could not identify how they were being harmed. *Id.* at 1–2.

365. *Id.* at 4 (citing *In re Whirlpool Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013); *Martin v. Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 417 (6th Cir. 2018)) (broad view of Rule 23).

flexibly, and nothing in the Rule 23 text prohibited courts “from organizing a cohesive body as the first step towards possible creation of a settlement class.”<sup>366</sup>

Turning to their three central arguments, the appellees contended that the negotiation class comported with Rule 23,<sup>367</sup> reminding that courts had recognized the settlement class concept for over two decades before the concept was finally endorsed by the Supreme Court in the late 1990s and adopted into Rule 23 as late as 2018.<sup>368</sup> In addition, courts have substantial discretion in determining whether to certify a class and possess inherent powers over the management and supervision of cases on their dockets.<sup>369</sup>

The appellees further claimed that the class certification of a negotiation class did not present any Article III issues,<sup>370</sup> suggesting that the Article III claim was “bizarre.”<sup>371</sup> They indicated that the plaintiffs and defendants involved in the *Opiate* litigation were adverse, that the district court was not being asked to answer a hypothetical question, that the class representatives had standing, and that thousands of cases in the MDL had live claims.<sup>372</sup>

The appellees asserted that the negotiation class more than adequately safeguarded class members’ interests.<sup>373</sup> The structure of the negotiation class afforded class members to learn of settlement allocations in advance and the supermajority voting procedure assured approval of each subclass before submitting the final settlement for judicial approval.<sup>374</sup> In addition, the certification order preserved class members’ ability to continue to litigate and even go to trial until there was a final settlement approval.<sup>375</sup> Finally, the district court had not ruled out requiring a second opt out opportunity after the global settlement fund was determined.<sup>376</sup>

At the granular level, the appellees asserted that Judge Polster, in certifying the class, had performed the required rigorous analysis.<sup>377</sup>

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366. Brief of Plaintiffs-Appellees, *supra* note 319, at 25.

367. *Id.* at 39–45. The appellees suggested that the negotiation class fit within the appellants typology of Rule 23 as embracing both trial and settlement classes; the negotiation class came within the concept of the settlement class. *Id.* at 41.

368. *Id.* at 42.

369. *Id.* at 43.

370. *Id.* at 45–48.

371. *Id.* at 46.

372. *Id.* at 47.

373. *Id.* at 48–56.

374. *Id.* at 49–50.

375. *Id.* at 51.

376. *Id.* at 53.

377. *Id.* at 58–61.

Appellees deflected the “usual stew of conflicts, lack of proper notice, and assorted generic challenges” by contending that the class was composed of political subdivisions responsible for the health and safety of the American population.<sup>378</sup> The appellees argued that the Rule 23 predominance requirement was satisfied, dismissing the appellants’ counterarguments as generic and boilerplate. The appellees found the appellants’ objection based on fifty states’ varying laws had nothing to do with the case, because Judge Polster had certified a Rule 23(b)(3) federal RICO claim, and two federal CSA claims under the Rule 23(c)(4) limited issues provision.<sup>379</sup> The defendants had failed to contest the commonality finding with regard to the RICO claims, which “doomed” their arguments against predominance.<sup>380</sup>

The appellees further argued that Judge Polster had not abused his discretion in concluding that the Rule 23 adequacy requirements were satisfied.<sup>381</sup> They pointed out that mere hypothetical conflicts do not undermine a finding of adequacy.<sup>382</sup> In addition, there were no future claimants in the litigation to present the types of conflicts that the Supreme Court identified in its *Amchem* and *Ortiz* decisions.<sup>383</sup> Finally, the appellees contended that the class notice comported with due process, suggesting that the defendants alone were challenging the notice as insufficient.<sup>384</sup> On April 10, 2020, the appellants filed reply briefs to the appellees’ contentions.<sup>385</sup>

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378. *Id.* at 4–5.

379. *Id.* at 62–63.

380. *Id.* at 67.

381. *Id.* at 68–74.

382. *Id.* at 69–71.

383. *Id.* at 73.

384. *Id.* at 74–77.

385. Reply Brief for Appellants, *In re Nat’l Prescription Opiate Litig.*, Nos. 19-4097/19-4099 (6th Cir. Apr. 10, 2020) ECF No. 48 (Albany County NY; Negotiation Class’s Class Representatives; Co-Lead Negotiation Class Counsel; Co-Negotiation Class Counsel, Plaintiff-Appellees [19-4097 and 19-4099], City of North Royalton, Ohio; City of East Cleveland, Ohio; City of Mayfield Heights, Ohio; City of Lyndhurst, Ohio; City of Huron, Ohio; City of Wickliffe, Ohio, Plaintiffs-Appellants [19-4099] v. McKesson Corporation, Cardinal Health, Inc., Amerisource Bergen Drug Corporation, Prescription Supply, Inc., Discount Drug Mart, Inc., Walmart, Inc., Walgreen Company; Walgreen Eastern Co., Inc; CVS Pharmacy, Inc.; CVS Indiana, LLC; CVS RX Services, Inc.; Rite Aid of Maryland, Inc., dba Rite-Aid of Mid-Atlantic Customer Support Center, Defendant-Appellants [19-4097]). See also Reply Brief for Defendant-Appellants, in *In re Nat’l Prescription Opiate Litig.* (6th Cir. Feb. 2, 2020) (No. 19-4097), ECF No. 74 (Albany County, NY, Negotiation Class Representatives; Co-Lead Class Counsel; Co-Negotiation Class Counsel as Plaintiffs-Appellees v. McKesson Corporation, Cardinal Health, Inc., Amerisource Bergen Drug Corporation, Prescription Supply, Inc., Discount Drug Mart, Inc., Walmart, Inc., Walgreen Company; Walgreen Eastern Co., Inc; CVS Pharmacy, Inc.; CVS Indiana, LLC; CVS RX Services, Inc.; Rite Aid of Maryland, Inc., dba Rite-Aid of Mid-Atlantic Customer Support Center as defendant-Appellants) [hereinafter Brief of Appellants].

#### D. *The Sixth Circuit Repudiation of the Negotiation Class*

On September 24, 2020, the Sixth Circuit issued a divided decision, reversing Judge Polster's certification of the negotiation class. Circuit Judge Eric Lee Clay authored the majority opinion.<sup>386</sup> The court recited the abuse of discretion review standard but previewed a narrow textual approach that eschewed inventive uses of the class action rule.<sup>387</sup> At the outset the court noted that the Supreme Court had instructed that "district courts do not have the liberty to invent a procedure with 'no basis in the Rule's text,' even absent language expressly prohibiting it."<sup>388</sup>

The Sixth Circuit's majority opinion was notable not only for what it said but for the questions and challenges it evaded. Although the appellants and their amici had raised an array of issues on appeal, Judge Clay's majority opinion rested solely and narrowly on a textual analysis of Rule 23 and the limits the rule places on courts' abilities to fashion procedural relief for litigants. The court did not address the appellants' Article III challenges or the states' attorney generals' federalism arguments. The court did not discuss due process concerns. The opinion did not discuss the appellants' granular challenges to the Judge Polster's misapplication of the Rule 23(a) and (b)(3) certification requirements. The court did not discuss the challenges to adequacy, conflicts of interest, and alleged deficiencies in the negotiation class notice. Finally, Judge Clay's decision made only passing reference to the appellants' challenge to predominance and superiority findings, and even this analysis was based on the court's textual interpretation of Rule 23.<sup>389</sup>

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386. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020). The decision was split; Circuit Judge Eric Lee Clay was joined by Circuit Judge David McKeague in the majority. Circuit Judge Karen Nelson Moore dissented. As a threshold matter, the court rejected the contention that Judge Polster's order was not immediately appealable and held that it had proper appellate jurisdiction under Fed. R. Civ. P. 23(f) to review Judge Polster's order, as the negotiation class was a "final order" under the rule. *Id.* at 669–70. The court further dismissed the plaintiffs' challenges to the defendants standing, holding that the defendants "are plainly aggrieved by the negotiation class" because the defendants were pressured, or at least strongly incentivized, to negotiate with the class. *Id.* at 670.

387. *Id.* at 670.

388. *Id.* at 671 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("And, of overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce . . . The text of a rule thus proposed and reviewed limits judicial inventiveness.")).

389. *Id.* at 675–676.

### 1. The Rule 23 Textual Arguments

The centerpiece of the Sixth Circuit's opinion was a textual analysis of Rule 23. The court's analysis was anchored in the proposition that the Federal Rules of Civil Procedure are enacted pursuant to the Rules Enabling Act<sup>390</sup> and as such are binding on the federal courts. Therefore, the court's analysis necessarily was grounded in the text of Rule 23. The court invoked the canon of construction that when a rule's language is plain then courts are required to enforce it according to its terms.<sup>391</sup> The Sixth Circuit concluded that the negotiation class was not authorized by the language, structure, or framework of Rule 23.<sup>392</sup>

The court noted that Rule 23 makes several references to litigation classes and settlement classes but makes no mention of a negotiation class. However, the court rejected the plaintiffs' argument that even though Rule 23 does not mention the negotiation class that it does not foreclose a court from approving one. The court stated "what the plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court."<sup>393</sup>

The court rejected the notion that the history of the settlement class supported current recognition of a negotiation class. Instead, the court pointed out that even though the settlement class was not codified in Rule 23 until 2018, a fair reading of Rule 23(e) prior to 2018 supported the concept of the settlement class. But, according to the court, the same could not be said for a textual support for a negotiation class. There was no comparative textual support for this concept. Also, because not all parties were compelled to participate in a negotiation class, this distinguished it from a settlement class which presented courts with a final settlement binding all.<sup>394</sup>

The court concluded that the negotiation class violated Rule 23 (and was unlike settlement classes) because a court could not make determinations about satisfaction of the Rule 23(a) and (b) requirements when there was no proposal to consider at the time the negotiation class was presented to a court for approval.<sup>395</sup> Circuit Judge Clay noted that the negotiation class did not fit into the two recognized categories of litigation and settlement classes. The negotiation class, therefore, evaded the

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390. *Id.* at 671, 676; 28 U.S.C. § 2072(b). The court recited the received jurisprudence that federal procedural rules cannot abridge, enlarge, or modify substantive rights, and to the extent that the negotiation class did this, it violated the Rules Enabling Act. 28 U.S.C. § 2072(b).

391. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 671.

392. *Id.* at 676.

393. *Id.* at 672.

394. *Id.* at 673.

395. *Id.*

Rule 23 certification requirements, and especially frustrated the analysis required to fulfill the superiority requirement.<sup>396</sup>

Moreover, the court found no safe harbor for the negotiation class in the Rule 23 provisions for litigation classes, either. Judge Polster's order permitting the negotiation class also indicated that it would not interfere with or displace any ongoing litigation. The court pointed out that Rule 23 permits aggregation and adjudication of common claims for trial, to avoid inconsistent judgments in individual proceedings. But the negotiation class Judge Polster certified allowed independent cases to continue in parallel to the negotiation class, that would not bring common claims to trial.<sup>397</sup>

The Sixth Circuit determined that the problems with the negotiation class were compounded by the plaintiffs' efforts to establish a limited issue class, which Judge Polster endorsed in his certification of the RICO and CSA claims under Rule 23(c)(4). The Sixth Circuit concluded that Judge Polster bootstrapped his limited issue certification to satisfy the predominance requirement; the court noted that Judge Polster had "papered over" the predominance inquiry.<sup>398</sup> The Sixth Circuit disagreed with Judge Polster's predominance analysis, concluding that the court's order minimized the myriad state law claims that potentially divided the class members.<sup>399</sup> As a general matter, Rule 23's structure did not permit courts to accomplish an end-run around the Rule 23(b)(3) predominance requirement by certifying a few common federal issues.<sup>400</sup>

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396. *Id.* at 674. The court of appeals noted that, in considering the superiority of the negotiation class, Judge Polster determined that the manageability prong of that inquiry was inapplicable for the negotiation class, as the proposal was not for litigation or trial, but simply for settlement negotiations.

397. *Id.* at 674, 676. The court concluded that the certification order did not fully satisfy Rule 23(b)(3)'s fairness concerns because it did not respect the differences between litigation classes and settlement classes).

398. *Id.* at 675.

399. *Id.* at 675 ("The district court's order creates confusion surrounding the scope of negotiations—a putative class members cannot be sure whether, and how, the negotiation class representatives, empowered by the court, will address their state law claims during settlement negotiations."); *id.* The court further noted that even if Judge Polster was correct in his assessment of the commonality of the federal law claims, there would nonetheless remain the problem of numerous potential and actual state law claims.

400. *Id.* at 676.

## 2. Rulemaking Concerns

In the final analysis the Sixth Circuit opined that it could not understand why the usual options of a litigation or settlement class were not feasible in the *Opiate* MDL. The court concluded that however innovative, creative, and effective the addition of a negotiation class might be to the resolution of mass tort cases, the District Judge was not at liberty to grant relief amounting to an effective amendment of a Federal Rule of Civil Procedure outside the normal rulemaking process prescribed by Congress. This multi-layered rulemaking process involved proposed rule amendments that were vetted by the Advisory Committee on Civil Rules, recommended to the Judicial Conference, and approved by the Supreme Court for promulgation. Moreover, Congress always has the ability prevent a rule amendment through statutory enactment.<sup>401</sup>

The Sixth Circuit noted that:

this multi-layered review process ensures that alterations to the Rules can only be made after thorough deliberations by multiple expert bodies, which can assess the virtues and drawbacks of a proposed change as well as evaluate the possible implications of the proposed rule across the entire judicial system, rather than by individual judges facing the pressure of litigation.<sup>402</sup>

The circuit court concluded that perhaps the Rules Advisory Committee and the Judicial Conference would, in the future, take under consideration revising Rule 23 to include a negotiation class, but until that time, the negotiation class “was beyond the Rule’s scope.”<sup>403</sup>

## 3. The Dissent

Circuit Judge Karen Nelson Moore dissented in an opinion almost twice the length of the majority opinion.<sup>404</sup> She resoundingly endorsed

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401. *Id.* at 676–77.

402. *Id.* at 676.

403. *Id.* at 677.

404. *Id.* at 677–708 (Moore, J., dissenting). Judge Moore disagreed with the majority’s adherence to the panel finding that the appellants had standing, asserting that the court’s conferring standing on the appellant’s exceeded logic. *See id.* at 705–706. Nonetheless she noted that the court was obliged to adhere to the panel’s determination. She also disagreed with the arguments presented by the State attorneys general, concluding that they “need not fear the cities and counties encroaching on state sovereignty in this case.” *Id.* at 707–08.

the judicial power to change and invent when confronted with massive, byzantine multidistrict litigation; her opinion is a paean to judicial resourcefulness.<sup>405</sup> More expansive than the majority's opinion, Judge Moore grounded her dissent in five concepts: (1) the Rules' equitable heritage; (2) Rule 23's textual requirements; (3) settlement class history; (4) satisfaction of the Rule 23(a) and (b)(3) requirements; and (5) the lack of constitutional or policy impediments to the negotiation class.<sup>406</sup>

In setting forth her views, Judge Moore reiterated the same arguments that litigants and courts had advanced over the past fifty years in support of expansive approaches to dealing with complex aggregate litigation. In the struggle between aggregationists and judicial conservatives, Judge Moore aligned herself with robust judicial power and innovative managerial judging. She maintained that if a district court meticulously adhered to Rule 23(a) prerequisites and Rule 23(b) demands in certifying litigation, settlement, or negotiation classes, then "what's in a name?"<sup>407</sup>

Judge Moore urged that the equitable heritage of the Federal Rules endowed the rules with flexibility that invited courts to apply the rules with "local imagination."<sup>408</sup> According to Circuit Judge Moore, courts should not apply canons of statutory construction to ensnare the interpretation and application of the FRCP. Rather, Circuit Judge Moore said that "courts should contemplate a liberal reading that fulfills the Rules' broader design and that does justice for the parties."<sup>409</sup> The dissent cites examples where courts have expansively interpreted the theories underlying rule 23 to promote efficient litigation and to react to modern litigation trends.<sup>410</sup>

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405. *Id.* at 677

("The Federal Rules of Civil Procedure were not written and have never been interpreted to manacle district courts that innovate within the Rule's textual borders. The district court has breathed life into a novel concept – a class certified for negotiation purposes—to aid in its Promethean duty to secure the just, speedy, and inexpensive resolution of this byzantine multidistrict litigation. We should be in the business of encouraging, not exterminating, such resourcefulness.")

See FED. R. CIV. P. 1, stating that the Rules were to be interpreted and applied to secure the just, speedy, and inexpensive resolution of civil litigation.

406. *See id.* at 677–708.

407. *Id.* at 708 (citing WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, Act 2, sc. 2).

408. *Id.* at 677 (quoting Jack B. Weinstein. *After Fifty Years of The Federal Rules of Civil Procedure: Are Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1911 (1989). Federal District Judge Weinstein is one of the federal judiciary's most notable aggregationists).

409. *Id.* at 678.

410. *Id.* at 679–80 (citing cases where courts liberally interpreted federal rules where there was no textual support for the rule's application).

Turning the Rule 23 textual arguments, Judge Moore contended — in opposition to the majority’s opinion and that of appellants — that the text of Rule 23 did not prohibit certification of a negotiation class. The majority was mistaken, she wrote, because class litigation was not cabined by the two rigid categories of litigation and settlement classes. She could not find any textual reference to “litigation class” or “settlement class” in the rules. Rather, as a matter of logic, negotiation was part and parcel of any settlement and therefore the settlement class concept legitimately embraced the negotiation class concept.<sup>411</sup>

The *Opiate* litigants presented competing historical interpretations of the settlement class concept. Judge Moore agreed with the plaintiffs-appellees’ narration, describing how the history of Rule 23 illustrated a trend towards judicial innovation in the face of emerging aggregate litigation problems, beginning with civil rights actions in the 1960s. Therefore, the history of the development and embrace of the settlement class further supported endorsement of the negotiation class. In the face of developing mass tort litigation, the settlement class could be traced back to the 1970s, even though Rule 23 had no provision for settlement classes. By the end of the 1990s, every federal appellate court and the Supreme Court declined to hold that settlement classes violated Rule 23. Echoing the appellee-plaintiffs’ version of history, Judge Moore agreed that over time the settlement class had become a stock device.<sup>412</sup>

Judge Moore devoted the most expansive portion of her dissent to countering arguments that Judge Polster had improperly applied the Rule 23 class certification requirements in certifying the negotiation class.<sup>413</sup> Point by point, Judge Moore concluded that the RICO and CSA claims were common to the class members and satisfied the Rule 23(b)(3) predominance requirement.<sup>414</sup> Engaging with the controversy over using the limited issue class to evade the predominance requirement, Judge Moore aligned with scholars and jurists who have conclud-

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411. *Id.* at 681. Judge Moore concluded that such a reading of Rule 23 was permissible, and encouraged, contemplation of the Rule’s plain text. *See id.* at 685–86. Moore also rejected strained textual arguments based on the pre-2003 version of Rule 23(e)’s provision for class action compromise. *See id.* at 685–86.

412. *Id.* at 684–86 (contending that the district court’s development of the negotiation class in the *Opiate* litigation “has as much of a basis in current Rule 23 as the creation of settlement classes had in past versions of Rule 23.”) (citing *In re General Motors Corp. Pick-Up Truck Tank Prods. Liab. Litig.*, 55 F.3d 768, 792–94 (1995)). Judge Moore contended that the district court’s development of the negotiation class in the *Opiate* litigation “has as much of a basis in current Rule 23 as the creation of settlement classes had in past versions of Rule 23.” *Id.* at 686.

413. *Id.* at 686–98.

414. *Id.* at 687–89.

ed that certification of limited issues under Rule 23(c)(4) is thoroughly legitimate.<sup>415</sup>

Similarly, Judge Moore determined that the *Opiate* negotiation class satisfied the superiority requirement because – taking a page from the Supreme Court’s *Amchem* settlement class – a court need not inquire whether the case, if tried, would present intractable management problems. Judge Moore opined that the majority had read too much into the district court’s decision to allow individual cases to proceed in tandem with the negotiation class.<sup>416</sup> Moreover, claimants had the ability to opt-out of the negotiation class.<sup>417</sup>

Circuit Judge Moore agreed with District Judge Polster’s conclusions concerning adequacy of representation. She suggested that “no nefarious financial conflicts have erupted in the case yet,” and that “hypothetical” or “speculative” conflicts did not undermine a finding of adequacy.<sup>418</sup> Nor did Judge Moore take issue with the way in which the plaintiffs had proposed six subclasses, contending that the defendant-appellants had not offered an alternative way that the plaintiffs should have sub-divided the class.<sup>419</sup> Extensively canvassing the subclass arguments, she determined that the appellants had failed “to conjure up a cogent theory of how even one specific conflict of interest mandates subclasses . . . .”<sup>420</sup>

Turning to policy and constitutional grievances, Judge Moore rejected the appellants’ contention that the timeline for opting out of the negotiation class divested them of negotiation leverage as well as an escape route from an unfavorable settlement.<sup>421</sup> She suggested that the appellants had advanced an overly simplistic view of how class action operate that failed to take into account myriad protections in Rule 23 that granted “material clout” to all class members.<sup>422</sup> Moreover, Judge Moore noted that class members were protected by Judge Polster’s reservation of the right to order a second opt out post-negotiation creation of a settlement offer.<sup>423</sup>

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415. *Id.* at 689.

416. *Id.* at 691.

417. *Id.* at 691–92.

418. *Id.* at 692–93.

419. *Id.* at 693–98.

420. *Id.* at 696. Judge Moore also the assertion that the negotiation class could create a conflict of interest because of the presence of future interests in its membership. *Id.* at 696–97.

421. *Id.* at 698–704.

422. *Id.* at 699.

423. *Id.* at 702.

## IV. THE FUTURE OF THE NEGOTIATION CLASS

A. *A Scholarly Post-Mortem of Judge Polster's Negotiation Class*

The reaction to the Sixth Circuit repudiation of the negotiation class was relatively muted.<sup>424</sup> After the Sixth Circuit decision and the final publication of the McGovern-Rubenstein article articulating the negotiation class, Professor Alan B. Morrison offered a balanced review of the negotiation class and its fate in the *Opiate* litigation.<sup>425</sup> Morrison's analysis focused chiefly on the advisability of the negotiation class rather than its legality.<sup>426</sup> While recognizing various problems with the implementation of the negotiation class in the *Opiate* MDL, Morrison nonetheless concluded that it was a preferred, workable model because it solved two problems in aggregate dispute resolution. He also noted that while the appellants raised an array of objections, the Sixth Circuit's majority opinion did not address most of them.<sup>427</sup>

Morrison first noted that in a negotiation class plaintiffs can agree to an allocation formula early in the litigation and before negotiation. Thus, solving the problem that arises where claimants are left voiceless (and powerless) in conventional settlement classes where class counsel determine award allocations after the court approves the settlement. To illustrate this point, Morrison compared the allocation process in the *NFL Concussion* litigation<sup>428</sup>—where Morrison argued the allocation process resulted in arbitrary distribution of settlement proceeds and an overall unfair settlement—with the pre-negotiation allocation process in the *Opiate* litigation.<sup>429</sup> In the *NFL Concussion* litigation, a small group of class counsel resolved intraclass conflicts of interest by making post-settlement allocation decisions themselves.<sup>430</sup> Morrison argued that had

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424. See e.g., Gluck & Burch, *supra* note 103 (making scattered references to the Sixth Circuit decision and focusing instead on Judge Polster's certification decision).

425. Alan B. Morrison, *A Negotiation Class: A New, Workable, and (Probably) Lawful Idea*, 99 TEX. L. REV. ONLINE 49 (2020).

426. *Id.* at 59–60 (agreeing with Judge Moore's analysis and conclusion concerning the legality of Rule 23 under a textual construction of the rule). See Judge Moore's analysis of Rule 23, *supra* notes 406–409 and accompanying text.

427. Morrison, *supra* note 425, at 63.

428. *In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 591 (2016).

429. Morrison, *supra* note 425, at 51, 53–59.

430. *Id.* at 58. Morrison noted that Chris Seeger was the lead counsel in the *NFL Concussion* litigation and was lead counsel in the *Opiate* litigation. Prof. Sam Issacharoff was lead appellate counsel in the *NFL* appeal. Both served as the plaintiffs-appellees' attorneys in the *Opiate* appeal.

the *NFL Concussion* litigation been a negotiation class, the former players' representatives would have had a meaningful part in the allocation process before negotiations with the defendant.<sup>431</sup>

Second, by requiring an opt-out early in the proceedings and before negotiations begin, the negotiation class affords defendants with the knowledge of who is in and out of the class, enhancing the defendant's goal of reaching a global settlement.<sup>432</sup> Defendants are more willing to bargain if the defendant knows the precise size and composition of the class.<sup>433</sup> Morrison endorsed the Sixth Circuit's conclusion that the defendants had standing to pursue an appeal of the class certification order because they had an interest in assuring that they would be required to pay a settlement only if the court properly certified the class.<sup>434</sup>

Morrison praised the negotiation class voting proposal coupled with district court settlement approval. Judicial approval of settlements already occurs in conventional settlement classes pursuant to Rule 23(e), so this part of the negotiation class model added nothing new to class action jurisprudence. The addition of a voting procedure would give voice to claimants and be advisory to courts, which might be influenced by a favorable vote, or not. Morrison asserted that there is no reason to believe that an affirmative vote by class members alone would result in ill-advised settlement approvals for negotiation classes.<sup>435</sup> A class vote, Morrison contended, had no independent legal significance under Rule 23 or as a matter of due process and did not affect the settlement process. A court could still disapprove a settlement even if 100% of the class supported it.<sup>436</sup>

Morrison identified some problems with the implementation of the *Opiate* negotiation class that he believed could have been remedied if the Sixth Circuit had ordered a remand, rather than reversing the class certification. Addressing the problem that the Six Cities appellants raised regarding the postponement of how allocated monies would be distributed to cities, Morrison suggested that this issue "might have been easier to resolve" before class certification "and to do so more fairly, sooner rather than later."<sup>437</sup> He also endorsed the assertion that if an appellate court upheld certification of a negotiation class, then the court should

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Morrison noted that between the two cases, they had changed their views on the desirability and possibility of broad negotiating terms.

431. *Id.*

432. *Id.* at 49–50.

433. *Id.* at 59.

434. *Id.*

435. *Id.* at 61.

436. *Id.* at 63.

437. *Id.* at 68.

exercise its authority under Rule 23(e)(4) and allow those who appealed a second chance to opt out, and any class member who opted out to opt back in.<sup>438</sup>

Morrison noted that the McGovern-Rubenstein proposal failed to indicate how class counsel and the representatives should proceed to achieve consensus on the allocation and voting procedures. Here Morrison generally recommended “significant outreach,” including state attorneys general at an early juncture in proceedings.<sup>439</sup> He faulted the class notice in this regard and suggested that its FAQs were less than complete.<sup>440</sup>

Morrison also noted that whether the *Opiate* class satisfied the Rule 23(b)(3) predominance requirement was a close one, depending on alternative interpretations of the *Amchem* decision. He stated that the Sixth Circuit did not resolve this issue because it globally found that Rule 23 authorized negotiation classes. But Morrison observed that the *Opiate* majority opinion left the issue of predominance open, suggesting that this recurring predominance problem can only be solved by a Rule 23 amendment or by Supreme Court revisitation of this issue.<sup>441</sup>

### B. *Bankruptcy Law as a Problematic Analog*

In the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, the McGovern-Rubenstein article, and Morrison’s assessment of the negotiation class, the proponents all cited to bankruptcy law as providing an analog for the proposed voting procedures.<sup>442</sup> Although the negotiation class that Judge Polster certified called for a 75% supermajority vote of

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438. *Id.* at 69.

439. *Id.* at 69–70.

440. *Id.* at 70

(“If class counsel (and defendants) in future negotiation class cases wish to be sure that there are no legitimate reasons for the court to allow a second opt-out once the deal has been struck, it is vital that the notice to the class, which is the basis on which class members decide whether to remain in the class or not, contains both the allocation formula and the voting methods in as much detail as reasonably possible. And to the extent that such descriptions appear to be vague, that may suggest that there is more work to be done before the notice and opt-out period can take place.”).

And to the extent that such descriptions appear to be vague, that may suggest that there is more work to be done before the notice and opt-out period can take place.

441. *Id.* at 64–66.

442. See PRINCIPLES, *supra* note 5, § 3.17 cmt. 2; McGovern & Rubenstein, *supra* note 128, at 113–14; Morrison, *supra* note 425, at 61–63.

class claimants, the efficacy of the *Opiate* voting experiment was never tested because the litigation did not advance to a post-negotiation settlement after the Sixth Circuit reversed class certification.<sup>443</sup> Thus, it is impossible to assess the fairness or value of the voting procedures in the *Opiate* MDL in terms of its implementation. Consequently, we are left to reflect on the efficacy of the voting proposal's design

Apart from cursory citations to the Bankruptcy Code, none of the voting procedure advocates discussed how effective voting procedures had been in mass tort bankruptcy proceedings.<sup>444</sup> When first proposed by the ALI Reporters, the voting proposal elicited some skepticism concerning the usefulness of bankruptcy law as an analog for the voting procedures set forth in § 3.17.<sup>445</sup> Moreover, the judicial system has had experience with resolving mass tort claims through bankruptcy proceedings, but not without some controversy concerning the feasibility of the bankruptcy procedures as an alternative means for resolving mass tort liabilities.<sup>446</sup>

A scholarly analysis of the use of bankruptcy laws to resolve asbestos mass tort litigation identified problems that emerged in the resolution of bankruptcy cases, most notably related to voting procedures.<sup>447</sup> Canvassing four case studies of asbestos bankruptcies, one scholar

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443. The Sixth Circuit denied a motion by lead attorney Chris Seeger for a rehearing en banc, effectively ending the *Opiate* negotiation class experiment. In re Nat'l Prescription Opiate Litig., 976 F.3d 664 (6th Cir. Sept. 24, 2020), rehearing en banc denied (Dec. 29, 2020); see Brendan Pierson, *In Brief: 6th Circuit Won't Reconsider Novel Opioid Negotiating Class En Banc*, WESTLAW NEWS (Dec. 29, 2020), <https://www.reuters.com/article/products-opioids/in-brief-6th-circuit-wont-reconsider-novel-opioid-negotiating-class-en-banc-idUSL1N2J918U> [<https://perma.cc/WYA4-NKG7>]; Seeger Weiss Urges a Full-Court Review of Proposed Negotiation Class in Opioid Litigation, SEEGER WEISS LLP (Oct. 9, 2020), <https://www.seegerweiss.com/news/seeger-weiss-urges-a-full-court-review-of-proposed-negotiation-class-in-opioid-litigation/> [<https://perma.cc/TEW2-UK96>].

444. See *supra* note 440 and accompanying text; Rave, *supra* note 133, at 1223–26 (describing bankruptcy voting procedures and their use in asbestos mass tort litigation); see generally Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012) (generally favoring bankruptcy for resolving mass tort litigation); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV., 2045 (2000) (lengthy analysis of the efficacy of bankruptcy proceedings for resolving mass tort litigation with several recommendations for reform of the Bankruptcy Code to address unique issues raised by mass tort claims).

445. See Ronald Barliant, Dimitri G. Karcazes & Anne M. Sherry, *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 453–54 (2004) (noting that “[a] plan may not group together differently situated creditors in the same class for voting purposes” and that “a plan . . . may not be confirmed over the rejection of an impaired class of creditors if it discriminates unfairly against that class.”); McKenzie, *supra* note 444, at 1014–15.

446. See S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 843–44 (2008); Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1399, 1399–1400 (2019); Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 101–102 (2004).

447. Brown, *supra* note 446, at 855–60.

identified problems of attorney dominance and self-dealing, concealment of critical information from claimants, authority to file and vote on behalf of asbestos victims, claims filing and support, and the exclusion of dissenting voices.<sup>448</sup> These problems in asbestos bankruptcies have relevance for the voting procedures in the negotiation class model. Indeed, some of these problems emerged prior to Judge Polster's certification of the negotiation class. A relatively small group of plaintiffs' attorneys dominated the pre-certification efforts, their self-interest resulted in aggressive advocacy for certification of the negotiation class as against any dissenting views, some class members complained of insufficient or incomprehensible information concerning the allocation methods in the class action notice, and others complained of the exclusion of their dissenting voices.

Apart from implementation problems in the voting procedure mechanism, none of its advocates addressed the more fundamental issue concerning judicial authority to approve such a device through a Rule 23 certification of a negotiation class. Discussing reliance on bankruptcy law to support the validity of voting procedures in a negotiation class, Morrison agreed that bankruptcy proceedings might reasonably be analogized to class action proceedings. However, he noted that the Bankruptcy Code contains express, detailed provisions concerning voting procedures in Chapter 11 bankruptcy proceedings,<sup>449</sup> and that Congress enacted the detailed provisions setting forth the bankruptcy voting procedures, "not by the plaintiffs in a particular negotiation class."<sup>450</sup> Thus, if voting procedures are to become a part of the settlement approval process and included in an amended Rule 23, this should be accomplished by the rulemaking process, legislation, or the Supreme Court.<sup>451</sup>

### *C. The Uncertain Future of the Negotiation Class: Appraising the Difference Between Implementation Problems Versus Design Problems*

Morrison's post-mortem of the Sixth Circuit's decision presents an optimistic view of the negotiation class that focuses on the beneficial and positive virtues of the model. Rather than a problem of flawed design,

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448. *Id.* at 860–83.

449. Morrison, *supra* note 425, at 62. Morrison notes that the Bankruptcy Code has express voting percentages required, mandatory voting, and precise procedural requirements that chapter 11 plan confirmation must adhere to.

450. *Id.*

451. *Id.* ("Under that approach, Rule 23 would have to set forth the circumstances in which a vote was required, as well as any supermajority requirements and whether any subgroups must separately approve the settlement.").

Morrison identified very few implementation problems. Moreover, he impliedly suggested that implementation problems may be cured in future attempts at assembling negotiation classes. While Morrison eschewed extensive discussion of the legal basis for the negotiation class, it is clear he agreed with Judge Moore and the plaintiffs-appellees who advanced a flexible interpretation of Rule 23 to embrace the negotiation class. If the *Opiate* negotiation class failed because of poor implementation, then there remains hope that the model is not dead.<sup>452</sup>

It may well be that the failure of the *Opiate* negotiation class was largely a function of flawed implementation. In their enthusiasm for introducing a novel approach to solving the problem of mass tort litigation generally, its advocates may have engaged in intellectual hubris and overreach. In the final analysis, the *Opiate* MDL most likely was a very poor vehicle to road test the negotiation class.<sup>453</sup> It was too sprawling in scope, it embraced too many divergent claims and competing interests, it was ensnared by complex federalism issues, it looked the other way at problematic applicable law concerns, and it got bogged down in demographic and geographic minutiae that resulted in an overly complex and incomprehensible allocation system. As Circuit Judge Clay pointed out, the negotiation class advocates somewhat cavalierly papered over several class certification requirements and issues. However, if a group of highly sophisticated attorneys, an unusually large number of special masters, a court appointed professorial expert, and a seasoned complex litigation judge could not marshal an acceptable negotiation class, what does this bode for future attempts at advancing another negotiation class?

Nonetheless, future attorneys may avoid implementation problems and the *Opiate* experience will inform their efforts. A more serious and open question concerns the legality or legitimacy of the negotiation class model itself. The Sixth Circuit's majority decision focused less on implementation problems but centered instead on the legitimacy issue, concluding that a narrow textual reading of Rule 23 did not authorize a negotiation class. Therefore, Judge Polster exceeded his authority in approving it. But the Sixth Circuit's majority opinion may not be the last word on the fate of the negotiation class. It is well to remember that if one additional aggregationist judge had sat on the panel, the negotia-

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452. *Id.* at 71 ("Fortunately, the implementation problems that surfaced do not go to the heart of the negotiation class concept, and most can be readily cured without undermining the benefits of the basic concept. That in itself is quite a triumph.")

453. *Id.* ("It is no surprise that there were bumps in the road, given the size and complexity of the class and the legal and factual issues in the MDL proceedings. In some ways it was surprising that there were not more.")

tion class might very well have been upheld with Judge Moore's dissenting opinion providing the majority view.<sup>454</sup>

The future of the negotiation class may unfold in at least three ways. First, plaintiffs' attorneys may heed the Sixth Circuit's repudiation of the negotiation class and abandon efforts to create a new negotiation class in some other mass tort MDL. However, if the history of mass tort litigation spanning five decades teaches anything, it is that plaintiffs' attorneys do not give up easily on novel ideas and will regroup and return with previously repudiated concepts. Second, a different district judge might approve a negotiation class and combined with an aggregationist-minded appellate court, uphold the model essentially adopting Judge Moore's dissenting views. As the plaintiffs-appellee-plaintiffs, Judge Moore, and Morrison agreed, the history of the judicial embrace of the settlement class provides this precedent.

Third, the Advisory Committee on Civil Rules might decide to put a negotiation class proposal on its agenda for Rule 23 amendment.<sup>455</sup> Or, the negotiation class advocates could pursue Congressional approval via legislation. In either instance it is difficult to forecast the fate of the negotiation class because both these processes are fraught with competing interests that inform the rulemaking and legislative processes. And the rulemaking and legislative processes are notoriously glacial. Notwithstanding all these obstacles, good betting money would wager that we have not yet seen the last of the negotiation class.

#### *D. The Ongoing Aggregation Debate and the Limits of Judicial Process: A Reprise*

A final but important note on appreciating the negotiation class in historical context. The failure of the negotiation class is but the latest chapter in a fifty-year struggle in federal and state courts to come to grips with how best to resolve mass tort and other complex litigation. This struggle embodies a very fundamental philosophical disagreement about the role of courts and judges, pitting concepts of litigant autonomy against notions aggregate justice. It is a struggle that questions the role of the judiciary in crisis situations where existing rules and proce-

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454. *Id.* ("Judge Moore's dissent is not simply a rejection of the majority's understanding of Rule 23, but more significantly, is an endorsement of the concept of a negotiation class and of the real-world benefits that it brings to the resolution of complex cases like opioids, with which I concur.").

455. *Id.* ("Nothing in the majority's opinion would prevent the Supreme Court, working through its rulemaking process, from amending Rule 23 to make the idea a reality.").

dures fail to provide fair and expeditious relief, and the Supreme Court and Congress do nothing to provide effective means for remedial justice.

The history of fifty years of mass tort litigation illustrates an almost decade-by-decade shift in federal judicial thinking about solutions to the problem of mass tort litigation. Beginning with the emergence of the seminal mass tort cases in the 1970s, most federal courts for the ensuing decade declined to certify mass tort class action based on restrictive textual reading of Rule 23, reliance on the 1966 Advisory Committee Note indicating that the Rule 23(b)(3) action was not suitable for mass accident cases, and policy reasons concluding that class procedures were not superior to other means for resolving tort actions.<sup>456</sup> In this decade, the courts sided with notions of litigant control and autonomy over their individual claims.

But by the mid-1980s, considering the burgeoning mass tort crisis on federal court dockets, federal courts adopted a crisis mentality, reversed course, and embraced innovative use of the class action to resolve mass tort litigation. The courts welcomed aggregative techniques and, between 1986 and 1996, aggregationist attorneys, judges, and scholars grew more vocal. In this decade courts endorsed liberal textual interpretations of Rule 23 with frequent reference to the equity basis of the federal rules; courts experimented with novel uses of class action procedure.<sup>457</sup> No statement typified the prevailing attitude of this decade more than the Fifth Circuit's pronouncement in 1986 that "[n]ecessity moves us to change and invent."<sup>458</sup> For a decade the federal judiciary shifted away from a preference for litigant autonomy towards embracing the benefits of aggregate litigation.

After a decade of judicial experimentation with innovative mass tort procedures and the creation of the settlement class, from 1995–1996 judicial reaction signaled a retreat from the aggregationist expansions of Rule 23 in the prior decade.<sup>459</sup> The same Fifth Circuit that had championed the notion that necessity moved the courts to change and invent, now rejected the notion that a move away from the one-on-one traditional model of litigation was little more than a move to modernity. On the contrary, the court noted that such traditional ways of proceeding reflected "far more than habit. They reflected the very culture of the jury trial and the case and controversy requirement of Article III."<sup>460</sup> The

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456. See MULLENIX, *supra* note 10, at 102–23.

457. *Id.* at 123–45.

458. *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 473 (5th Cir. 1986).

459. MULLENIX, *supra* note 10, at 145–65.

460. *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir. 1990).

Fifth and Seventh Circuits led the way in repudiating nationwide mass tort class certifications, Rule 23(c)(4) limited issue class workarounds, and the notion that class actions were a superior means to resolve these large-scale litigations.<sup>461</sup> The anti-aggregationists had prevailed again.

The debate over the settlement class spanned the entire decade of the 1990s and this debate offered competing interpretations of Rule 23 that continued for decades. The *Opiate* negotiation class revived the very same debate that litigants exhaustively argued in the 1990s. The Supreme Court endorsed the settlement class at the end of the decade in its *Amchem* and *Ortiz* decisions, but the Court also set forth limiting principles in accomplishing mass tort class litigation.<sup>462</sup> Although the aggregationists gained ground with the Court's recognition of the settlement class, this victory was cabined by the accompanying restrictive due process requirements. Perhaps more important, the Court in *Amchem* and *Ortiz* decision counselled against further adventurous uses of the Rule 23.

With the return of class litigation to the federal courts in the 2005 post-CAFA era, dedicated aggregationists turned their efforts to seeking reform of restrictive class action jurisprudence that had emerged in the 1990s. The advent of the twenty-first century marked a shift of large-scale litigation to MDL forums, and the emergence of non-class aggregate settlements — yet another novel development on the mass tort landscape. Between 2004 and 2010, aggregationists seized the opportunity through the auspices of the American Law Institute to rewrite and undo almost all the restrictive class action principles federal courts articulated in the 1990s. At the same time, the ALI Reporters and Advisers sought to liberalize MDL non-class aggregate settlements with novel rules. The resulting PRINCIPLES OF THE LAW OF AGGREGATION was a monument to the aggregationist movement that was nascent in the early 1980s. It was followed, in 2017, by the McGovern-Rubenstein negotiation class proposal, building off the ALI *Principles*.

Viewed in historical context, then, the litigation over the *Opiate* negotiation class was a part of the continuing jurisprudential debate between aggregationists on the one hand, and litigation traditionalists on the other. Hardly any of the arguments advanced in the *Opiate* litigation were new: all had been presaged in earlier decades in the same fights over innovative expansion of the class action and non-class action devices. Even the judicial decisions parsing the text of Rule 23 and the policies implicat-

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461. See generally *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (1996); *In re the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

462. MULLENIX, *supra* note 10, at 221–65.

ed in the problem of mass tort litigation were not fresh. In the end, Judge Polster and Judge Moore aligned with the aggregationists' well-developed views of the world, while the Sixth Circuit majority in its *Opiate* opinion reverted to traditional views of litigant autonomy coupled with limited judicial power. In this round of the mass tort litigation struggle, the Court's injunction to federal judges to cease adventurous use of Rule 23 prevailed. But if five decades of mass tort litigation teaches anything, it is that the short unhappy life of the negotiation class is probably not definitive.

#### CONCLUSION

History will best assess whether the negotiation class was fatally flawed in design or implementation, or both. Certainly, the rapid rise and demise of the negotiation class in two short years was congruent with the Court's admonition to federal judges, at the end of the twentieth century, to cease adventurous use of the class action rule. Hence, two decades after these warnings in *Amchem* and *Ortiz*, the Sixth Circuit disavowed the introduction of yet another novel adaptation of the class action rule. What is interesting about the negotiation class proposal was the great effort its authors expended on contextualizing the model within the contours of existing class action jurisprudence, emphasizing the due process protections afforded by their proposal. Indeed, the proponents went to great lengths to explain that the negotiation class was not a departure from class action jurisprudence, but rather adhered more closely to the requirements of Rule 23 and constitutional due process requirements, than settlement classes. The Sixth Circuit ultimately disagreed.

Apart from the technical failure of the negotiation class in the *Opiate* MDL, the introduction of the proposal and Judge Polster's willing embrace of it raise other legitimacy questions. Does our legal system contemplate the unparalleled influence and power of two law professors and a special master with unfettered access to a judicial officer supervising a litigation, to effectively rewrite existing law and then lobby for its implementation by the parties and the judge? What does democratic process mean in class or other aggregate litigation? What place do democratic principles have in judicial proceedings, at any rate? Do concepts of civil justice entail and embrace principles of democratic governance?

The negotiation class proponents sought to invest their negotiation class concept with an aura of democratic theory and decisionmaking.

Class members were to have a place at the negotiation table and enhanced voice in the resolution of their cases. Class members were to be enfranchised. Class members were to benefit from agreeing in advance to a process and not necessarily a result. Despite all these representations, the promised democratization of the settlement process did not materialize in the *Opiate* MDL. In reality, the promises of the negotiation class remained a gloss on what in practice very much resembled the old way of settling class litigation.

Moreover, with the onset of the opiate crisis, actors enmeshed in the burgeoning litigation may have become convinced that this litigation landscape was too big to fail. In other words, that the litigation was so large and interconnected that the failure to find a global, expeditious resolution would have catastrophic consequences for public health. Counsel for the negotiation class had argued to the Sixth Circuit that the negotiation class was triggered by the unprecedented gravity of the opiate crisis. Thus, invested with a crisis mentality and a no small measure of hubris, a cohort of aggregationist attorneys, academicians, and a sympathetic MDL judge determined to save the entire judicial and national public health systems through imposing a novel class action solution. But in so doing, the negotiation class proponents failed to accept that if the litigation landscape was too large and complex, perhaps it deserved to fail and be broken up.

As Professors McGovern, Rubenstein, and others correctly pointed out, courts rejected the settlement class concept for several years until judges finally embraced it and settlement classes eventually became a stock device in the class action toolbox. Whether the negotiation class gains judicial traction in the future and becomes another stock device remains to be seen. Moreover, it remains to be seen whether the Sixth Circuit's repudiation of the negotiation class has implications for utilization of the ALI § 3.17 proposal for the resolution of non-class aggregate settlements. Class counsel for the negotiation class sought to quell policy concerns by arguing that although the negotiation class was a crucial innovation to provide an optional mechanism for resolving the national opiate crisis, it was unlikely to be considered in the vast majority of class actions. But that was true for the then-novel settlement class. Moreover, if the *Opiate* negotiation class failed to pass judicial scrutiny under the stringent Rule 23 requirements, it is perhaps questionable whether the novel consent and voting procedures might prove more problematic for federal judges in non-class aggregate setting, or not.

The failure of the *Opiate* negotiation class recalls the biblical parable concerning the problem with pouring new wine into old bottles.<sup>463</sup> In formulating and implementing the negotiation class, its proponents were trying to put the new wine of the negotiation class into the old bottle of Rule 23. Although conventional jurisprudence had come to embrace the settlement class, in the *Opiate* litigation the Sixth Circuit concluded that the old Rule 23 bottle could not contain the new negotiation class wine. As the parable implies, for this to work, the negotiation class needs a new Rule 23.

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463. There are numerous explanations of the parable's meaning. In the early first-century, wine was kept in wineskins, not bottles. Over time old wineskins expanded with continued use. If someone attempted to place new wine in an old wineskin, fermentation would cause the old wineskin to burst. The parable was told to persuade Jesus's audience that his new preaching would not fit comfortably within old received religious ideas. Therefore, his followers needed to accept a new wineskin.