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# Curing The Mass Tort Settlement Malaise

Noah Smith-Drelich

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# CURING THE MASS TORT SETTLEMENT MALAISE

*Noah Smith-Drelich\**

*To settle the thousands of claims arising from the defective painkiller Vioxx, Merck Pharmaceuticals brokered an agreement, not with the Vioxx plaintiffs but with their lawyers. This agreement required the plaintiffs' lawyers to recommend settlement to all of their clients and to withdraw if any of those clients declined: plaintiffs' lawyers could either settle all of their claims or none. Through this unusual arrangement, made without the involvement of the plaintiffs and outside of any formal judicial supervision, Merck was able to craft a favorable settlement group that mimicked a Rule 23 class.*

*This Article explores the Vioxx Agreement as but the first consequence of the Supreme Court's restrictive mass tort class certification jurisprudence. Starting with Amchem Products, Inc. v. Windsor and Ortiz v. Fibreboard Corp., the Court has repeatedly disapproved of lower courts' broad readings of Rule 23 and denied mass tort class certification—even where justice appears to demand a class action. Now, with so little flexibility in Rule 23's requirements, few mass tort plaintiffs can hope to file suit as a Rule 23 class.*

*By removing a crucial tool for mass tort litigators, the Supreme Court has begun to push the resolution of mass torts out of the formal judicial system and into private contractual arrangements like the Vioxx Agreement. Although agreements like this may appear to be an adequate replacement for Rule 23 actions, they are far from it. Placing a substantial proportion of group litigation outside of a judicially controlled framework will lead to a fundamental shift in the carefully drawn balance between the interests of plaintiffs, plaintiffs' lawyers, defendants, and society. Defendants will benefit from the ability to craft*

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\* Noah Smith-Drelich is a graduate of Stanford Law School and spent the last year clerking on the Ninth Circuit Court of Appeals. He is currently clerking on a federal district court. Thanks are due to the Honorable Vaughn R. Walker and the Honorable Jay S. Bybee, Professors Janet Alexander, Howard Erichson, and Nora Engstrom, and Andrew Prout, Maggie McKinley, Julie Slater, and Harker Rhodes, IV for their enormous help in the writing of this Article.

*desirable settlement classes since plaintiffs' lawyers will face the choice between maximizing their clients' interests or their own gains—all without effective judicial oversight. Plaintiffs, and ultimately society, will bear the brunt of the changes brought about by replacing Rule 23 settlements with agreements like the Vioxx Agreement, as unjust settlements and systemic under-deterrence of future negligence will result.*

*Previous scholarship has focused on either the ethical problems inherent in the Vioxx Agreement or the difficulties that prospective mass tort classes now face in seeking class certification. This Article analyzes these issues together and proposes that a proliferation of "Vioxx Agreements" is both inevitable and undesirable. This Article then presents a solution to this overlooked, but substantial, emerging problem: much of the deterrence value inherent in group litigation may be preserved in private settlements by aggressively sanctioning plaintiffs' lawyers for even minor ethical violations in the context of Vioxx Agreements. Rule 23 is carefully crafted to prevent abuses of mass adjudication, and may therefore effectively guide regulators in sanctioning those abuses most harmful to plaintiffs and society.*

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## I. INTRODUCTION

In the mid-1990s, obese and overweight Americans flocked to Fen-Phen, the newest miracle cure for the love handle. Fen-Phen promised what not even the traditional remedies of diet and exercise could deliver: an average of thirty pounds of rapid weight loss.<sup>1</sup> An estimated six million Americans took Fen-Phen between 1992 and 1997, and approximately eighteen million prescriptions were written in 1996 alone.<sup>2</sup> Tragically, weight loss was only the second most significant effect of Fen-Phen on the human body: fully one-third of Fen-Phen's patients developed damaged heart valves, a potentially life-threatening health complication.<sup>3</sup> Fen-Phen was pulled from the market in 1997 and a flood of litigation quickly followed.<sup>4</sup> The manufacturers and distributors of Fen-Phen were repeatedly drawn into court; 50,000 Fen-Phen claims would be eventually filed.<sup>5</sup> The potential burden of this litigation was crippling, not only for defendants, but for the judicial system, which was not equipped to handle cases on this scale.

Many things must go wrong for a mass tort such as the Fen-Phen disaster to occur: regulatory fail-safes must fail, medical knowledge must come up short, and companies must gamble with the health and safety of their customers. Tort law can powerfully deter this last, but arguably most significant, factor in mass torts. Companies will design safer products, use more care in production lines, and better publicize what unavoidable risks are associated with their goods when tort awards and settlements increase the cost of risky practices. For tort law to accomplish this goal, however, tort victims must

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1. See Gina Kolata, *How Fen-Phen, a Diet 'Miracle,' Rose and Fell*, N.Y. TIMES, Sept. 23, 1997, <http://www.nytimes.com/1997/09/23/science/how-fen-phen-a-diet-miracle-rose-and-fell.html>; Brad Walters, *5 Things You Need to Know About Fen-Phen*, LIVESTRONG.COM (Nov. 18, 2009), <http://www.livestrong.com/article/4811-need-fen-phen/>. Fen-Phen boasted a weight-loss rate three times that of diet and exercise, and twice that of even other diet drugs. *Id.*

2. Gale White, *What's the "Skinny" on Fen-Phen*, FINDLAW (Mar. 3, 2008), <http://corporate.findlaw.com/litigation-disputes/what-s-the-skinny-on-fen-phen.html>.

3. Kolata, *supra* note 1.

4. Some litigation preceded the removal of Fen-Phen from the market. See ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* (2001).

5. Walters, *supra* note 1.

actually sue. Sophisticated companies will recognize when certain categories of victims do not seek legal remedy for their injury, and will therefore be under-deterred with respect to such victims. Victims of mass torts represent one such potential group: because causation, liability, and damages are often particularly difficult and expensive to prove in the context of mass torts, mass tort victims rarely instigate individual lawsuits.<sup>6</sup>

Rule 23 changed this, permitting the consolidation of small claims in class actions, and, therefore, broadening the reach of tort justice to include plaintiffs who, individually, do not have viable claims.<sup>7</sup> This is far from the extent of Rule 23's benefits, however. Rule 23 is carefully calibrated to balance the interests of plaintiffs, defendants, and society as a whole. Rule 23 provides plaintiffs a path to cost-effective recovery for their injuries, while adding a layer of protection from unscrupulous attorneys who do not act in the plaintiffs' best interests.<sup>8</sup> Rule 23 promises defendants a path to relief from the seemingly unpredictable and unlimited liability associated with individually litigated mass tort claims, as well as

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6. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal-Analysis*, 59 BROOK. L. REV. 961, 968 (1991) (noting that “[n]o claim in a mass tort litigation will have value until plaintiffs are able to establish causation, liability and damages”). This Article uses the term “mass tort” to refer to mass personal injury torts: instances in which the negligent behavior of a small number of defendants has *physically* injured many parties. Such accidents may often be composed of toxic tort, products liability, or failure-to-warn claims. “Mass torts” of this nature may be distinguished from antitrust, security, or workplace-discrimination mass litigation, where a *financial* injury has occurred.

7. Rule 23 may not even go far enough. For the argument that the private incentives to litigate in a class are often inadequate to achieve the desired social benefits, see John Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

8. This Article makes a number of assumptions: that plaintiffs generally have little information and are therefore largely at the mercy of their lawyers; that plaintiffs' lawyers are economic actors, motivated by primarily financial ends; and that the threat of tort liability can act as a deterrent. Coffee, Kalven, Rosenfield, Rosenberg, and others explore these assumptions in more depth. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in Large Class Actions*, 54 U. CHI. L. REV. 877 (1987); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1226 (1995); Jonathan Macey & Geoffrey Miller, *The Plaintiffs' Attorney Role in Class Actions and Derivative Suits: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) [hereinafter Rosenberg, *Class Actions for Mass Torts*]; David Rosenberg, *The Casual Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

from the cost of defending a multitude of separate lawsuits. And by allowing even the smallest individual injuries to be litigated, the Rule provides substantial deterrence while sparing society from the enormous cost of the flood of individual claims that inevitably follow from a mass tort. Rule 23's consolidation of mass torts benefits plaintiffs, defendants, and society alike.<sup>9</sup>

Following the Supreme Court's strict reading of Rule 23 starting with *Amchem Products, Inc. v. Windsor*<sup>10</sup> and *Ortiz v. Fibreboard Corp.*,<sup>11</sup> however, class actions are no longer viable in the mass tort context: neither society's need for the mass adjudication of mass torts nor the practical difficulty most mass tort plaintiffs face in satisfying Rule 23(a) can justify courts' relaxation of Congress's class certification requirements.<sup>12</sup> By removing a crucial tool for mass tort litigators, *Amchem* and *Ortiz* have begun to push the resolution of mass torts almost entirely out of the formal judicial system and into private contractual arrangements. One such arrangement is the recent Vioxx Agreement, a creatively structured non-class aggregate settlement that required lawyers to recommend the deal to their clients and to withdraw from the Agreement if any of their clients declined.<sup>13</sup> This consequence of *Amchem* and *Ortiz* has received little scholarly attention.<sup>14</sup> Yet, if left unchecked, it will

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9. Put more precisely, Rule 23 carries potential for a win-win. Much scholarship has been devoted to discussing Rule 23's shortcomings. See, e.g., STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 253 (1987) (criticizing the mandatory nature of (b)(2) class actions because it is "more likely than in the (b)(3) cases that the interests of the group's members will conflict and will be least amenable to abstract assessment"); Allan Erbsen, *From "Predominance" to "Resolvibility": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1023 (2005) (noting "diversity among the circumstances of individual class members and judicial reactions to that diversity" as "overlooked source[s] of controversial shortcomings in the class action device"); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS C. L. REV. 323 (2005) (cataloguing a number of objections to Rule 23).

10. 521 U.S. 591 (1997).

11. 527 U.S. 815 (1999).

12. For a more detailed discussion, see *infra* Part II.B.

13. For a more detailed discussion of the Agreement, see *infra* Part III.

14. The impacts of *Amchem* and *Ortiz* on non-class aggregate settlements and the tort deterrence equation have been addressed only tangentially in the literature. See, e.g., Deborah R. Hensler, *As Time Goes By: Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002) [hereinafter Hensler, *As Time Goes By*] (examining whether *Amchem* and *Ortiz* "have achieved the aims the objectors to the settlements sought" in the asbestos context); Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007) (describing how mass toxic tort litigation has evolved to include more lawyers, fewer settlements, and diminished "bet the company" risks for defendants); Deborah R. Hensler, *The Future of Mass*

significantly change the tort deterrence equation. Although at first the terms of these private agreements may largely mirror, in appearance, the terms of class action settlements, the removal of mass tort settlements from the judicial system will deprive plaintiffs of the security that Rule 23 provides.<sup>15</sup> Without the threat of class certification, non-class aggregate settlements will become further and further removed from the balance and protections that Rule 23's structure provides. Judges may still be involved in some capacity, if only to provide parties to the settlement with a modicum of legitimacy, but left to the free market, the shift to private settlement agreements will ultimately benefit defendants the most.

This Article proceeds in four parts. Part II discusses how mass litigation has evolved to become an important tool for resolving mass torts, and analyzes how Rule 23's construction carefully balances the competing interests brought into play by mass adjudication. Part III describes how, despite this careful legislative balancing, the judiciary

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*Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306 (2011) (using, as its example of the future of mass litigation, the 2005 Dutch Act on the Collective Settlement of Mass Claims, an administrative solution); Samuel Issacharoff, *Shocked: Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1925 (2001) (exploring the consequences of *Amchem* and *Ortiz* through a theoretical lens); Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871, 884 (2001) (anticipating, in a single short paragraph, the creation of class action surrogates like the Vioxx Agreement in the aftermath of *Amchem* and *Ortiz*, but providing no discussion of the practical or normative consequences of such surrogates); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Method of Managing Multidistrict Litigations: Problems and a Proposal* (N.Y.U. Law and Economics, Working Paper, 2009), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1178&context=nyu\\_lewp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1178&context=nyu_lewp) (analyzing the structural possibilities and consequences of MDLs, including the Vioxx MDL); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009) (proposing a "do no harm" alternative to the "identity-of-interests" requirement from *Amchem*); cf. JENNY STEEL & WILLEM H. VAN BOOM, MASS JUSTICE: CHALLENGES OF REPRESENTATION AND DISTRIBUTION (2011) (offering restrained praise for the Vioxx Agreement's hybrid approach); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2010) (exploring the ethical issues of the Vioxx Agreement); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010) (describing the ethical problems associated with "all-or-nothing settlements," a category that includes the Vioxx Agreement).

15. For a discussion of the importance of Rule 23's protections, see the Supreme Court's recent Rule 23 jurisprudence. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *Ortiz*, 527 U.S. at 858; *Amchem*, 521 U.S. at 621. In practice, however, the security provided by Rule 23 may not be adequate to fully protect plaintiffs. See generally Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671 (2004) (analyzing shortcomings in the judiciary's application of Rule 23(a)(4)). This Article asserts that those protections offered in its absence will be even less effective.



significantly broadened Rule 23's reach in response to the mass torts of the 1980s and 1990s, ultimately leading the Supreme Court to return Rule 23 to its pre-mass torts construction in *Amchem* and *Ortiz*. Part IV discusses how *Amchem* and *Ortiz*'s restriction on class certification has spurred plaintiffs and defendants to seek resolution of mass torts outside of a judicially controlled framework,<sup>16</sup> and how this shift towards extra-judicial resolution will ultimately benefit defendants and lead to under-deterrence. Finally, Part V concludes with a novel, and counter-intuitive, solution: jurisdictions can attain near-optimal mass tort deterrence, even in the absence of permissive class certification, by aggressively sanctioning plaintiffs' attorneys who do not act in the best interests of their clients when settling class settlements outside of Rule 23's protections.

## II. THE APPEAL OF GROUP LITIGATION, FROM THE MEDIEVAL TO THE MODERN

This Article begins by exploring the many advantages provided by Rule 23 in the context of group litigation. This discussion is integral to understanding why agreements similar to the Vioxx Agreement are likely to propagate in the wake of the Supreme Court's ever-more-limiting Rule 23 jurisprudence. But it also shows why such extrajudicial agreements are so dangerous. Rule 23 is carefully calibrated to balance the interests of plaintiffs, plaintiffs' lawyers, defendants, and society in group litigation.

### A. *A Medieval Tool Matures*

Group litigation has been a part of the Anglo legal system since the thirteenth century.<sup>17</sup> This unusual judicial instrument first arose as an administrability tool of the nobility. Executing a legal judgment against an entire community was far easier for medieval monarchs than attempting to secure and enforce many individual judgments.<sup>18</sup> Difficulties with administration, communication, and transportation

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16. At least one settlement has already made use of the Vioxx Agreement's unusual structure: the GM Rice settlement reached in 2011. See *GMB Settlement Agreement*, GM RICE SETTLEMENT CLAIMS ADMIN. WEBSITE, [http://gmricesettlement.com/BY\\_Un-secure/MDL\\_Settlement\\_Agreement.pdf](http://gmricesettlement.com/BY_Un-secure/MDL_Settlement_Agreement.pdf) (last visited Sept. 21, 2014).

17. Yeazell, *supra* note 9.

18. *Id.*

forced early English sovereigns to regularly turn to group litigation for governance throughout much of the late Middle Ages.<sup>19</sup>

Centuries later, group litigation retains its salience. Class actions, the contemporary manifestation of this ancient device, are useful in a wide range of contexts, including the resolution of mass accidents.<sup>20</sup> As the legal system developed, group litigation ceased to be used by the government: the modern administrative state assumed much of the role previously fulfilled by group litigation. Yet, agencies have proven ill-equipped to handle the overwhelming task of investigating and prosecuting safety issues, instead relying heavily on the research produced by potential defendants to determine whether products are safe for the marketplace.<sup>21</sup>

Thus, the ancient prosecutorial mantle of group litigation has been passed to plaintiffs' lawyers, who, as a result, are alternatively lauded as "private attorneys general"<sup>22</sup> and vilified as "ambulance chasers." This seeming contradiction stems, in large part, from plaintiffs' lawyers' unique funding model. Rather than billing by the hour or even by the lawsuit, plaintiffs' lawyers typically take a fixed percentage of any recovery or settlement—30 or 35 percent is

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19. *Id.* at 82–86.

20. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 (1995) (noting that "[d]efendants have not only adopted the class action as their preferred means of resolving their mass tort liabilities, but have also actually begun to solicit plaintiffs' attorneys to bring such class actions (as a condition of settling other pending litigation between them)"); see also David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 8–9 (1990). One example of this is the class action filed over the defective Bjork-Shiley heart valve, which was brought originally as a nationwide class action, but extended to a global class action on defendants' insistence. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 154–55 (S.D. Ohio 1992), *appeal dismissed*, 995 F.2d 1066 (6th Cir. 1993); Michael Schachner, *Global Settlements Draw Praise, Scorn*, BUS. INS., Oct. 10, 1994, at 1.

21. A recent study shows that agencies, such as the FDA, can only handle a small percentage of possible claims brought to them and are woefully understaffed. See REPORT OF THE SUBCOMMITTEE ON SCI. & TECH., FDA SCIENCE AND MISSION AT RISK (2007), available at [http://www.fda.gov/ohrms/dockets/ac/07/briefing/2007-4329b\\_02\\_01\\_fda%20report%20on%20science%20and%20technology.pdf](http://www.fda.gov/ohrms/dockets/ac/07/briefing/2007-4329b_02_01_fda%20report%20on%20science%20and%20technology.pdf).

22. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001). Professor Hensler notes that although this characterization may ascribe more altruism to plaintiffs' lawyers than what is warranted, the impact of lawsuits in such contexts is to internalize negative societal externalities—regardless of whether a plaintiff's lawyer acts out of a motivation to do good or to make money. *Id.*

standard for suits brought individually.<sup>23</sup> This creates strong incentives for plaintiffs' lawyers to not merely litigate, but to seek out and investigate potential mass torts since the lucrative prize of a class action judgment far outweighs even substantial investigative and litigation costs.<sup>24</sup> Consequently, plaintiffs' lawyers, wielding the threat of a large lawsuit, have become a powerful arbiter of safety in modern society.

Not all of the incentives that contingency fees create are positive, however. The contingency fee-funding model means that plaintiffs' lawyers must balance the prospective cost of litigation against the possibility of recovery. This creates a financial incentive for plaintiffs' lawyers to accept early settlement offers, which provide lawyers with a guaranteed payment without the cost or risk of trial. Moreover, plaintiffs who seek non-financial remedies may find their lawyers less than amenable to such arrangements. Because victims of mass torts are typically neither sophisticated nor repeat legal players, they litigate at the mercy of their lawyers, and when the interests of plaintiffs' lawyers are not aligned with those of the plaintiffs that they represent, it is too often the plaintiffs whose interests are harmed.

### *B. The Broad Appeal of Group Litigation*

One other challenge that contingency fee litigation presents is that the prospective financial award of a settlement or judgment must be sufficient to justify the time and cost of litigation for the plaintiffs' lawyer. Individual victims of mass torts, however, often

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23. See Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633 (2013); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011); see also David Giacalone, *Contingency Fees (Pt. 3): Do "Standard" Fees Exist?*, F/K/A . . . THE ARCHIVES (Apr. 8, 2006, 2:34 AM), <http://blogs.law.harvard.edu/ethicalesq/contingency-fees-pt-3-do-standard-fees-exist/>. Mass litigators generally take smaller percentages of the recovery, but due to the large size of mass judgments, the reward of representing a class of plaintiffs can be even more disproportionate in relation to the time and expense of litigation.

24. This is not to say that all plaintiffs' lawyers are purely economic agents; plaintiffs' lawyers are also influenced by non-economic external factors such as "moral duties, altruism, or virtue." Elizabeth Chamblee Burch, Response, *Procedural Adequacy*, 88 TEX. L. REV. 55, 58 (2010). For the purposes of exploring *Amchem*, *Ortiz*, and the Vioxx Agreement, however, this Article will treat plaintiffs' lawyers as predominantly economically motivated. To the extent that plaintiffs' lawyers are actually driven by other motives, the effects described throughout this Article will be diminished.

have suffered only speculative injury, and require extensive discovery and expert testimony to develop their claims; many justiciable mass tort injuries are of an uncertain value, are expensive to litigate, and are therefore unattractive to plaintiffs' lawyers.<sup>25</sup> Although individual mass tort claims tend to be far from insignificant, few plaintiffs' lawyers will spend hundreds of thousands of dollars in discovery, expert witness, and time costs to secure a judgment that may count only in the tens of thousands of dollars.<sup>26</sup> Even cases with relatively certain judgments will be refused by lawyers when the value of recovery is too small to sufficiently cover the costs incurred in securing that recovery.<sup>27</sup>

Modern group litigation seeks to address this challenge. Class action lawsuits provide a vehicle for making the litigation of small claims viable. By aggregating numerous small claims into a single larger claim, class actions multiply the potential reward of litigation without similarly multiplying the costs. Many potential mass tort plaintiffs thus have no workable path to recovery outside of group litigation.<sup>28</sup>

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25. See Coffee, *supra* note 8, at 884 (“Although some plaintiffs in a mass tort action may have suffered disproportionately large injuries and thus have a sufficient stake in the action to justify expending funds to monitor the attorney, most do not.”); Rosenberg, *Class Actions for Mass Torts*, *supra* note 8, at 563 (describing mass torts as “exceedingly, if not prohibitively, expensive to litigate”); see also RAND CORP., *Understanding Mass Personal Injury Litigation* (1995), available at [http://www.rand.org/pubs/research\\_briefs/RB9021/index1.html](http://www.rand.org/pubs/research_briefs/RB9021/index1.html) (noting that issues such as interdependent values, difficulty proving causation, and future injury lower the value of many mass-tort injuries to plaintiffs' lawyers).

26. The exception to this rule comes when plaintiffs use litigation as a strategic business tool, as is common in the intellectual property arena. Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1 (2012), <https://journals.law.stanford.edu/stanford-technology-law-review/online/giants-among-us> (describing the rise of patent mass aggregators and the use of patents both defensively and offensively as a business tool).

27. Cf. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1486 (2009) (describing and analyzing the rise of “settlement mills”: firms that specialize in a high-volume practice of low-risk cases).

28. For examples and discussions of this, see, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986); *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 HARV. L. REV. 739 (1984); Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369, 1395–96 (1985); Don V. Jernberg, *Insurance for Environmental and Toxic Risks: Basic Analysis of the Gap Between Liability and Coverage*, 34 FED’N INS. COUNS. Q. 123 (1984). This same obstacle to recovery may apply in “diminished recovery cases.” See, e.g., *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 289 (4th Cir. 1989); *Garza v. Sporting Goods Properties, Inc.*, No. CIV. A. SA–93–CA–108, 1996 WL 56247 (W.D. Tex. Feb. 6, 1996); *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 527–28 (Ct. App. 1995); *Anthony v. Kelsey-Hayes Co.*, 102 Cal. Rptr. 113 (Ct. App. 1972). On the other hand, many mass torts—

Modern class actions retain the efficiency, administrability, and finality advantages that justified their precursors and, thus, are not merely a device used by plaintiffs, but one that is often preferred by defendants.<sup>29</sup> First, class actions present an efficient alternative to individual suits. Class action defendants seek to control the costs of their mistakes, which means limiting not merely their legal liability but the price of being sued. The expense of litigation defense has soared over the past century, as hourly billable rates have steadily grown. What was once an incidental cost of doing business has become a multi-billion dollar industry.<sup>30</sup> In fact, a 1985 RAND Institute for Civil Justice study revealed that the amount of the recovery now makes up less than half of the total cost of litigation.<sup>31</sup> Because defense lawyers typically bill by the hour, defendants have a significant monetary incentive to resolve litigation quickly. The substantial costs of expert witnesses and discovery only heighten the financial impact of taking a personal injury case to trial. Second, class actions are more administrable than individual lawsuits. Hundreds of suits requiring thousands of lawyers and experts are neither quick nor cheap to resolve. Although a single class action lawsuit may nevertheless be more difficult and expensive to litigate than any one individual lawsuit, class actions have substantially

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such as in the asbestos context—cause high value injuries that are attractive to plaintiffs’ lawyers even as individual cases. *See, e.g.*, Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 LAW & CONTEMP. PROBS. 27 (1990).

29. *See, e.g.*, HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7509 (4th ed. 1977); Steven M. Morgan, *Finality in Litigation*, 1, available at <http://www.docstoc.com/docs/96215790/Finality-in-Litigation> (describing the many reasons why “[u]sing the class action in this fashion could be advantageous for a Defendant,” including the facts that “it would involve a single, unified adjudication, would prevent relitigation of the same issues, would close-off avenues for new, subsequent Plaintiffs, and a settlement with a representative party could bind a whole class of affected parties”). It is also worth noting that classes of defendants are still permitted under Rule 23. They now comprise, however, only a small fraction of all class actions. Fed. R. Civ. P. 23(a) (“One or more members of a class may sue *or be sued* as representative parties on behalf of all members . . . .” (emphasis added)); *see also* David E. Rigney, Annotation, *Permissibility of Action Against a Class of Defendants Under Rule 23(b)(2) of Federal Rules of Civil Procedure*, 85 A.L.R. FED. 263 (1987).

30. Joni Hersch & Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 AM. LAW ECON. REV. 330 (2007).

31. JAMES S. KAKALIK & NICHOLAS M. PACE, RAND CORP., COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3391.pdf> (explaining that 37 percent of the cost of litigation is legal and expense fees, 15 percent is lost time value, and 2 percent is court costs. The remaining 46 percent in 1985 was the payment made to plaintiffs, whether via settlement or court-ordered award).

lower litigation expenses for defendants than the alternative of countless individual suits. Third, class actions offer defendants the possibility of finality. Because litigation generates significant bad publicity and ill will for defendants, defendants often want nothing more than to put lawsuits—especially class action lawsuits—behind them.<sup>32</sup> The desire to achieve finality in litigation is more than publicity-based, however; corporations must be able to plan for the future and, thus, unpredictability in prospective litigation costs also takes a substantial toll. Class actions, which may bind absent plaintiffs in addition to present plaintiffs, provide defendants not only with a quick and efficient means of resolving lawsuits but with a degree of finality that would otherwise be impossible to ensure.

The most significant advantage provided by group litigation, however, may be to society. The societal cost of mass torts—whether counted in pain and suffering, lost earnings potential, or decreased consumer trust—is enormous. Privately adjudicating such losses through class action lawsuits provides for closer-to-optimal levels of deterrence. From a law and economics standpoint, optimal deterrence is achieved when tort law fully internalizes the cost of the tort—for example when the marginal cost of an extra dollar of precaution equals the marginal benefit of an extra dollar of accident reduction.<sup>33</sup> Prospective defendants will take cost-justified precautions in response to group litigation, leading to a safer, healthier, and happier society. Where administrative agencies cannot or will not act, class actions nevertheless provide a market-driven deterrence alternative without regard to the size of individual plaintiffs' claims. Moreover, group litigation relieves the already overworked court system from the burden of trying thousands, or tens of thousands, of duplicative

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32. James M. Anderson, *Understanding Mass Tort Defendant Incentives for Confidential Settlements: Lessons from Bayer's Cerivastatin Litigation Strategy* (Rand Institute for Civil Justice, Working Paper No. WR-617-ICJ, 2008), available at [http://www.rand.org/pubs/working\\_papers/WR617.html](http://www.rand.org/pubs/working_papers/WR617.html) (describing how Bayer's reputational concern impacted the course of the cerivastatin litigation).

33. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 878–79 (1999) (discussing the concept of optimal deterrence, and noting “if a defendant will definitely be found liable for the harm for which he is responsible, the proper magnitude of damages is equal to the harm the defendant has caused”). As Professors Polinsky & Shavell recognize, tort law generally provides sub-optimal deterrence. *Id.* Therefore, one consequence of the class action structure increasing the viability of plaintiff claims—and therefore the likely cost of tortfeasors to potential defendants—is that deterrence is increased to closer-to-optimal levels.

cases. Consequently, class action lawsuits are a powerful tool for creating societal good through their promotion of judicial efficiency and their role in deterring societal harms.<sup>34</sup>

The mutually beneficial nature of class actions may be at its greatest in the context of class action settlements. Class action settlements assure defendants a degree of finality that would otherwise be impossible to achieve with individual suits, as class settlements bind all members of a class who do not affirmatively opt-out—all without the litigation costs of trial or appeal.<sup>35</sup> For plaintiffs and plaintiffs' lawyers, the aggregation of claims in group litigation significantly raises the financial stakes, and thus, the guarantee of even only a partial recovery will often prove attractive.<sup>36</sup> Plaintiffs' lawyers may therefore recoup a significant proportion of their contingency fees through settlement without having to underwrite the costs of trial or assume the risk of an unfavorable judgment.<sup>37</sup> Courts, in turn, also welcome settlements as a means of reducing the burdens that litigation places on an already overwhelmed judicial system. On the whole, class action settlements represent an apotheosis of efficiency; hundreds, if not thousands, of suits may be resolved in one fell swoop without the need for a complicated and lengthy trial.

This is not to say that settlement has no disadvantages: the financial incentive for plaintiffs' lawyers to settle can subvert the aims of justice, particularly in the class action context.<sup>38</sup> The economics of group-settlement litigation, which often pit the interests of defendants and plaintiffs' lawyers against the interests of plaintiffs and society, could upset tort law's deterrence function. Although it is often defendants who instigate settlement talks, settlements are not commonly formed only from a defendant's sense of obligation or guilt: settling is frequently a defendant's best business decision. In such circumstances, defendants often seek to offer the smallest possible sum necessary to buy finality (taking into

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34. RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* (5th ed. 2009).

35. *See* FED. R. CIV. P. 23.

36. Unfortunately, this has created unfortunate incentives for plaintiffs' lawyers to settle cases even when not in the best interest of their clients. *See infra* Part II.

37. Frances E. McGovern, *Resolving Mature Mass Tort Litigation*, 59 B.U. L. REV. 659, 663–64 (1989).

38. *See infra* Part II.

account the costs of monetary and nonmonetary damages). Plaintiffs, of course, need not accept defendants' initial offers, and often do not. Through their lawyers, plaintiffs have a financial incentive to seek the highest settlement value that defendants are willing to agree to (taking into account, once again, the value of both monetary and nonmonetary damages). So long as plaintiffs' lawyers fulfill this role and zealously advocate for their clients, settlements will remain widely used, wildly attractive, and an all-around good option for the resolution of mass torts.<sup>39</sup>

It is when plaintiffs' lawyers shirk in their duties as zealous advocates that this bargaining breaks down and settlements are no longer advantageous for plaintiffs or society. Plaintiffs, unlike defendants and plaintiffs' lawyers, are usually not repeat players in litigation and thus are relatively ignorant as to what constitutes a good or fair settlement offer.<sup>40</sup> This is known as the "agency cost problem."<sup>41</sup> As Professor Coffee outlines, this can lead to "sweetheart" settlements where plaintiffs lawyers urge plaintiffs to accept settlements that are far smaller than what plaintiffs' claim is worth, in the hopes of avoiding the significant time required in trials and appeals.<sup>42</sup> It is too often that trusting clients accept such sub-optimal arrangements.<sup>43</sup>

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39. See *infra* Part II; see also FED. R. CIV. P. 23(e) (providing judicial oversight of Rule 23 settlements).

40. See Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) [hereinafter PSLRA]. PSLRA helps limit abuses of the litigation system in the securities context. As one of its many reforms, the PSLRA allows judges to decide the most adequate plaintiff in class actions and encourages greater judicial scrutiny of lawyer conflicts of interest. *Id.*

41. Coffee, *supra* note 8, at 885; see also Saylor v. Lindsley, 456 F.2d 896, 899-900 (2d Cir. 1972); Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964); Andrew Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113, 114-17 (1976) (concluding that statistical analyses of class-action settlements indicate that settlements result in pecuniary gains to attorneys at the expense of the class).

42. Coffee, *supra* note 8 (describing, also, other problems that can arise from the plaintiffs' lawyer-client relationship). These financial incentives can be so strong that Professor Coffee has commented that "it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client." *Id.* at 882-83.

43. See *id.* For example, a plaintiff may be offered a settlement of \$30,000 for a claim likely to yield a \$100,000 recovery through trial. Assuming the plaintiff's lawyer was working on a standard one-third contingency fee, this would entail a \$10,000 payment to the lawyer for her time spent securing the settlement or a \$33,000 payment for her time spent securing a trial judgment. If the settlement offer required five hours of work from the plaintiff's lawyer, but a trial would require one hundred hours of work, the hourly benefits of settling (\$2,000 per hour) far outweigh the hourly benefits of going to trial (\$330 per hour). Even assuming that a favorable



The risk of financial cross-incentives diminishing plaintiffs' quality of representation is greatest in the context of group litigation.<sup>44</sup> Since the time and costs of trial, the threat and uncertainty of appeal, and the potential ultimate value of class actions tend to be far higher than in individual lawsuits, plaintiffs' lawyers have the greatest incentive to seek quick, cheap resolutions.<sup>45</sup> Moreover, many plaintiffs do not expect a recovery sufficient to justify time or money spent monitoring their lawyers; though some plaintiffs suffer disproportionately large injuries and are therefore personally invested in the quality of their representation, it is not uncommon for a substantial proportion of mass tort class action plaintiffs to be, effectively, free riders.<sup>46</sup> These issues are further compounded by two additional related factors: no market exists to regulate lawyer behavior, and because class action lawyers typically solicit clients (and not the other way around), principal preference plays a much smaller role than in typical agent-principal relationships.<sup>47</sup>

Even those plaintiffs interested in monitoring their lawyers face difficulties in class actions where plaintiffs' lawyers act on behalf of a significant number of plaintiffs whom they may never meet and, thus, are one step further removed from the interests of many of their clients. And because plaintiffs' lawyers are typically paid on contingency, a plaintiff who seeks only an apology or a promise of changed behavior on the part of defendant may have difficulty finding any representation at all. Plaintiffs' lawyers are not paid in apologies and may therefore persuade their clients that a small, sure, settlement value is preferable to the prospective relief desired by plaintiffs, even when it is not.<sup>48</sup> The rewards of settlement, especially in the class action context, may be great—but so are the risks.

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trial judgment was all but assured, it would be financially rational, though not ethical, for the lawyer to urge her client to accept the settlement offer despite the fact that settlement makes little financial sense for a plaintiff in this situation.

44. *See id.* at 884.

45. Plaintiffs, similarly, are often sensitive to the significant investment of time and the inherent uncertainty involved in group litigation. As has been discussed, but nevertheless bears repeating, settlement often can be the optimal resolution of a class action.

46. Coffee, *supra* note 8, at 884.

47. *Id.* at 885–86.

48. This may be what happened in the proposed Ticketmaster settlement, where prospective class members were provided \$1.50 credits towards future Ticketmaster purchases while their

### C. Group Litigation Codified

Enter Rule 23. The contemporary evolution of group litigation was completed by the 1966 revisions to Rule 23 of the Federal Rules of Civil Procedure,<sup>49</sup> which regulates the modern federal class action.<sup>50</sup> The protections that Rule 23 provides for plaintiffs, defendants, and society as a whole are carefully constructed, and are critical to the successful resolution of mass accidents *en masse*. Crucially, the deterrence function of class actions depends on Rule 23's precise execution. Rule 23 may not operate perfectly to effectuate its goals but, as this section argues, its absence presents greater risks than does its presence. Rule 23 is not an empty procedural rule, and changing any of the safeguards integral to its structure will have serious consequences for the deterrence of potential mass tortfeasors.

#### 1. Defining a Class Under Rule 23(a)

Rule 23(a) sets forth the qualifications that a group must possess in order to be defined as a class.<sup>51</sup> Because mass tort class actions provide more deterrence than individual lawsuits,<sup>52</sup> a permissive reading of Rule 23(a) will result in additional classes being certified—and therefore in greater deterrence. On the other hand, a restrictive reading of Rule 23(a) will lead to fewer class certifications and less deterrence.

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attorneys won \$16.5 million in legal fees. Andy Vuong, *Judge Rejects Ticketmaster Settlement Offering \$1.50 Coupons to Consumers, \$16.5 Million to Attorneys*, DENVER POST (Oct. 4, 2012, 11:22 AM), <http://blogs.denverpost.com/techknowbytes/2012/10/04/judge-rejects-ticketmaster-settlement-offering-150-coupons-consumers-165-million-attorneys/6611/>. The proposed settlement was rejected by the presiding judge. *Id.*

49. The 1966 revisions created the modern version of Rule 23. *See* Yeazell, *supra* note 9, at 229; *see also* Nora Freeman Engstrom, *The Plaintiffs' Lawyer Reader* 324 (Spring 2011) (unpublished manuscript) (on file with author).

50. States frequently have class action statutes as well, but this Article focuses on Rule 23, given its outsized influence on the modern class action.

51. Rule 23(a) reads, in its entirety:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

52. *See* discussion *supra* note 33.

Rule 23(a) does not merely impact the deterrence function of class actions, however. This gatekeeper of class certification also ensures that the class action is both fair and justiciable. Although the scaled economy of group litigation is efficient, it is not without its costs: along with the benefits of grouping many individual claims comes the risk that justice may not be done. This tension—between optimal deterrence, and fairness and justiciability—is carefully balanced by Rule 23(a)'s specific provisions.

Rule 23(a)'s first requirement—numerosity—ensures that the class action vehicle will only be used when a sufficient number of prospective plaintiffs have been injured such that individual lawsuits would overwhelm the courts and defendants, and joinder is impracticable.<sup>53</sup> Because the class action format trades some degree of specificity for efficiency, the numerosity requirement prevents class certification in instances where defendants', plaintiffs', and society's interest in efficiency does not outweigh the benefits of individual trials. Although permitting certification for less-numerous classes could increase the deterrence function of class actions (because more class actions will be certified), mass torts generally include a large number of mass tort victims. Enforcement of Rule 23(a)'s numerosity requirement will therefore have little impact on mass tort deterrence: it will not generally be the case that a mass tort class action will not be certified because it fails to meet the numerosity requirement.<sup>54</sup>

The second requirement—commonality—protects defendants by prohibiting suit where prospective plaintiffs' claims are not sufficiently alike to be litigated as one claim.<sup>55</sup> This ensures that class actions are both fair and justiciable. Rule 23(a)(2) also has

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53. FED. R. CIV. P. 23(a)(1) (requiring that “the class [be] so numerous that joinder of all members is impracticable”).

54. For a recent discussion of the numerosity requirement, albeit in a slightly different context, see Julie Slater, *Reaping the Benefits of Class Certification: How and When Should “Significant Proof” Be Required Post-Dukes?*, *BYU L. REV.* 1259 (2011).

55. FED. R. CIV. P. 23(a)(2) (requiring that “there are questions of law or fact common to the class”); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (insisting that the common question must be “of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”). There is some disagreement as to whether *Dukes* changed or clarified Rule 23(a)(2). Compare *Connor B., ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 33 (D. Mass. 2011) (noting that *Dukes* clarified the law), with *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012) (noting that *Dukes* heightened the standard for commonality).

significant deterrence consequences, however, as a lenient application of the commonality requirement could lead to either over-deterrence or under-deterrence. For example, over-deterrence will result if plaintiffs are permitted to craft classes that include unlike claims, compelling defendants (who lose) to pay for the claims of class members whom they may not have wronged. And under-deterrence will result if defendants can influence class composition by crafting settlements that group a small number of strong claims with weaker claims that define the recovery. On the other hand, a too-strict application of the commonality requirement will also lead to sub-optimal deterrence; no two injuries are exactly identical, so requiring an unrealistic degree of commonality will discourage class actions.<sup>56</sup>

The third provision of Rule 23(a) is typicality, which protects both defendants and prospective plaintiffs by ensuring that the named plaintiffs' claims are typical of the class as a whole. Defendants should not be subjected to the aggregated claims of a weak class made strong by its named plaintiffs, and absent class members should not be bound by a judgment reached on facts that materially vary from their own.<sup>57</sup> Because typicality serves defendants and plaintiffs alike, a more permissive interpretation of Rule 23(a)(3) may increase the unpredictability of class action judgments but may not influence deterrence in one way or the other.<sup>58</sup> However, should either defendants or plaintiffs be systematically permitted to craft classes with strategically atypical named plaintiffs, rewards would become systematically skewed, and either under-deterrence or over-deterrence will result.

Finally, Rule 23(a)(4)—adequacy of representation—provides the class with some assurance that the lead lawyers are competent to represent the interests of named and unnamed plaintiffs, and that there are no conflicts of interest inherent to the class. Plaintiffs in class actions may not even know that they are parties to a suit until they have been notified of a prospective settlement or judgment and, consequently, plaintiffs are especially vulnerable to unethical

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56. See Slater, *supra* note 54.

57. *Id.*

58. Unpredictability may have its own impact on deterrence, but that is the subject for a different paper.

plaintiffs' lawyers. Because the interests of plaintiffs and their attorneys often do not align in class actions, a more permissive interpretation of this requirement could interfere with the class action's deterrence function: plaintiffs' attorneys who inadequately represent the class may choose a modest private settlement over the possibility of a large public judgment (that would require an expensive trial), and will be less likely to seek non-monetary remedies because of the compensation structure of the contingency fee.<sup>59</sup> More settlements and smaller remedies will result, as well as agreements that restrict publicity. The sum total of these effects will be sub-optimal deterrence.

## 2. Determining the Type of Class Under Rule 23(b)

If a prospective class meets the Rule 23(a) requirements, a judge must then turn to Rule 23(b) to determine on what grounds the class may be certified. Judges have three options, each of which is carefully attuned to advancing important societal goals while preventing misuse of group litigation. Whereas Rule 23(a) defines the class being certified, Rule 23(b) limits the circumstances in which a class action may be used. Permitting class certification in circumstances other than those specifically delineated by 23(b) opens the door to the co-option of group litigation by self-interested parties.<sup>60</sup> As with Rule 23(a) determinations, the deterrence value of class action lawsuits will be influenced by how broadly or restrictively courts apply Rule 23(b).

### *a. 23(b)(1) Certification*

Rule 23(b)(1) permits class certification where “individual adjudication of the controversy would prejudice either the party opposing the class, (b)(1)(A), or the class members themselves, (b)(1)(B).”<sup>61</sup> Thus, if a judge determines that “inconsistent or varying adjudications” will arise from individual suits, certification may be

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59. *See supra* Part II.B.

60. It's also possible that greater Rule 23(b) flexibility will lead to creative structures that allow more justice. But, as I will discuss, the incentives and structures that define mass-tort litigation will more likely drive non-Rule 23(b) settlements towards societally undesirable outcomes. *See infra* Part IV.B.

61. FED. R. CIV. P. 23(b); *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986).

granted under 23(b)(1)(A).<sup>62</sup> Alternatively, Rule 23(b)(1)(B) permits class certification where individual judgments will, as a practical matter, preclude suit for other members of the class.<sup>63</sup> This is commonly the case when individual claims made against a limited fund are likely to exhaust the fund before all claims are satisfied.<sup>64</sup>

Rule 23(b)(1)(B) classes have been very useful, and are most widely used within the context of the limited-fund class.<sup>65</sup> Given the high number of individual claims typically brought in a mass tort class action—over 50,000 in the Fen-Phen litigation, for example<sup>66</sup>—the chance of a defendant declaring bankruptcy before all suits have concluded is extraordinarily high. Therefore, if certification of a prospective 23(b)(1) lawsuit fails, it can have significant implications for the tort system’s administration of justice. Plaintiffs who file suit quickly will be more assured of recovery regardless of the relative merit of their claims, and plaintiffs whose injuries surface years later might be deprived of any hope of recovery. Bankruptcy is a powerful defense against slow-developing illnesses and will lead to a substantially diminished recovery, and therefore under-deterrence, for injuries with a delayed onset. Finally, any relaxation of 23(b)(1)’s

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62. FED. R. CIV. P. 23(b)(1)(A); *see* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366–67 (1921); DAVID W. LOUISELL & GEOFFREY C. HAZARD, JR., PLEADING AND PROCEDURE: STATE AND FEDERAL 719 (1962) (rephrasing this requirement as a consideration as to whether “the possibility exists that [the] actor might be called upon to act in inconsistent ways”).

63. *See Cauble*, 255 U.S. at 356; *Waybright v. Columbian Mut. Life Ins. Co.*, 30 F. Supp. 885 (W.D. Tenn. 1939); *cf. Smith v. Swormstedt*, 57 U.S. 288 (1853). For similar cases in the shareholders context, *see Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961); *Ames v. Mengel Co.*, 190 F.2d 344 (2d Cir. 1951); *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Knapp v. Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D. Pa. 1954), *aff’d*, 230 F.2d 717 (3d Cir. 1956); *Goldberg v. Whittier Corp.*, 111 F. Supp. 382 (E.D. Mich. 1953); *Speed v. Transamerica Corp.*, 100 F. Supp. 461 (D. Del. 1951); *Sobel v. Whittier Corp.*, 95 F. Supp. 643 (E.D. Mich. 1951), *appeal dismissed*, 195 F.2d 361 (6th Cir. 1952); *Edgerton v. Armour & Co.*, 94 F. Supp. 549 (S.D. Cal. 1950); *Giesecke v. Denver Tramway Corp.*, 81 F. Supp. 957 (D. Del. 1949). Finally, similar cases also arise in breach of trusts by fiduciaries that affect a large class of beneficiaries. *See, e.g., Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944); *Boesenberg v. Chi. Title & Trust Co.*, 128 F.2d 245 (7th Cir. 1942); *cf. York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev’d on other grounds*, 326 U.S. 99 (1945).

64. FED. R. CIV. P. 23 advisory committee’s note, *reprinted in* 39 F.R.D. 69, 105 (1966); *cf. Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952).

65. Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1102 (2012). Rule 23(b)(1)(A) actions are relatively rare, due to the rule’s overlap with Rule 23(b)(2) actions. *Id.* at 1101; *see also Nat’l Treasury Emp. Union v. Reagan*, 509 F. Supp 1337 (D.D.C. 1981).

66. *Fen-Phen Heart Valve Damage Lawsuit*, LAWYERSANDSETTLEMENTS.COM, [http://www.lawyersandsettlements.com/lawsuit/fenphen.html#U\\_yhrEsx\\_wJ](http://www.lawyersandsettlements.com/lawsuit/fenphen.html#U_yhrEsx_wJ) (last updated Apr. 11, 2013).

opt-out provision will permit defendants to trap plaintiffs in a class action judgment or settlement that is not favorable to plaintiffs, leading to a lesser overall recovery and therefore to under-deterrence.

### *b. 23(b)(2) Certification*

Rule 23(b)(2) permits class certification where plaintiffs seek injunctive relief applicable to the class as a whole. Unlike in 23(b)(3) classes, plaintiffs in 23(b)(2) classes are not permitted to opt out.<sup>67</sup> Traditionally, 23(b)(2) classes have been used most regularly in the context of civil rights lawsuits,<sup>68</sup> although they are not limited to such cases.<sup>69</sup> Injunctive relief may also be sought in the mass tort context where the damage—say, a toxic spill—is ongoing. Permitting plaintiffs to reap the benefits from a remedial injunction while opting out and seeking additional damages could lead to over-deterrence; defendants would essentially face double punishment for their wrongs.

### *c. 23(b)(3) Certification*

Finally, a judge may certify a class under Rule 23(b)(3) so long as common questions of law and fact “predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>70</sup> Rule 23(b)(3) acts as a catch-all for

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67. Rule 23(b)(1) classes are generally considered mandatory classes, but the Second Circuit has permitted Rule 23(b)(1)(B) opt-out at the discretion of district courts in a limited set of circumstances. *See* *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001).

68. *See, e.g.*, *Baby Neal v. Casey*, 43 F.3d 48, 58–59 (3d Cir. 1994) (noting that Rule 23(b)(2) “serves most frequently as the vehicle for civil rights actions and other institutional reform cases that receive class action treatment”); *see also* *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963); *Brunson v. Bd. of Trs. of Sch. Dist. No. 1, Clarendon City, S.C.*, 311 F.2d 107 (4th Cir. 1962); *Green v. Sch. Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Northcross v. Bd. of Educ. of Memphis*, 302 F.2d 818 (6th Cir. 1962); *Mannings v. Bd. of Pub. Instruction of Hillsborough Cty., Fla.*, 277 F.2d 370 (5th Cir. 1960); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957); *Frasier v. Bd. of Trs. of Univ. of N.C.*, 134 F. Supp. 589 (M.D.N.C. 1955), *aff’d sub nom. Bd. of Trs. of Univ. of N.C. v. Frasier*, 350 U.S. 979 (U.S.N.C. 1956).

69. FED. R. CIV. P. 23 advisory committee’s note, *reprinted in* 39 F.R.D. at 102 (describing how Rule 23(b)(2) may be used by a class of purchasers alleging a seller’s improper price fixing, or by patent licensees to test the legality of patent “tying” provisions). And, following *Dukes*, it is unclear how feasible Rule 23(b)(2) certification is in even the civil rights context. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (holding 5-4 that commonality requirement was not satisfied, and 9-0 that claims for backpay made certification under Rule 23(b)(2) inappropriate).

70. FED. R. CIV. P. 23(b)(3).

instances in which a class action is called for but does not fall under the specific circumstances described by (b)(1) or (b)(2). It requires that prospective class members be given notice as well as an opportunity to opt-out of the class. Although the latitude that Rule 23(b)(3) grants to judges to certify classes is great, its predominance requirement is rigid. Therefore, even when “economies of time, effort, and expense,” or concerns about the uniformity of decisions, militate class certification, certification may only be granted where predominance exists; the class action format cannot be used pragmatically at the cost of compromising the rights of defendants or plaintiffs.<sup>71</sup>

Permitting the certification of classes that do not meet Rule 23(b)(3)’s requirements will open the door to a more pragmatic use of the class action. Although such pragmatic certification will increase the efficiency of the court system, it may do so at the cost of justice. For example, permitting certification where common questions of law and fact do not predominate will bind both plaintiffs and defendants to claims that substantially differ from those actually litigated at trial. Moreover, if Rule 23(b)(3) is robbed of its opt-out or notice provisions, it may lock plaintiffs into unfavorable decisions and lead to under-deterrence of future wrongdoing.<sup>72</sup> The high bar for Rule 23(b)(3) certification implies a concern that group litigation is susceptible to abuse, especially outside of the Rules 23(b)(1) and (b)(2) context.

### 3. Protecting a Class Under Rule 23

A number of Rule 23’s provisions expressly provide strict judicial oversight of the class action, from class certification, to settlement, to the final disbursement of the judgment. In particular, Rule 23 ensures adequate attorney representation of plaintiffs through Rules 23(a)(4),<sup>73</sup> 23(e)(2),<sup>74</sup> 23(g),<sup>75</sup> and 23(h).<sup>76</sup> Moreover,

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71. FED. R. CIV. P. 23 advisory committee’s note, *reprinted in* 39 F.R.D. at 102; *see* Miller v. Nat’l City Bank of N.Y., 166 F.2d 723 (2d Cir. 1948); *Oppenheimer v. F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944).

72. This is much less of a concern for Rule 23(b)(1) or (2) actions, given the set of circumstances to which they apply.

73. FED. R. CIV. P. 23(a)(4) (permitting class certification only where “the representative parties will fairly and adequately protect the interests of the class”).



the Class Action Fairness Act (CAFA) adds an additional level of scrutiny; under CAFA, coupon settlements may be reviewed by an independent expert preceding judicial approval, and lawyers must take some of their payment in coupons.<sup>77</sup>

Plaintiffs, who typically are not repeat players in the tort system, are uniquely vulnerable to the avarices not only of defense lawyers but of unscrupulous plaintiffs' attorneys.<sup>78</sup> This vulnerability presents a significant obstacle to the successful implementation of tort law.<sup>79</sup> Failing to fully enforce Rule 23's protections will open the door for dishonest plaintiffs' attorneys to seek financial settlements that avoid trial while maximizing their own contingency fees, thereby not only robbing tort law of its compensatory function but diminishing the overall rewards obtained. As even strong claims are pushed towards settlement, defendants may escape their wrongs relatively unscathed, happily passing the externalities of their negligence to plaintiffs and society as a whole.

Rule 23 protects against the strong financial incentives motivating plaintiffs' lawyers to settle even when settlement is not in their clients' best interest.<sup>80</sup> Therefore, although the financial incentives of class action settlements do not always encourage an optimal resolution for plaintiffs, the strict regulatory requirements surrounding settlements provide substantial tools for the judiciary to check untoward practices. Settlements may still be an imperfect solution for defendants and plaintiffs alike, but because of this

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74. FED. R. CIV. P. 23(e)(2) (permitting a settlement, voluntary dismissal, or compromise that binds class members only "after a [court] hearing and on a [court] finding that it is fair, reasonable, and adequate").

75. FED. R. CIV. P. 23(g) (setting forth rules for a court's appointment of class counsel, including the requirement that the court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class").

76. FED. R. CIV. P. 23(h) (limiting the award of attorney's fees to only those fees that are "reasonable").

77. 28 U.S.C. § 1712(d) (2012).

78. For examples of strong court oversight of settlements, see *In re Cal. Micro Devices Sec. Litig.*, 965 F. Supp. 1327 (N.D. Cal. 1997); *In re Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996); see also *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716 (N.D. Ill. 1990); *Cunningham v. Abbott*, Nos. 2007-CA-001971-MR, 2007-CA-001981-MR, 2007-CA-002173-MR, 2007-CA-2174-MR, 2011 WL 336459 (Ky. App. Feb. 4, 2011). Courts do not, however, always provide such vigorous oversight.

79. See, e.g., *Coffee*, *supra* note 8, at 886.

80. See *Engstrom*, *supra* note 49, at 365 n.8.

formalized judicial supervision, they remain a palatable solution nevertheless.

### III. THE RISE AND FALL OF RULE 23

#### A. *The Rise of Rule 23*

Although Rule 23's structural protections are important to the successful resolution of many mass torts,<sup>81</sup> Rule 23 class certification has not always been an option for mass tort litigators. Rather, the Advisory Committee to the 1966 revision of Rule 23 made it clear that Rule 23 was not intended for mass torts.<sup>82</sup> In an advisory note, the Committee explained that "[a] 'mass accident' resulting in injuries to numerous people is ordinarily not appropriate for a class action"; the likelihood that significant questions of damages, liability, and defenses to liability would affect parties differently was too great.<sup>83</sup> Mass accidents were reasonably uncommon in 1966 and rarely resulted in a large number of separate trials. Thus, for the 1966 Committee, which saw little need for mass tort class certification, this appeared to be an appropriate balance to strike.<sup>84</sup> For over a decade, courts followed the Committee's expressed intent, denying class certification in the mass tort context.

Beginning in the 1980s, however, courts increasingly certified Rule 23 class actions for mass torts, even where they had previously denied certification.<sup>85</sup> In 1984, Judge Weinstein certified what was then the largest class to date in the Agent Orange litigation, citing, as justification, the many challenges inherent to mass torts that would inevitably cripple individual Agent Orange lawsuits.<sup>86</sup> In the

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81. *See supra* Part II.C.

82. The 1966 revisions created the modern version of Rule 23; *see* Yeazell, *supra* note 9, at 237; *see also* Engstrom, *supra* note 49, at 324.

83. FED. R. CIV. P. 23 advisory committee's note, *reprinted in* 39 F.R.D. 69, 103 (1966).

84. *See* Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433 (1960) (cited favorably by the Advisory Committee's Article to Proposed Rule of Civil Procedure) (describing, also, how contingency fees "insure[] effective legal service for any injured person who wants a lawyer").

85. *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 24–25 (2000) (describing, as notable, the Agent Orange certification, the Fifth Circuit's first ever upholding of an asbestos class certification, and a surprising Sixth Circuit reversal of its previous denial of class certification for personal injury claims).

86. *Id.*; *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 747–48 (E.D.N.Y. 1984) (indicating that the difficulty of proof in the mass-tort context, issues surrounding the "Statute of

following year, the Fifth Circuit for the first time upheld an asbestos class certification.<sup>87</sup> The class certification floodgates appeared ready to open, and by the late 1980s class certification was no longer uncommon in the mass tort context.<sup>88</sup> This looming jurisprudential shift arrived not a moment too soon; mass accidents of the 1970s, 1980s, and 1990s had created a crushing burden on the judiciary.<sup>89</sup>

Although a complete list of products spurring mass actions during these decades would stretch for pages, much of the increase in litigation resulted from a single substance: asbestos. The judicial system was ill-equipped to handle the ongoing asbestos tragedy. Millions of potential plaintiffs were exposed to dozens of asbestos manufacturers' products, leading to billions of dollars of present and future damages.<sup>90</sup> Many of those exposed have still not yet developed symptoms,<sup>91</sup> and given the ubiquity of asbestos' distribution, few potential plaintiffs can definitively indicate which specific manufacturers' asbestos caused their illness. However, plaintiffs' lawyers were able to overcome much of the uncertainty surrounding proof and degree of exposure by combining huge numbers of plaintiffs into classes. Plaintiffs' lawyers highlighted those claims most suited for the modern rules of litigation and therefore provided recovery for plaintiffs who were undoubtedly injured by some of defendants' products, but who would not have had as strong claims if brought individually. This is not to say that asbestos claims are not also individually sustainable: they often are.

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Limitations and Failure to Determine Who Was Harmed and Who Caused Harm[,]” are but a few of the “legal problems posing major obstacles to plaintiffs’ recovery”).

87. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470 (5th Cir. 1986) (expressing concern that courts will be “ill-equipped to handle this ‘avalanche of litigation’” (citation omitted)).

88. *See HENSLER, supra* note 85, at 24–25 (describing many of these certifications, including a surprising Sixth Circuit reversal of its previous denial of class certification for personal injury claims).

89. For a critical perspective on this litigation, see *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in part and rev'd in part*, 751 F.2d 562 (3d Cir. 1984); Coffee, *supra* note 8 (building on his earlier work and calling into question the value of such class actions to plaintiffs); Macey & Miller, *supra* note 8 (proposing revisions in the regulatory system in the context of a discussion of the entrepreneurial attorney).

90. STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 92 (2005), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf) (estimating that the costs of asbestos litigation, including litigation costs and settlement and judgment values, totaled over \$70 billion through 2002).

91. 45 AM. JUR. 2D *Proof of Facts* § 1 (1986) (originally published in 1986) (noting that asbestosis “symptoms normally take at least 10, and usually 20 or more, years to develop”).

But those infirmities that are endemic to asbestos claims, such as the challenge of proving causation and responsibility, are largely palliated by the class action structure.

Even given the powerful incentives to group asbestos suits, the widespread harm caused by asbestos led to a flood of individually filed claims. From the time that the public became aware of the harm caused by asbestos in the 1970s,<sup>92</sup> the quantity of asbestos-related litigation grew exponentially. In the mid-1980s, asbestos litigation alone accounted for a significant percentage of civil filings in a number of jurisdictions.<sup>93</sup> For example, by 1990, one-third of all civil cases filed in the Eastern District of Texas were asbestos personal injury claims.<sup>94</sup> Courts and defendants alike were overwhelmed by these claims, welcoming class certification as a means of efficiently resolving these conflicts and effectively assuring finality. Plaintiffs' lawyers increasingly filed class certification motions to resolve not just asbestos but other mass torts.<sup>95</sup>

As the 1966 Advisory Committee's remonstrance against class certification for mass accidents grew more distant, the burden that mass torts placed on the court system multiplied. Plaintiffs' and defense lawyers alike supported class certification, and courts were becoming all too willing to oblige. Facing an onslaught of claims in the waning years of the twentieth century, district courts took advantage of new, less literal readings of Rule 23, devising "creative class structures to forge mass settlements."<sup>96</sup> Again and again, mass tort class actions were certified—largely for the purpose of seeking settlement—as district courts responded to crises caused by asbestos, Agent Orange, Bendectin, Fen-Phen, and the dozens of other large-

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92. Asbestos' toxicity was discovered in 1906, and evidence linking asbestos to various lung diseases grew through the first decades of the twentieth century. James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 227 (2006); *Asbestos*, AM. CANCER SOC'Y (2010), <http://www.cancer.org/Cancer/CancerCauses/OtherCarcinogens/Pollution/asbestos?sitearea=PE>; 60 AM. JUR. *Trials* § 73 (1996). Yet, it was not until the 1960s that the United States public awoke to asbestos' dangers, and the substance's use was curtailed in new construction. *Id.* At this point, it was too late; asbestos was present in schoolhouses, office buildings, and countless products used daily by millions of Americans nationwide. *Id.*

93. See Hensler, *As Time Goes By*, *supra* note 14, at 1900.

94. *Id.*

95. See Coffee, *supra* note 8, at 885–86 (describing how lawyers may have flocked too quickly to mass torts such as the Agent Orange, Bhopal, and Dalkon Shield litigations, collecting clients at an impossibly fast rate).

96. Engstrom, *supra* note 49, at 327.

scale injuries caused by mass production and an increasingly globalized supply chain, wherein a single defect in a product can lead to millions of illnesses or injuries.<sup>97</sup>

### B. *The Fall of Mass Tort Class Action Settlements*

But as soon as the era of mass tort class actions appeared ready to begin, it came crashing to an end. In *Amchem Products, Inc. v. Windsor*<sup>98</sup> and *Ortiz v. Fibreboard Corp.*,<sup>99</sup> the Supreme Court reaffirmed the Advisory Committee's Note to Rule 23, holding that irrespective of society's need for relaxed class certification standards, Rule 23 must be read as the Committee intended: narrowly.<sup>100</sup>

#### 1. *Amchem* Restricts Rule 23(a)

In *Amchem*, a global, settlement-only class had been certified by Judge Weiner of the Eastern District of Pennsylvania in a suit against twenty former asbestos manufacturers (known as the "CCR").<sup>101</sup> All prospective class members sought recovery for injuries due to asbestos exposure. Prospective class members complained of a range of differing levels of exposure to asbestos, an inherent characteristic of asbestos and other mass tort claims. Although a number of district judges had certified broad classes,<sup>102</sup> as was common in the mass tort context, the Third Circuit denied certification, noting that the proposed class members had been "exposed to different asbestos-containing products, in different ways, over different periods, and for

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97. See, e.g., MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1998) (Bendectin); MUNDY, *supra* note 4 (Fen-Phen); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (enlarged ed. 1987) (Agent Orange); see also MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* (1996) (breast implants); PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985) (asbestos).

98. 521 U.S. 591 (1997).

99. 527 U.S. 815 (1999).

100. *Amchem* and *Ortiz* were but the first of a number of Supreme Court opinions to limit Rule 23. Because *Amchem* and *Ortiz* involved the same sort of mass torts discussed in this Article, this Part focuses on these two cases.

101. *Amchem*, 521 U.S. at 591.

102. See Jody L. Gallegos, *Three Decades of Frustration: Finally, A Solution to the Asbestos Problem*, 15 ST. JOHN'S J. LEGAL COMMENT 61, 72-73 (2000) (describing the history of asbestos class certification leading up to *Amchem* and *Ortiz*).

different amounts of time.”<sup>103</sup> The Supreme Court granted certiorari and agreed: “Rule 23, which must be interpreted with fidelity . . . and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it.”<sup>104</sup> It mattered little that plaintiffs and defendants only had requested class certification for the purpose of reaching a settlement. Notwithstanding the importance and complexity of asbestos litigation,<sup>105</sup> Rule 23 “demand[s] undiluted, even heightened, attention in the settlement context.”<sup>106</sup> Thus, rather than allowing a relaxed application of Rule 23 for mass tort class action settlements, the Supreme Court reasserted the Advisory Commission’s admonition that the Rule was not appropriate for mass torts.

This holding threw the mass tort world into disarray. Plaintiffs in modern mass torts usually have been exposed to defendants’ products in different ways and for varying lengths of time.<sup>107</sup> Moreover, asbestos litigation was far from the most problematic category of mass tort; asbestos’ causation of asbestosis, as well as of many cancers,<sup>108</sup> was well-established, and therefore what is normally a substantial challenge in the mass-tort context was not significantly at issue.<sup>109</sup> The Supreme Court sent a clear message with *Amchem*: no flexibility could be read into the Rule 23(a) class requirements, even if a strict reading of these requirements meant that few mass tort classes could be certified.

## 2. *Ortiz* Restricts Rule 23(b)

Two years later, the Supreme Court once again refused to bend the rigid class certification requirements and invalidated a Rule

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103. *Amchem*, 521 U.S. at 609.

104. *Id.* at 629.

105. These dual points were emphasized by Justice Breyer in a separate opinion. *Id.* at 630–31.

106. *Amchem*, 521 U.S. at 620.

107. See Noah Smith-Drelich, *The Specific Causation Paradox* (unpublished manuscript) (on file with the author).

108. *Asbestos Exposure and Cancer Risk*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last updated May 1, 2009) (noting that asbestos has been classified as a “known human carcinogen” by the U.S. Department of Health and Human Services).

109. See Smith-Drelich, *supra* note 107.

23(b)(1)(B) asbestos certification.<sup>110</sup> As in *Amchem*, at issue in *Ortiz* was the level of discretion afforded to district courts when interpreting Rule 23's requirements, specifically in the context of mass tort litigation. The district court in *Ortiz* recognized that the defendant, Fibreboard, was being slowly forced into bankruptcy by the litigation, and relaxed 23(b)(1)(B)'s historical limited fund criteria so as to give "the class as a whole . . . the best deal" by allowing Fibreboard "to remain a working enterprise."<sup>111</sup> As in *Amchem*, however, differences within the class—of the sort inherent to mass tort class actions—raised the possibility that there were conflicts of interest within the class. Once again, the Supreme Court insisted that the Rule 23 requirements must be strictly applied, even if it precluded certification of mass tort classes.

Thus, first in *Amchem* and then in *Ortiz*, the Supreme Court "rejected a massive asbestos class action settlement for failing to comport with the requirements of Rule 23 despite claims that the settlement was not only necessary but also substantively and procedurally fair, if not the best that could be achieved."<sup>112</sup> Little question was left as to the future of mass tort class action settlements. The "elephantine mass" of mass torts could not be unraveled within the class action regulatory framework, not even "to avoid delay and expense so great as to bring about a massive denial of justice."<sup>113</sup> Although mass tort class actions can be certified after *Amchem* and *Ortiz*, they rarely are.

#### IV. MASS TORTS IN THE AFTERMATH OF *AMCHEM* AND *ORTIZ*

Deprived of the option of class certification, mass tort defense and plaintiffs' attorneys alike are faced with a choice: either they can litigate tens, if not hundreds, of thousands of cases individually in the court system, or they may look outside the current regulatory

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110. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

111. *Id.* at 882–83 (Breyer, J., dissenting).

112. George M Cohen, *The "Fair" Is the Enemy of the Good: Ortiz v. Fibreboard Corporation and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23, 25 (2000). *Amchem* and *Ortiz* have been followed by *Wal-Mart v. Dukes*. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). While *Dukes* was not a mass-torts case, in *Dukes* the Supreme Court once again insisted on a restricted reading of Rule 23's requirements, even when such a narrow construction had the effect of making certification in cases similar to *Dukes* difficult. *Id.*

113. *Ortiz*, 527 U.S. at 866–67 (Breyer, J., dissenting).

framework for justice. In this context, the emergence of private, contract-driven settlements like the Vioxx Agreement was inevitable.<sup>114</sup>

### A. Settlements and the Vioxx Agreement

*Amchem* and *Ortiz* made the certification of large classes difficult for the resolution of mass torts. In fact, according to a study released in the aftermath of *Amchem* and *Ortiz*, only 22 percent of class actions removed to federal court were ultimately certified.<sup>115</sup> As predicted, courts have been especially skeptical when faced with consumer product classes.<sup>116</sup> Interestingly, although state courts have been perceived as more receptive to certifying nationwide class actions,<sup>117</sup> state courts do not certify classes at a significantly higher rate than federal courts.<sup>118</sup> This is because many state courts follow *Amchem*, and because of the effects of CAFA, which “expanded *Amchem*’s limitation of judicial regulation” by diminishing the impact of certification-friendly state jurisdictions.<sup>119</sup>

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114. The exception to this rule is MDL No. 875, a multidistrict litigation created in 1991 by the JPML to manage the asbestos personal injury and wrongful death cases. *About MDL 875*, U.S. DISTRICT CT. FOR E. DISTRICT OF PENNSYLVANIA, <http://www.paed.uscourts.gov/mdl875a.asp> (last visited Mar. 16, 2013). The MDL has had over 121,000 cases transferred to it, and has settled, dismissed, or remanded over 108,000 of those cases. *Id.*; see also *Multi-District Litigation Funding*, RD LEGAL FUNDING, <http://www.legalfunding.com/eligible-cases/multi-district-litigation-funding/> (last visited Nov. 8, 2014) (providing statistics). However, the rate at which asbestos claims have been resolved—an average of over 4,000 each day, Aricka Flowers, *MDL Judge Could Change the Game of Asbestos Litigation*, SOUTHEAST TEX. REC. (Apr. 17, 2009), <http://setexasrecord.com/news/220607-mdl-judge-could-change-the-game-of-asbestos-litigation>—should raise questions about whether the MDL is sacrificing justice in the name of efficiency.

115. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 605 (2006). But see BOB NIEMIC & TOM WILLGING, FED. JUDICIAL CTR., EFFECTS OF *AMCHEM/ORTIZ* ON THE FILING OF FEDERAL CLASS ACTIONS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (2002), available at [http://www.fjc.gov/public/pdf.nsf/lookup/AmChem.pdf/\\$file/AmChem.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/AmChem.pdf/$file/AmChem.pdf) (finding an increase in the filing of class actions following *Ortiz*).

116. See *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (noting that the Ninth Circuit “has recognized the potential difficulties of ‘commonality’ and ‘management’ inherent in certifying products liability class actions”); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (commenting that, after *Amchem* and *Ortiz*, products liability classes present challenges for certification because they usually involve factual and legal issues that vary from individual to individual).

117. See S. REP. NO. 109-14, at 14 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 14–15.

118. See Willging & Wheatman, *supra* note 115, at 599.

119. See Alec Johnson, *Vioxx and Consumer Product Pain Relief: The Policy Implications of Limiting Courts’ Regulatory Influence over Mass Consumer Product Claims*, 41 LOY. L.A. L.



Thus, after *Amchem* and *Ortiz*, few litigants were able to take advantage of Rule 23 in crafting their settlements. Enter Vioxx. A pain medication shown to substantially increase heart attack and stroke risk, Vioxx may have caused up to 160,000 cases of heart attacks and strokes before it was pulled from the market.<sup>120</sup> However, because the detrimental health effects of Vioxx were exclusively short-term, the number of potential plaintiffs was finite.<sup>121</sup> Although a motion for class certification was filed shortly after Vioxx's withdrawal, it was denied.<sup>122</sup> In denying class certification, Judge Fallon cited "'a vast number of different persons, who took different dosages of Vioxx, at different times' and who suffered widely different injuries from their exposure."<sup>123</sup>

In the absence of class certification, the resulting flood of individual suits filed was massive, "spanning six years and involving the production of over 50 million pages of documents and the taking of more than 2,000 depositions."<sup>124</sup> Defending these suits cost Merck, Vioxx's manufacturer, \$1 million a day, according to press reports.<sup>125</sup>

Moreover, despite winning eleven out of the eighteen "bellwether" trials filed, Merck, facing high punitive damages, was eager to settle. Plaintiffs, too, sought resolution of their cases through settlement. Ironically, even while the evidence strongly supported plaintiffs' general claim that Vioxx caused heart attacks and strokes, plaintiffs found it difficult to prove specific causation, "that *this* Vioxx caused *this* stroke."<sup>126</sup> And the Supreme Court had recently granted certiorari in *Wyeth v. Levine*,<sup>127</sup> which involved the preemption of drug company liability by FDA approval, leaving many plaintiffs' lawyers concerned that the Court was "on the verge of adopting a strong preemption position that would leave plaintiffs

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REV. 1039, 1074–76 (2008) (describing the impact of *Amchem* and *Ortiz* on nationwide class actions). For a complete discussion of how CAFA affects this reform, see *id.*

120. Engstrom, *supra* note 49, at 370 (describing a later, independent study completed by Dr. Eric Topol and published in the *New England Journal of Medicine*).

121. *Id.* at 369–70.

122. *Id.* at 370. Given *Amchem* and *Ortiz*, this denial was thoroughly unsurprising.

123. *Id.* at 370–71 (quoting Judge Fallon's denial of plaintiffs' motion for class certification).

124. *Id.* at 371.

125. *Id.* Ultimately, the costs of defending Vioxx totaled over \$1 billion. *Id.*

126. *Id.* (emphasis in original).

127. 555 U.S. 555 (2009).

empty-handed.”<sup>128</sup> Thus, the Vioxx litigation was an ideal vehicle for an innovative settlement mechanism: everybody wanted to settle. Merck’s announcement of a \$4.85 billion settlement agreement in November 2007 was a welcome relief to plaintiffs’ and defense attorneys alike, as well as the overburdened courts. This settlement bought Merck finality at a relative discount,<sup>129</sup> while providing individual plaintiffs certain remediation for their injuries—which was more than what individual litigation could offer.

This settlement was not a Rule 23 class action settlement, but rather a private contractual agreement made between Merck and the plaintiffs’ attorneys who represented multiple Vioxx-injured plaintiffs. Strikingly, the Agreement required these plaintiffs’ attorneys to recommend settlement to each of their Vioxx clients if any one of their clients signed onto the settlement. Moreover, for any client who decided not to participate in the settlement, the signatory law firms promised “‘to the extent permitted’ by applicable strictures of legal ethics, ‘to disengage . . . from the representation’ of any such dissenting client.”<sup>130</sup> Put simply, a lawyer could “recommend the settlement to all of her eligible clients or to none of them.”<sup>131</sup> Before determining whether to recommend enrollment in the program, an enrolling attorney also agreed to exercise his or her independent judgment in the best interest of each client individually.<sup>132</sup> Settlement amounts were determined by a point system, through which plaintiffs deemed eligible for compensation—not all were—were assigned points based on a combination of factors seeking to approximate the strength and value of the plaintiff’s case. For example, the severity of the plaintiff’s injury, the length of time the plaintiff took Vioxx, the proximity between the injury and the plaintiff’s Vioxx use, and the plaintiff’s personal risk factors were taken into account.<sup>133</sup> Awards

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128. Engstrom, *supra* note 49, at 371. The Supreme Court did not adopt such a position, instead holding 6-3 that the FDA’s approval of the medication did not shield Wyeth Pharmaceuticals from state law liability. *Wyeth v. Levine*, 555 U.S. 555 (2009). The holding was announced nearly two years after the Vioxx agreement.

129. Financial analysts predicted that the cases were worth up to \$25 billion. *A Lot at Stake for Merck in Vioxx Suits*, CNN MONEY (Jul. 12, 2005, 10:27 AM), <http://money.cnn.com/2005/07/11/news/fortune500/vioxx/index.htm>.

130. Engstrom, *supra* note 49, at 372 (quoting settlement agreement).

131. *Id.* at 372–73.

132. *See id.*

133. *See, e.g., id.* at 373–74.

were determined by taking the total points of all claimants and dividing it by the settlement plot. Finally, Merck retained the right to withdraw from the settlement if fewer than 85 percent of the plaintiffs agreed to it. The entire Agreement provided for oversight by Judge Fallon, who agreed to lend his experience and the weight of his office toward ensuring a successful settlement; although, in doing so he was serving as the “Chief Administrator” of the settlement, rather than as a Rule 23 judge.<sup>134</sup> Notably, Judge Fallon was granted significant authority to ensure that the terms of the Agreement were not “prohibited or unenforceable to any extent.”<sup>135</sup> Judge Fallon did not, however, have the use of the full panoply of his judicial powers, such as contempt, to do so.

The Agreement was not bound by class action restrictions, but its terms in large part replicate those found in class action settlements.<sup>136</sup> Why, if they were free to avoid the risk and burden of judicial oversight, did the Agreement’s drafters nevertheless give Judge Fallon “broad power?”<sup>137</sup> Although including such assurances of fairness likely sweetened the settlement deal for plaintiffs, Judge Fallon’s involvement also served a crucial legal function: a sitting judge’s acceptance of the contract’s terms gave the Agreement legitimacy and mitigated what ethical concerns otherwise might have kneecapped the Agreement.

And there were no small number of potential ethical violations associated with the Agreement. Leading ethicists have raised numerous objections to the terms of the Agreement.<sup>138</sup> In particular, Rule 1.16(b) of the Model Rules of Professional Conduct prohibits

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134. Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto §§ 9.2.4, 9.2.5, 16.4.2 (Nov. 9, 2007), available at <http://cdn.levinlaw.com/pdf/Vioxx-Master-Settlement-Agreement.pdf>.

135. *Id.* § 16.4.2; see also *id.* §§ 9.2.4, 9.2.5.

136. See, for example, the terms of the Dow Corning breast-cancer settlement described in ANGELL, *supra* note 97, at 194.

137. Engstrom, *supra* note 49, at 373.

138. See Mark Donald, *Plaintiffs Counsel Disagree Over Ethical Duties in Vioxx Settlement*, 23 TEXAS LAWYER 1 (2007); Erichson, *supra* note 14, at 1002; Johnson, *supra* note 119, at 1088; see also Alex Berenson, *Lawyers Seek to Alter Settlement Over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4; Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer’s Loyalty*, N.Y. TIMES (Jan. 22, 2008), <http://www.nytimes.com/2008/01/22/us/22bar.html>; *Antitrust Objection to Vioxx Settlement*, DRUG & DEVICE L. (Jan. 23, 2008), <http://druganddevicelaw.blogspot.com/2008/01/antitrust-objection-to-vioxx-settlement.html> (describing the ethical problems raised by Professor George Cohen of Virginia, “a particularly vocal critic of the settlement”).

attorneys from withdrawing from representation for an improper reason.<sup>139</sup> The Agreement, however, required signatory lawyers to withdraw from representing any client who did not wish to settle with Merck—which is not a proper reason for withdrawal.<sup>140</sup> Model Rule 1.2(a) requires that attorneys abide by their clients’ decisions,<sup>141</sup> yet the Agreement was made between Merck and the lawyers, and restricted the lawyers’ ability to respond to client concerns. Specifically, the Agreement sought to eliminate the opt-out problem typical to class action settlements; in class action settlements, it is not uncommon for lawyers to encourage those clients with the strongest suits to opt out of the settlement, leaving only those class members with weak claims bound by the terms of the settlement. The Agreement successfully prevented participating lawyers from opting out clients with especially strong claims and less than 1 percent of plaintiffs ultimately opted out.<sup>142</sup> Moreover, Rule 2.1 of the Model Rules requires attorneys to exercise independent judgment,<sup>143</sup> but the Agreement effectively forces attorneys to treat all of their clients as one. Finally, Rule 5.6 prohibits agreements that improperly restrict the lawyer’s right to practice.<sup>144</sup> The Agreement seeks to do just that through its coercive, all-or-nothing provisions. Although many of the attorney signatories likely did not have their decisions constrained by the Agreement’s terms, the Agreement would not have succeeded had it not effectively restricted some of the attorneys who were party to its terms.

Thus, although the Vioxx Agreement appeared to replicate Rule 23, conspicuously absent from its terms was anything approximating 23(a)(4), 23(e)(2), or 23(g): the fail-safes for attorney misconduct. Substantially compounding this problem was the Agreement’s strong

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139. MODEL RULES OF PROF’L CONDUCT r. 1.16(b) (Discussion Draft 1980).

140. That this requirement included the caveat that no lawyer should violate legal ethics in withdrawing from representation is somewhat of an empty assurance; it is a stretch to accept that the Agreement’s terms can be a *proper* reason for withdrawing, and, thus, any lawyer who followed the Agreement’s urging and withdrew may have committed a per se violation of this ethical rule. *See Antitrust Objection to Vioxx Settlement*, *supra* note 138.

141. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (2011).

142. *See Merck Argues Vioxx Case Before U.S. Supreme Court*, MERCK.COM (Nov. 30, 2009), [http://www.merck.com/newsroom/news-release-archive/corporate/2009\\_1130.html](http://www.merck.com/newsroom/news-release-archive/corporate/2009_1130.html) (citing that 99 percent of eligible parties enrolled in the settlement).

143. MODEL RULES OF PROF’L CONDUCT r. 2.1 (2011).

144. MODEL RULES OF PROF’L CONDUCT r. 5.6 (2011).

discouragement of plaintiffs opting out; although the Vioxx Agreement addressed a class best encapsulated by 23(b)(3), it took its lead from the 23(b)(2) mandatory classes. The Vioxx Agreement drafters could thus craft a class favorable to defendants without worrying that its strongest members would opt out and sue separately. Plaintiffs were trapped in an unfavorable class, represented by attorneys who appeared, at times, more accountable to Merck than to their own clients.<sup>145</sup>

Although the structural problems inherent in the Vioxx Agreement were not immediately apparent—this is the first Article to cast light on the Agreement’s ingenious mimicry of Rule 23—the numerous ethical questions were. And yet, only one state’s ethics board issued an opinion on the subject<sup>146</sup>—an informal opinion that appears unlikely to have had any impact on the overall number of signatories to the Agreement: over 99 percent of plaintiffs ultimately took part in the settlement.<sup>147</sup> Judge Fallon’s involvement in the Agreement appears to have given it a sufficient degree of legitimacy to clear its ethical hurdles. The vast majority of settlement payments have been disbursed, and yet no lawyers have faced any sort of reprimand or sanction, let alone disbarment, for their participation.

This is the future of mass tort settlements.<sup>148</sup> After *Amchem* and *Ortiz*, few mass tort prospective classes will meet the rigid Rule 23 requirements for certification. Yet plaintiffs, defendants, and the court system alike all need an efficient model for settlement of these claims. The Vioxx Agreement presents exactly such a model, solving the apparent conflict of maintaining a healthy settlement class without suffering a loss of propriety. Although it was not the first non-class aggregate settlement, the Agreement’s particular contingencies ensured a remarkable degree of all-or-nothing compliance. By contracting with plaintiffs’ attorneys, the defense ensured that all cases, and not merely the weakest ones, were

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145. See, e.g., Donald, *supra* note 138.

146. Conn. Comm. on Prof’l Ethics, Informal Op. 08-01 (2008), available at <http://forctlawyers.com/wp-content/uploads/2008/04/08-01-final-signed.pdf>.

147. *Merck Argues Vioxx Case Before U.S. Supreme Court*, *supra* note 142.

148. This may also be the future of workplace discrimination settlements; the Vioxx model need not be limited to the mass-tort context. There is nothing stopping an employer like Wal-Mart, eager to escape the bad publicity that accompanies workplace discrimination suits, from similarly contracting with plaintiffs’ attorneys to quiet even those claims that appear no longer viable as class actions.

included in the settlement. And although this crucial provision raised serious ethical concerns, by voluntarily building in many of the protections required by class action law—pseudo-judicial oversight in particular—the agreement passed, if not bypassed, ethical scrutiny.

### *B. The (Non-)Deterrence of Vioxx Agreements*

The success of the Vioxx Agreement indicates that the question of “how to legitimize the mechanism of coercion in the advancement of peace” can be answered: by “driving peacemaking toward . . . private contract”<sup>149</sup>—so long, at least, as that contract locks all plaintiffs and their lawyers into the agreement. Other “Vioxx Agreements”<sup>150</sup> may make use of a variety of alternative, creative provisions, but it is not difficult to begin to imagine how they might be structured.<sup>151</sup> One particularly damaging condition of the Vioxx Agreement—its insistence that plaintiffs’ lawyers recommend the deal to their clients and to withdraw if any client declines—is sure to be replicated in future non-class action mass settlement agreements, at least where plaintiffs have no hope of becoming a certified class. Without fear of a viable class action lawsuit, savvy defense attorneys will implement lock-in provisions with greater and greater frequency, knowing that with the right incentive, many plaintiffs’ attorneys will gladly abandon the less-attractive proposition of filing hundreds or thousands of individual lawsuits. Ironically, as such contractual agreements relieve the stress of mass torts on the judicial system, calls for reform of Rule 23 will gradually diminish.

The implications of placing mass tort justice into the calloused hands of the market are serious. When Rule 23 classes—even settlement-only classes—provide at least a potential basis for settlement, plaintiffs have some assurance that Rule 23’s protections and oversight will limit any abuses by either defendants or plaintiffs’ lawyers. Should defendants deviate far from Rule 23 in creating non-

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149. Engstrom, *supra* note 49, at 388.

150. In future references, this Article will use the phrase “Vioxx Agreements” to refer to any such non-class mass settlement that effectively locks plaintiffs’ lawyers and plaintiffs into the settlement group.

151. The Vioxx settlement, with a fixed group of plaintiffs, was in many ways an especially easy case to settle. Future mass-tort settlements may require additional provisions, partially replicating Rule 23(b)(1)(B) or other portions of the class action rule.

class aggregate settlements that undermine the adversarial process, plaintiffs and their more-responsible lawyers will have the safety of Rule 23 to fall back on. Without even so much of a threat of a class action lawsuit, however, defendants have less incentive to stay within Rule 23's bounds in crafting settlements maximally favorable to their interests—and plaintiffs' lawyers will be less able or less willing to effectively combat such settlements. The consequences of such unbound settlements may be serious.

First, problems inherent in the lack of Rule 23(a)'s numerosity-, commonality-, typicality-, or adequacy-of-representation-checks are likely to arise. Defendants will prefer to achieve the broadest arrangements possible and can strategically propose settlements built around their own weak "class" of plaintiffs. Those plaintiffs thrust to the forefront of negotiations may not necessarily have claims typical of the "class" they represent, and lawyers acting on behalf of the "class" will no longer be restrained by Rule 23's oversight to represent the whole "class" adequately. Without judicial enforcement of Rule 23(a)'s checks, defendants will be free to buy finality from disreputable plaintiffs' lawyers with as broad and as weak of a group of plaintiffs as possible.<sup>152</sup> And, in so buying-off the plaintiffs bar, defendants may effectively foreclose the possibility of later strong suits emerging—all at a relative pittance. Given the information asymmetries inherent to mass tort actions, this could have serious access-to-justice implications. Moreover, from a societal perspective, defense attorneys' ability to strategically avoid or diminish Rule 23(a)'s protections will lead to smaller settlement awards and systemic under-deterrence of future harm.

Second, as defendants become more creative in crafting these arrangements, agreements will emerge with terms that do not mirror Rule 23(b). Defendants may choose to structure agreements that provide inadequate notice or effectively do not permit plaintiffs to opt out (just as the Vioxx Agreement did not). This, too, will lead to smaller total recoveries for plaintiffs and systemic under-deterrence, as plaintiffs with strong individual suits who would have opted out if they had been given notice or an opportunity will be grouped in the

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152. See Slater, *supra* note 54. Although it is possible that plaintiffs' lawyers can be similarly "bought off" in the Rule 23 context, the incentive for plaintiffs' attorneys to agree to such ethically marginal arrangements is substantially diminished when a viable alternative exists.

settlement agreement and prevented from seeking any additional remedy.

Third, absent the protection of Rules 23(a), (e)(2), or (g), plaintiffs will lack the assurance that their individual interests will be represented. Not even the Vioxx Agreement provided plaintiffs with protection from their own attorneys, other than an admonition that attorneys should follow their ethical obligations. Thus, the Vioxx plaintiffs' attorneys were free to negotiate settlement awards that benefited their own interests over those of their clients. The very structure of the Agreement itself ensured that not all plaintiffs would be adequately represented, yet a sitting judge acting in a semi-private capacity did nothing to intervene.<sup>153</sup> The powerful financial incentives driving plaintiffs' attorneys to settle quickly will likely lead to substantial under-deterrence in the absence of formal judicial oversight.<sup>154</sup>

Fourth, a proliferation of Vioxx Agreements will put immense pressure on the judges who administer these Agreements. Such additional, non-statutorily-imposed duties could change the nature of the judiciary. Given the unique situations and novel contractual provisions that will begin to emerge, judicial resources may be taxed merely by virtue of judges' learning curve for each new complicated agreement. Furthermore, even as these agreements proffer oversight to judges with one hand, they will take away judicial control with the other. Pre-settlement negotiations often influence, if not determine, the eventual settlement reached, and they are overseen by judges in cases brought before the court—but no such oversight is necessarily provided for by extra-judicial contractual arrangements. Similarly, most judges actively manage cases in their dockets, intervening if it appears that one party's counsel is not adequately acting on behalf of that party's interests, or if some other injustice has occurred. There are also additional mechanisms of judicial control provided by rule,

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153. In fact, Judge Fallon went on the record to describe the settlement as fair and adequate. Although Judge Fallon's oversight may have been similarly ineffective in the Rule 23 context, plaintiffs would have then at least had the recourse of appealing his Rule 23 judgment on the basis that he had failed to adequately enforce Rule 23—an option not available to aggrieved Vioxx Agreement signatories (who could not appeal Judge Fallon's failure to follow Rule 23 as the settlement was not bound by Rule 23).

154. *See supra* Part II.



including oversight of lawyer fees<sup>155</sup> and coupon settlements,<sup>156</sup> and the latitude to reject unfair settlements.<sup>157</sup> None of these are guaranteed by Vioxx Agreements. Thus, more broadly inclusive settlements—and therefore under-deterrence—should be expected to arise along with these non-Rule 23 settlements.

Finally, economic theory predicts that individual plaintiffs, less able to bear the risk of trial and thus more eager to settle, will be disadvantaged in settlement negotiations.<sup>158</sup> In the context of class action litigation, much of this disadvantage is mitigated by the threat of a class action trial, which gives plaintiffs collectively a bargaining chip they otherwise would not individually possess. Here, where *Ortiz* and *Amchem* limit class certification, plaintiffs no longer can make this powerful threat: a plaintiff must either accept a defendant's offer or sue as an individual. Thus, the lack of a credible class action threat gives defendants an advantage additional to the procedural advantages that defendants gain by circumventing Rule 23. This will result in smaller settlement totals for plaintiffs, and also the chipping away of individual liberties normally protected by regulation, as such agreements increasingly push the ethical envelope.

Although judges will continue to be involved in these private contractual settlements so as to alleviate ethical concerns, without the formal protection of Rule 23 and CAFA, defendants are likely to structure these agreements so as to allow themselves greater leeway than would be permitted by the current regulatory framework. Judges play a critical role in checking the destructive cross-incentives affecting plaintiffs' attorneys that would otherwise undermine justice and fairness in class action settlements. Including judicial oversight only to the extent desired by defendants and plaintiffs' lawyers will ensure that plaintiffs—the parties most in need of judicial protection—receive the short end of the stick in settlement negotiations. This will result in not only a substantial loss of plaintiff

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

156. 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006).

157. FED. R. CIV. P. 23. Also, the absence of objectors in Vioxx agreements, *id.*, removes yet another check on the fairness of Rule 23 settlements.

158. *Cf., e.g.*, Proceedings of the Forty-Fifth Judicial Conference of the D.C. Circuit, 105 F.R.D. 251, 290 (1984). (“The plain fact is that, with very rare exceptions, in our culture, parties who are disadvantaged in litigation are even more disadvantaged in alternative-dispute-resolution settings when the courts are closed to them.”).

autonomy but in the systemic under-deterrence of future defendant misbehavior.

Most of these factors are present, to some extent, in any non-class aggregate settlement. Without the threat of a viable Rule 23 class, however, defendants have far more leeway to achieve settlements that favor their interests. The Vioxx Agreement, and its all-or-nothing lock-in provisions, is evidence of how defendants can take advantage of non-class settlement structures in circumstances where no Rule 23 class is viable.

#### V. WE NEED NOT “SETTLE” FOR VIOXX AGREEMENTS

Fortunately, there are several possible resolutions to this looming problem. One is to turn to the parties responsible for approving these arrangements for help: judges. By refusing to participate as administrator of Vioxx Agreements, judges would avoid lending legitimacy to these problematic arrangements.<sup>159</sup> Even judges who are not personally involved in administering settlement agreements could help by refusing to enforce settlement contracts with problematic clauses. Such actions would help stem the damage from Vioxx Agreements. But they do not present a panacea: without broader systemic changes, untoward settlement practices would likely continue outside of the occasional settlement-unfriendly district.

Another option is to look to the rulemakers for change. A legislative solution could help provide that needed systemic change and prevent the injustice and under-deterrence that will accompany a proliferation of Vioxx Agreements. Doing so, however, risks disturbing the Rules’ careful calibration of the interests of plaintiffs, defendants, and society, not to mention the balancing of efficiency and justiciability inherent in Rule 23. More crucially, legislative reform requires a legislature willing and able to act. Given the current political climate of inaction, a legislative solution unfortunately thus remains a long shot.

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159. And it bears repeating: judges *should not* participate in such arrangements. Any judge who participates in her official capacity may be participating in coercing settlement, in violation of Canon 3(A)(5) of the Code of Conduct for United States Judges and its accompanying commentary. A judge who acts in her unofficial capacity may be moonlighting as a private arbitrator in violation of Canon 4(A)(4) or as an administrator in violation of Canon 4(E). Code of Conduct for U.S. Judges Canon 3(A)(4)–(5), 4(E) (2003).

There is another broad-sweeping solution on hand, one that does not rely on the slow-moving and overly-politicized involvement of legislators: jurisdictions can attain closer-to-optimal mass tort deterrence, even in the absence of permissive class certification, by aggressively sanctioning the plaintiffs' attorneys who do not act in the best interests of their clients in settling outside of Rule 23's protections.<sup>160</sup> And unlike a change brought about by individual judges' refusal to participate in Vioxx Agreements, a sanction-based solution may be accomplished in just one or two fell swoops: it is the *threat* of reprimand, sanction, or disbarment that will serve as a substantial counterweight to the financial incentives driving plaintiffs' lawyers to fail to act in the best interest of their clients. Thus, sanctions need only be threatened in a small handful of high-profile instances to effect a change in the settlement of non-class mass actions. Ethics regulators and public interest groups need only see judicial involvement in non-class mass settlement for what it is—defendants' clever attempt to cloak problematic arrangements in the shroud of the judge's legitimacy—and actively pursue those ethics violations that will necessarily accompany the new generation of Vioxx Agreements.

The remainder of this Article will discuss this proposal.<sup>161</sup> Part V begins by outlining how regulation of Vioxx Agreements would work, starting by exploring what sanctions will be effective (V.A), turning then to discuss when and where sanctions should be implemented (V.B), and finally identifying who should regulate Vioxx Agreements (V.C). Part V then concludes with a discussion of why this proposal should be implemented (V.D).

### A. *Deterring Unethical Vioxx Agreements*

What must be done to deter Vioxx Agreements? This initial question may also be the easiest. Because the function of sanctions in the context of this proposal is to motivate plaintiffs' lawyers to zealously represent their clients, *any* action that discourages ethics

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160. Defense attorneys and state court judges should also be sanctioned for participation in problematic Vioxx Agreements (for, respectively, proposing and approving such problematic arrangements). Article III limits the consequences that may be directed at federal judges.

161. To my knowledge, no other scholarship has considered using ethical sanctions to influence the deterrence value of tort law, let alone in this context.

violations (at least of the sort that relate to zealous representation) will be effective. This could include fines, limitations on practice, and disbarment, as well as reprimands from either the bench or from ethics committees. So long as the consequences are sufficiently unpleasant to adequately deter, it does not matter exactly what that punishment is.<sup>162</sup> It is even possible that news coverage of settlements or outreach by public interest groups could have an impact on the ethical quality of the plaintiffs' bar in this context, whether such public efforts would shame lawyers into better practices or whether lawyers would cease unethical behaviors for fear of losing future clients and referrals.<sup>163</sup>

The effects of such public shaming, however, would be limited by many plaintiffs' ignorance as to their lawyer's qualifications. Fortunately, state bars can help here too, with requirements that every attorney advertisement publicize a local ethics hotline and include notice of any sanctions against that attorney. When consumers know not only that Larry "The Hammer" Rangler will "fight for YOU," but have a number to call when Larry seems to be cheating them (and the knowledge that he has been sanctioned on three previous occasions), plaintiffs' influence in discouraging problematic lawyering, and therefore in balancing the tort law deterrence equation, will grow.

Moreover, because the primary goal of these sanctions is deterrence, rather than retribution or corrective justice, it is possible that as few as a handful of high-profile, highly punitive sanctioning actions will be sufficient to bring plaintiffs' lawyering back into compliance with the Model Rules in the context of Vioxx Agreements. Should plaintiffs' lawyers become widely aware that the consequence for their failure to zealously represent the best interests of *all* of their clients could be disbarment or sanction, deterrence may follow even if draconian penalties are only used a handful of times. Thus, the actions of only a small handful of ethics

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162. This flexibility also means that a state bar short on funding can use fines to support its ethics enforcement.

163. The small group of elite plaintiffs firms that repeatedly handle large class actions would be most impacted by such measures: reputation, for these firms, is a valuable business commodity insofar as it ensures that they will continue to be appointed lead counsel in large mass actions. Because of the importance of reputation to these firms, however, they are also less likely to engage in these problematic practices in the first place.

regulators<sup>164</sup> may be sufficient to successfully enact this Article's proposed reform; punishing only even the most egregious of conduct may be enough to solve the underlying problem—so long, of course, as the word gets out.

### *B. Deterring Only Unethical Vioxx Agreements*

Ensuring that it is predominantly *unethical* behavior that is deterred is, unfortunately, somewhat more challenging. Not every aggrieved plaintiffs' claim should become a publicity spectacle, nor should every ethics complaint be prosecuted; there are many excellent plaintiffs' lawyers who do consistently act in their clients' best interests. Blindly punishing those who engage in non-class mass settlements will stifle creativity among even well-meaning lawyers, potentially bringing mass settlement to a halt in the context of mass torts.

So when and where should regulators act? Which mass tort settlement agreement terms and what lawyer behaviors should raise the hackles of potential regulators? This is no easy question, and the subtleties of its answer must ultimately be played out on a case-by-case basis by ethics regulators. Fortunately, Rule 23 presents a handy guide as to what constitutes a fair settlement structure, and it may serve, at least, as a starting framework for potential regulators rooting out problematic settlement terms. As this Article extensively discussed in Part II, Rule 23 carefully balances the involved parties' interests in efficiency, fairness, and finality together with society's interest in deterring future accidents.

Should defendants be permitted to craft a non-class action aggregate settlement "class" that includes a small number of strong claims with a predominantly weak "class" that defines the recovery (in violation of Rule 23(a)(2)'s commonality requirement), the result will be a settlement that is both unfair to those plaintiffs with stronger claims and insufficient to properly deter future mass torts.<sup>165</sup> This same injustice could result if such a "class" included named plaintiffs whose claims were atypical of the "class" as a whole (in

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164. See *supra* Parts IV, V.A, for a discussion of the ethical violations inherent in Vioxx Agreements.

165. See *supra* Part IV.

violation of Rule 23(a)(3)'s typicality requirement).<sup>166</sup> And, in addition to the already-discussed risk of "sweetheart" deals propagating in the absence of judicial oversight over plaintiffs' lawyers,<sup>167</sup> agreements that elevate less-competent plaintiffs' lawyers to the position of lead counsel for the purposes of attaining defendant-favorable terms (in violation of Rule 23(a)(4)'s adequacy of representation requirement) could similarly result in smaller total settlements and less overall deterrence. Potential regulators should therefore be very suspicious of any proposed non-class aggregate settlement with terms that would not pass scrutiny under Rule 23(a).<sup>168</sup>

But most troubling would be agreements made in violation of Rule 23(b). Rule 23(b) restricts no-opt-out classes to a very particular set of circumstances and is therefore especially critical to ensuring fairness in non-class mass settlements.<sup>169</sup> If settlement groups best described by 23(b)(1) or 23(b)(3) (both of which permit opt-outs) are effectively prohibited from opting out from the agreement—as was the case for the Vioxx Agreement<sup>170</sup>—smaller settlements and substantial injustice could result. Particular scrutiny should be devoted to these so-called "Vioxx Agreements": non-class aggregate settlements that seek to prevent opting-out in circumstances where injunctive relief is not sought.

One final characteristic that should prompt scrutiny is an agreement's lack of meaningful neutral third-party oversight to the settlement (thereby implicitly violating any of the numerous provisions in Rule 23 indicating that oversight and enforcement is provided by "the court"). As obviously problematic as this may seem, it would not even be unprecedented: for example, BP placed its *own employee* in the role of the "neutral" arbiter in disbursing the Gulf Coast Claims Facility funds following the Deepwater Horizon spill.<sup>171</sup> There are many different forms that such a problematic

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166. See *supra* Part II.C.1.

167. See *supra* Part II.B; see also Coffee, *supra* note 8, at 883 (discussing the implications of "sweetheart" settlements).

168. See *supra* Part II.C.1.

169. See *supra* Part II.C.2.

170. See *supra* Part II.C.2. For a discussion of the Vioxx Agreement's "all or nothing" clause, see, *supra* Parts IV.A, IV.B.

171. See, e.g., Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims*, 71 LA. L. REV. 819, 838 (2011) (describing many of the

characteristic of an agreement could take, but ethics regulators would be well-advised to look closely at any agreement made and disbursed outside of the supervision of a neutral arbiter who effectively possessed most of a judge's tools for ensuring fairness.

So long as potential ethics regulators reserve sanction for those agreements that fail to adhere to Rule 23's guidelines, sanctioning would-be crafters of the next Vioxx Agreement will prevent abuse of non-class mass settlements without stifling settlement altogether. Thus, sanctions and the free market can fill the need for fair and adequate mass settlement where Rule 23 class actions are no longer permitted or appropriate.

### C. *Finding Accountability's Administrators*

Having described *what* will deter untoward Vioxx Agreements, and *when* and *where* deterrence should be applied, this Article completes its analysis of how to defer Vioxx Agreements by exploring *who* these regulators should be. There are two primary challenges to effective ethics regulation in such a context: (1) identifying effective ethics regulators, and (2) motivating these regulators to actually regulate. Entire law review articles have been devoted to the topic of ethics enforcement. This Article will therefore not attempt to provide a comprehensive map to ethics reform—that must be the subject of a different article—but will rather briefly outline who could feasibly regulate Vioxx Agreements.

#### 1. Who Are the Ethics Regulators?

The lax enforcement of ethics rules is a widely known and well-discussed problem.<sup>172</sup> State ethics committees were tasked with enforcing the rules implicated by the Vioxx Agreement itself, and yet did little to insist on strict ethical compliance. Fortunately, ethics committees are not the only entities with the knowledge, motivation, or authority to uphold the ethical practice of law; judges, too, can be ethics regulators. Unfortunately, judges also are reluctant arbiters of

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problems underlying the structure of the Deepwater Horizon claims resolution process, including Kenneth Feinberg's disputed "neutral" role as Master of this fund).

172. See, e.g., Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819, 825–26 (2004); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 707 (1998).

ethics violations and act infrequently in the face of potentially sanctionable or referable conduct. There is a third potential means by which ethics regulation may be achieved: if breaking ethical rules is a bad business proposition, lawyers will self-regulate. Thus, the public at-large, through the influence it exerts on prospective clients, provides some regulating force on plaintiffs lawyers.

There are a number of explanations for why effective ethics regulation does not currently spring from any of these sources.<sup>173</sup> Two primary reasons for this non-regulation, each implicated by Vioxx Agreements, are precedent and transparency. First, judges and ethics committees are predominantly lawyers, and are therefore trained to defer to precedent. Even though ethics precedent is generally not binding, judges and committees are lax ethics enforcers because—in part—lax enforcement is the norm.<sup>174</sup> Neither judges nor ethics committees wish to be accused of inconsistency or favoritism in their enforcement, and the rare use of sanctions has rendered what should be a regular practice an exception instead. Second is the transparency problem: ethics committees can only discipline infractions that are brought to their attention. As the academic literature has recognized, a substantial obstacle to ethics enforcement is the identification of potential violators: “Only after the identification function is improved are prosecutorial and adjudicatory procedures and policies of primary importance. Without adequate information input, the system cannot attend to, because it does not know about, the majority of instances of lawyers’ misconduct.”<sup>175</sup> Consequently, a lack of transparency regarding potential rules-breaking will hamper the effective regulation of ethics rules.

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173. At least, in general. Some judges and ethics committees are, of course, stricter than others.

174. See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 470 (2001) (describing the absence of regulation that has defined the majority of the practice of law).

175. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 1005 (1976); see also AM. BAR ASS’N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 168 (1970) (discussing the problems caused by the failure of attorneys and judges to report misconduct); E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers’ Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95 (1976); Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 282 (1970).



Ethics committees primarily receive information regarding ethics violations from three sources: (1) the lawyers' clients, (2) the public, or (3) another lawyer.<sup>176</sup> Of these sources, lawyers' clients—usually plaintiffs—contribute a substantial proportion, if not an outright majority, of all ethics references.<sup>177</sup> Unfortunately, although references from plaintiffs are key to ethics committees, plaintiffs often understand little about the law, their case, or their lawyers, and are therefore rarely empowered to demand change.<sup>178</sup> And because class action lawyers typically solicit potential plaintiffs, and not vice-versa, market pressures from discerning plaintiffs are only a weak influence on lawyer behavior.<sup>179</sup> Similarly, neither the public at-large nor other lawyers constitute a significant check against unethical behavior. The public usually lacks both the knowledge and the will to refer violating lawyers to ethics committees.<sup>180</sup> And lawyers generally choose not to report potential ethics violations: lawyers are uniquely able to “rationalize a breach as less than substantial by some defensible theory,”<sup>181</sup> have a sense of solidarity with their colleagues on the bar,<sup>182</sup> and are influenced by society's stigmatization of whistleblowers.<sup>183</sup> Thus, very little pressure currently exists to regulate potential ethics violators. But fortunately, as will be discussed, there are several parties who are in a strong position to monitor Vioxx Agreements.

## 2. How Do We Motivate Regulators to Regulate?

These obstacles present a practical problem for this Article's normative proposal; that strict ethics enforcement is advantageous

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176. John Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 103 (1982). Levy also discusses a fourth potential avenue of reference: some sort of legal professional law enforcement. However, as there is currently no ethics police, this final avenue for ethics references will be tabled for the remainder of the present Article; although an ethics police could be an ideal means of (un)ethical references of Vioxx Arrangements, it remains strictly hypothetical.

177. *Id.*

178. *See id.*

179. Coffee, *supra* note 8, at 886.

180. Levy, *supra* note 176, at 103.

181. “In common parlance and even in law review articles, pejorative terms such as ‘squeal,’ ‘rat,’ ‘stool pigeon,’ and ‘gestapo’ are used freely.” *Id.* at 104–05 (noting also that “The Clark Report found ‘outright hostility’ from the practicing bar toward disciplinary enforcement”).

182. Levy, *supra* note 176, at 104.

183. *Id.*

does not necessarily mean it is feasible. But all hope is not lost! The novel structure of Vioxx Agreements mitigates at least some of the existing major bars to effective ethics regulation. This Article does not propose that the structure of such Agreements, alone, subjects Agreements to sufficient regulation: as the Vioxx Agreement itself demonstrates, the market is not currently self-regulating. Rather, as this section explains, the reforms proposed in this Article are attainable, should motivated regulators or public interest groups desire to pursue such change.

First, the novelty of Vioxx Agreements should diminish the limiting effect precedent has on effective ethics regulation. The emergence of a new category of settlement presents an opportunity for ethics regulators—whether they are ethics committees or judges—to engage anew. There has not yet been a sufficient propagation of Vioxx Agreements for either precedent or reputation to develop, so regulators may regulate Vioxx Agreements without feeling that they are disregarding precedent or fearing that they will be accused of inconsistency or favoritism.

Second, the unusual and novel structure of Vioxx Agreements should attract greater scrutiny from ethics committees, judges, other members of the bar, the public at large, and even the claimants themselves. The information limitation on regulators' ability to regulate, therefore, will be less of a bar to ethics scrutiny in the context of Vioxx Agreements than it might be in other contexts; regulating lawyers and judges will be more predisposed to suspicion of these unusual settlements than more staid forms of settlement, and will presumably hesitate less to refer potential violators for sanction. The public, in turn, is more likely to be engaged, as the novel legal structures applied should attract greater press attention<sup>184</sup>—although engagement from uninvolved parties is likely to remain low. Finally, the mass nature of these settlements effectively guarantees that *some* claimants will believe that they have received the short end of the stick. And, especially if ethics regulators become a more involved presence in the context of mass settlement, a number of these newly

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184. Soo Yeon Hong, *Gatekeeping of News Releases: The Gap Between the Selection and the Prominence of News Releases*, ALLACADEMIC RES., 1 (2007), available at [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/7/2/8/6/pages172866/p172866-7.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/7/2/8/6/pages172866/p172866-7.php) (noting that “unexpectedness” is a major factor in newsworthiness).

minted complainants will inevitably find their way to ethics committees.

In fact, many of these effects have already begun to manifest as ethics regulators have thus far been relatively, albeit still insufficiently, engaged in overseeing novel settlement arrangements. State ethics committees have shown an increasing willingness in recent years to sanction plaintiffs' attorneys who abuse their clients' trust in the context of mass tort settlements,<sup>185</sup> and judges have shown a similarly increased willingness to police plaintiffs' attorneys who do not act in the best interest of their clients.<sup>186</sup> A bar of attorneys specializing in challenging improper settlements, even, has begun to emerge.<sup>187</sup>

This is not to say that disciplinary committees or other potential regulators are sure to act in this context. What will most likely happen is more of the same.<sup>188</sup> And the scrutiny currently being applied to Vioxx Agreements falls far short of that necessary to effectuate the reform proposed in this Article. But this Article is not merely descriptive but normative. What *should* happen is more regulation of Vioxx Agreements. And as this Article has described, the reaction of lawyers and judges to novel settlements thus far does show potential for sufficient reform. Even a single action could get regulators' attention and jump-start the institution of effective measures. This could take the form of a high-profile sanction or something more unusual—such as a civil suit filed by plaintiffs or some federal involvement, such as a criminal prosecution of the settling lawyers or an investigation of a settlement agreement by a

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185. See, e.g., Jon Newberry, *Stan Chesley "Counsel in Chief" in Fen-Phen*, CINCINNATI BUS. COURIER (Jun. 17, 2011), <http://www.bizjournals.com/cincinnati/print-edition/2011/03/04/stan-chesley-counsel-in-chief-in.html?page=all>.

186. In fact, it was the threat of judicial action, in part, that likely motivated Judge Fallon's involvement in the Vioxx Agreement.

187. See, e.g., *Chicago Lawyers for Cases Involving Insufficient Settlements*, SCHIFF GORMAN LLC, <http://www.sgattorneymalpractice.com/Legal-Malpractice-Services/Insufficient-Settlements.shtml> (last visited Oct. 2, 2003); *Improper Settlement*, FLORIDA MALPRACTICE LAWS., <http://www.sdtriallaw.com/PracticeAreas/Improper-Settlement.asp> (last visited Aug. 24, 2014); LEGAL MALPRACTICE LAW., <http://www.legal-malpractice-law.com/improper-settlement/> (last visited Oct. 2, 2013).

188. The track record of disciplinary authorities in other high-stakes areas leaves much to be desired; despite the problems that have emerged in corporate practice, for example, authorities have done little.

consumer protection agency.<sup>189</sup> Sufficient regulation is, therefore, within reach;<sup>190</sup> with some additional will, a sufficient regime of sanctions may be enacted.

#### D. Accountability's Advantages

Thus far this Article has presented a problem and a solution. In closing, it will briefly discuss not merely *how* this solution should be adopted, but *why* it should. Why is it that sanctioning plaintiffs' lawyers will remedy the problems that have begun to arise from *Amchem* and *Ortiz*'s restriction of Rule 23 certification? Nearly all of the structural problems that arise in the absence of Rule 23's protections are due to breakdowns in plaintiffs' representation and the cross-incentives facing plaintiffs and their attorneys.<sup>191</sup> Zealous advocacy from the plaintiffs' bar will close much of the gap between those resolutions that are made within the confines of Rule 23 and those that are made without.<sup>192</sup>

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189. See Ted Frank, *George Cohen's Letter to the FTC Re the Vioxx Settlement*, POINTOFLAW.COM (Jan. 22 2008, 12:11 PM), <http://www.pointoflaw.com/archives/004680.php#4680> (arguing to the FTC that the Vioxx Agreement was an antitrust violation because the participating lawyers were effectively conspiring to refuse to represent lawyers who opted out of the Agreement).

190. As was previously noted, see *supra* note 160, one other ripe target for regulation may be the *defense* attorneys who propose these problematic arrangements. A sophisticated mass-tort defense bar has arisen, and a small number of firms dominate products liability mass-tort defense. Even a single sanction or reprimand, therefore, could have a significant impact on the practices of these lawyers. Although the legal or ethical obligations of defense lawyers to only participate in agreements that preserve the rights of plaintiffs may not be as strong as that of plaintiffs' lawyers, ethical regulators may nevertheless be able to hold defense lawyer drafters of problematic agreements responsible. See, e.g., Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 388 (2002) (noting that "[d]rafting the instrument effecting the harm is the step beyond advice that would expose the lawyer to possible liability for the consequences of misdeeds in which he or she actively participated"); Alvin B. Rubin, *A Causerie of Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 588 (1975) (noting that lawyers have no right to right or duty to assist a client in unconscionable conduct); see also Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 686 (1978) ("In measuring the possible liability for lawyers who write standard form contracts, it is important to distinguish between advising a client that a particular term in a form contract might not be unconscionable and serving the client by drafting an unconscionable provision intended to impede enforcement of citizens' rights.").

191. See *supra* Part IV.B. Defense lawyers are no less responsible for these problems. And as has been discussed, sanctions directed at defense lawyers will similarly be effective in curbing problematic practices. See *supra* notes 160, 190. But because defense lawyers' responsibility may not extend to the formal ethical or legal arena, discussion of this Article's proposal will focus primarily on the impact on plaintiffs' lawyers.

192. As has been discussed, sanctioning defense lawyers or state judges would be a similarly effective, albeit a more difficult to enact, remedy. See *supra* note 160.

First, plaintiffs' attorneys will resist the formation of settlement classes that hide the claims of strong plaintiffs behind weak or unrepresentative named plaintiffs if the price for their lackluster representation is disbarment. This will motivate plaintiffs' lawyers to push for the most favorable possible class composition for their clients, contributing to a healthy dialogue that will better inform supervising judges of the varying interests implicated by the class structure. Any lawyer failing to adequately represent her client in this manner would risk violating a number of the Model Rules of Professional Conduct, including the conflicts of interest rules (1.8),<sup>193</sup> counselor rules (2.1),<sup>194</sup> and the Rules' general requirement of zealous advocacy.<sup>195</sup> Rule 23(a) may not be entirely resurrected in such non-Rule 23 agreements by the threat of mere sanctions alone, but the heart of its protections would be essentially preserved.<sup>196</sup>

Second, plaintiffs' attorneys facing a severe regime of sanctions will not hesitate to opt out of agreements unfavorable to their clients' interests. In addition to the Model Rules implicated when Rule 23(a) is not applied, plaintiffs' lawyers who fail to opt their clients out of unfavorable settlements that would otherwise fall under Rule 23(b) likely violate the rules requiring the exercise of independent judgment (2.1) and unrestricted practice (5.6).<sup>197</sup> Although the heightened requirements of 23(b)(3) could be difficult to replicate with sanctions alone, Rule 23(b)'s protections may at least be partially organically recreated by ensuring adequate representation.<sup>198</sup>

Third, the structural oversights provided by 23(e)(2) and (g) that prevent attorneys from taking advantage of their clients will be far less necessary if there are sanctions motivating faithful advocacy.<sup>199</sup> Rather, an aggressive regime of sanctions would largely—if not entirely—supplant any formal protections from the greed of

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193. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.8 (Discussion Draft 1980).

194. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 2.1.

195. See, e.g., *id.* at Preamble.

196. See *supra* Part II.C.1.

197. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 2.1, 5.6 (2011).

198. See *supra* Part II.C.2. There will likely remain some issues associated with resolving limited-fund settlements where the fund really is limited. Bankruptcy may prove to be a superior tool for such circumstances. See Troy McKenzie, *Towards a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012).

199. See *supra* Part II.C.3.

plaintiffs' lawyers. A plaintiff's lawyer operating in her own best interest would not lead her client astray were she faced with a reasonable possibility of severe punishment for her actions.

Fourth, although sanctions may not decrease the use of Vioxx Agreements, they could simplify the administration of such private arrangements. Faced with a real possibility of discipline, the lawyers structuring these agreements will be more likely to follow the tested and established guidelines of Rule 23. This will not merely increase the equitability and deterrence value of non-Rule 23 settlements, but will require judges to come to terms with far fewer novel or creative structures. Moreover, plaintiffs' lawyers will insist on more active judicial management of these arrangements, and overseeing judges will oblige, preferring their names not be associated with sanctioned arrangements. This will therefore simultaneously decrease the strain of overseeing novel non-Rule 23 arrangements on the judiciary while increasing the judiciary's ability to effectively manage and police those private arrangements.

In sum, although these changes may not impact the economic disadvantages to plaintiffs inherent in the Supreme Court's limiting Rule 23 jurisprudence—since plaintiffs' threats of litigation and trial will continue to have less credibility<sup>200</sup>—for the reasons described, this Article's proposal will significantly improve our current sanction-less world of Vioxx Agreements. Assuring plaintiffs adequate representation will go a long way to ameliorating the injustices that plaintiffs will otherwise face outside of Rule 23, and it will restore much of the deterrence power of group litigation. Plaintiffs' attorneys acting in the best interest of their clients will refuse to sign on to agreements that create plaintiff classes that disadvantage those participating in a manner prohibited by Rule 23(a). Similarly, plaintiffs' attorneys will steer plaintiffs clear of class agreements prohibiting opt-outs in situations other than those encapsulated by Rule 23(b)(2). Although some deterrence value will remain lost, due to the diminished bargaining position of plaintiffs who cannot threaten a class action lawsuit, aggressive sanctions against plaintiffs' lawyers will close much of the remaining gap between such extra-judicial agreements and Rule 23 settlements.

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200. See discussion *supra* Part IV, p. 37.

This is the lesson learned from the Fen-Phen litigation. In Kentucky, before any national class action settlement could be negotiated, state courts certified a 400-plaintiff class.<sup>201</sup> To avoid the prospect of a costly trial, Wyeth Pharmaceuticals negotiated a settlement with a number of plaintiffs' attorneys, agreeing to a \$200 million settlement supervised by a Kentucky judge. The judge, however, was too close with the plaintiffs' attorneys and accepted an agreement that gave nearly half of the settlement to just three lawyers as attorney fees.<sup>202</sup> Ultimately, the judge was disbarred and two of the attorneys were convicted of defrauding their clients.<sup>203</sup> Although the Kentucky Fen-Phen settlement may have been a failure, the message it sent to attorneys was clear: settle in your own interests at your own peril.<sup>204</sup> Thus, the Fen-Phen failed settlement was a sweeping success for the management of a just judiciary. But even more aggressive management of lawyers is necessary in the context of non-Rule 23 mass settlements, not merely due to the possibility of ethical transgressions, but due to the inevitable impact that the loss of Rule 23's protections will have on the deterrence value of mass settlements outside of the formal class action framework.

Fortunately, inadequacies in representation need not rise to the level seen in the Fen-Phen litigation before sanctions may be used; jurisdictions seeking to crack down on under-detering Vioxx Agreements do not need to look far to find attorney ethical violations. The Vioxx Agreement was remarkably well-crafted yet, as previously discussed, it implicated Rules 1.16(b), 1.2(a), 2.1, and 5.6 of the Model Rules of Professional Conduct.<sup>205</sup> Other privately crafted agreements will likely implicate additional ethical rules.<sup>206</sup>

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201. Joe Tort, *Kentucky Fen-Phen Lawyers Given Long Prison Sentences*, MASS TORT LITIG. BLOG (Aug. 18, 2009), [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/2009/08/kentucky-fenphen-lawyers-given-long-prison-sentences.html](http://lawprofessors.typepad.com/mass_tort_litigation/2009/08/kentucky-fenphen-lawyers-given-long-prison-sentences.html).

202. Debra Cassens Weiss, *Former Judge Disbarred for Approving Fen-Phen Settlement Without Checking the Details*, ABA J. (Oct. 28, 2011, 9:43 AM), [http://www.abajournal.com/news/article/former\\_judge\\_disbarred\\_for\\_approving\\_fen-phen\\_settlement\\_without\\_checking\\_t/](http://www.abajournal.com/news/article/former_judge_disbarred_for_approving_fen-phen_settlement_without_checking_t/).

203. *Id.*

204. David G. Arganian, *The Cautionary Tale of Plaintiffs Attorney Stan Chelsey*, L. OFFS. OF DAVID ARGANIAN, <http://dwi-counsel.com/news/21.htm> (last visited Sept. 30, 2012) (describing how one of the disbarred attorneys has long been a controversial figure in the mass-tort world due to his predilection for "elbow[ing] his way into cases and then settl[ing] them too early").

205. *See supra* Part IV.

206. Such as MODEL RULES OF PROF'L CONDUCT r. 1.7, 1.8, and 5.4—as discussed above.

By seeking significant sanctions as well as disbarment for ethical violations, localities would go a long way toward discouraging lawyers from contracting with defendants in ways adverse to their clients' interests, a practice that could even itself be barred outright. This solution will allow Vioxx Agreements to continue to meet the needs of group litigation—curtailing extrajudicial group dispute resolution will leave plaintiffs' injuries unremunerated and defendants unable to ensure finality, and will produce negative societal externalities<sup>207</sup>—without substantially sacrificing group litigation's deterrence value. By ensuring that the hard-working and creative attorneys crafting these agreements adhere to the spirit of Rule 23, the threat of sanctions will facilitate non-class mass settlements in the free market that match, or even exceed, Rule 23 in protecting the various interests of defendants, plaintiffs, and society.

## VI. CONCLUSION

As the Supreme Court takes ever more restrictive positions with respect to Rule 23 class certification, mass tort settlements will continue to move toward private contractual arrangements like the Vioxx Agreement. Ironically, although *Amchem* and *Ortiz* represented an unequivocal victory for proceduralists, the emergence of Vioxx Agreements in the aftermath of the Supreme Court's Rule 23 jurisprudence will do far more procedural damage than the pre-*Amchem* and *Ortiz* jurisprudence ever could.<sup>208</sup> Although ensuring a healthy settlement class without triggering obvious ethical objections will generally entail the involvement of judges in some capacity, judicial oversight of these private agreements will not as rigorously protect plaintiffs as Rule 23 and CAFA currently do. This is not to say that these regulations effectuate good, or even adequate, protection, but rather that Vioxx Agreements will offer even less. The primary result of this will be the systemic under-deterrence of future harm resulting, in large part, from the inadequate representation of plaintiffs—an unfortunate consequence of insufficient judicial oversight and the elimination of Rules 23(a)(4), (e)(2), and (g). Therefore, the market has provided a solution to mass torts' loss of Rule 23, but it is a solution that itself must be cured.

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207. See *supra* Part II.

208. See, e.g., Issacharoff, *supra* note 14, at 1926–27.



Although a complete revision of Rule 23 could resolve this dangerous consequence of *Amchem* and *Ortiz*, a far simpler solution would be to enforce sanctions against those plaintiffs' lawyers who fail to sufficiently protect classes in non-Rule 23 group settlements. State bar associations, ethics boards, and judges can and should act assertively to prevent inadequate representation and oversight in the non-Rule 23 settlements that will proliferate in the aftermath of *Amchem* and *Ortiz*.