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Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement

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BRINGING AN END TO THE TREND: CUTTING JUDICIAL “APPROVAL” AND “REJECTION” OUT OF NON-CLASS MASS SETTLEMENT

Alexandra N. Rothman* 

In March 2010, Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York rejected a mass settlement between the City of New York and the 9/11 first responders and rescue workers. The settlement was not a class action but some ten thousand individual cases aggregated for efficiency purposes. Nonetheless, Judge Hellerstein, invoking the spirit of Rule 23(e) of the Federal Rules of Civil Procedure, which provides for judicial approval of class action settlement, decided that the initial settlement was not enough, and sent the parties back to the negotiating table. There, the parties reached an amended settlement that Judge Hellerstein later approved. These actions inspired a debate over whether judges have the authority to approve or reject mass settlement absent class certification. This Note continues this discussion, and in doing so, contends that the 9/11 settlement “rejection” and subsequent “approval” was part of a larger trend of judges approving non-class mass settlement, even though the Federal Rules do not sanction such conduct. In examining this trend, this Note discusses three examples of non-class action, multidistrict litigation before turning to the 9/11 litigation and settlement. This Note concludes that judicial approval and rejection of non-class mass settlement, although a pragmatic response to the burdens of mass litigation, is inconsistent with the Federal Rules and the adversarial system.

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INTRODUCTION

A class action is sui generis; a “walks like a duck, quacks like a duck, it must be a duck” analysis cannot be used.¹

In March 2010, Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York rejected a $575 million settlement agreement for the 9/11 first responders and rescue workers.² Calling the settlement “not enough,” the judge sent counsel back to the negotiating

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² See Mireya Navarro, Judge Rejects Deal on Heath Claims of Workers at Ground Zero, N.Y. TIMES, Mar. 20, 2010, at A12. This Note references various court orders from In re World Trade Center Disaster Site Litigation. These documents are available online at http://www.nysd.uscourts.gov/sept11. The settlement agreement applied to three dockets: In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (S.D.N.Y. Feb. 13, 2003) (order establishing master docket), for first responders who worked at the World Trade Center; In re Lower Manhattan Disaster Site Litigation, No. 21 MC 102 (S.D.N.Y. Feb. 13, 2003) (same), for rescue workers who cleared rubbish in surrounding buildings, and In re Combined World Trade Center and Lower Manhattan Disaster Site Litigation, No. 21 MC 103 (S.D.N.Y. Mar. 28, 2007) (same), for claimants who worked at both locations. For clarity, this Note will discuss the 9/11 litigation as one docket, In re World Trade Center Disaster Site Litigation, No. 21 MC 100 (S.D.N.Y. 2010).
table to reach a better deal.\(^3\) Few heads would have turned if *In re World Trade Center Disaster Site Litigation*, the case over which Judge Hellerstein presided, had been brought as a class action. Under Rule 23 of the Federal Rules of Civil Procedure (Federal Rules or Rules), a class action settlement is not binding without judicial approval.\(^4\) *World Trade Center*, however, was a mass, not class, action.\(^5\) It was roughly 10,000 individual cases consolidated under Federal Rule 42,\(^6\) not 23.\(^7\) So what was Judge Hellerstein doing?

This Note suggests that Judge Hellerstein was expanding upon a recent trend in non-class mass litigation where judges have been “approving” non-class mass settlement, even though the Federal Rules do not authorize such a practice. In doing this, judges are altering the dynamics of non-class mass litigation. The judicial motivations behind this practice are admirable; judges seek to resolve complex cases and protect injured claimants. However, reviewing and then approving or rejecting a mass settlement absent class certification stretches the judiciary’s power and stifles litigants’ rights in mass actions.

To highlight this trend, this Note studies three examples of non-class mass litigation—*In re Zyprexa Products Liability Litigation*,\(^8\) *In re Vioxx Products Liability Litigation*,\(^9\) and *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*\(^10\)—before discussing the *World Trade Center* litigation.\(^11\) The first three cases are examples of multidistrict litigation, aggregated across district lines under 28 U.S.C. § 1407.\(^12\) By contrast, *World Trade Center* was consolidated in the Southern District of

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\(^4\) See *FED. R. CIV. P. 23(e)(1)*.


\(^7\) The litigation did not have class action status because the claimants’ injuries varied. See Mark Hamblett, Plan Is Implemented to Resolve Complex Suits in WTC Cleanup, N.Y. L.J. Feb. 25, 2009, at 1 (“[T]he plaintiffs are claiming that exposure to toxic materials in the air and at the site led them to contract some 387 different diseases, ranging from lethal to mildly irritating.”). Therefore, common questions of fact did not predominate. See *FED. R. CIV. P. 23(b)(3)*.

\(^8\) MDL No. 1596 (E.D.N.Y.).

\(^9\) MDL No. 1657 (E.D. La.).

\(^10\) MDL No. 05-1708 (D. Minn.).

\(^11\) *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (S.D.N.Y. 2010).

\(^12\) See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 398 F. Supp. 2d 1371 (J.P.M.L. 2005) (transfer order); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (same); *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 314 F. Supp. 2d 1380 (J.P.M.L. 2004) (same); see also 28 U.S.C. § 1407 (2006) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).
New York under Federal Rule 42.\textsuperscript{13} Despite this difference, all four cases involve thousands of individuals brought together outside of Rule 23, and as this Note suggests, outside of the Rule 23(e) mandate that a judge approve any settlement.

As this trend has developed, some scholars have suggested adding a judicial approval requirement to non-class mass settlement.\textsuperscript{14} Indeed, the American Law Institute has proposed a limited form of judicial review when claimants give advanced consent to such a settlement.\textsuperscript{15} These suggestions focus on the parallel concerns that arise in the class action and non-class mass litigation context, and in an attempt to protect claimants, recommend extending a judicial check from the former to the latter. This Note questions the assumption that similarities between a class action and non-class mass action necessitate an expansion of judicial power, especially when a non-class mass settlement remains a private contract.\textsuperscript{16}

Part I of this Note introduces the relevant background on non-class mass litigation. Part I distinguishes the non-class mass action from the class action and presents the recent judge-led trend to link these two forms of litigation under the “quasi-class action” label. Part II discusses various situations, such as the class action, where a settlement is not binding without judicial approval.

Part III presents the trend of judges approving and rejecting non-class mass settlement. This part considers judicial efforts to shape the settlement as well as the judge’s ultimate approval at the end of the process. As much of this practice occurs behind closed doors or beyond court decisions, this part looks closely at court transcripts and judicial orders. Part III examines the justifications judges have offered for their decisions to approve or reject a non-class mass settlement, and ultimately shows that Judge Hellerstein’s

\textsuperscript{13} FED. R. CIV. P. 42(a) (“If actions before the court involve a common question of law or fact, the court may (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”).

\textsuperscript{14} See L. Elizabeth Chamblee, Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements, 65 LA. L. REV. 157, 227–48 (2004) (arguing that transferee judges in multidistrict litigation (MDL) should review post-aggregation settlements using mechanisms similar to Rule 23); Deborah R. Hensler, Bringing Shuts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions, 74 UMKC L. REV. 585, 589 (2006) (urging courts to extend the settlement review and approval process from class actions to non-class mass settlements negotiated at the court’s prompting); Alexandra D. Lahav, The Law and Large Numbers: Preserving Adjudication in Complex Litigation, 59 FLA. L. REV. 383, 432 (2007) (suggesting that “judicial approval should also be required in aggregative settlements under the auspices of MDL judges”); see also Lester Brickman, Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics, 79 GEO. WASH. L. REV 700, 708 (2011) (noting that judicial approval of settlement might curb lawyers’ failure to adhere to Rule 1.8(g) of the ABA Model Rules of Professional Conduct). Rule 1.8(g) mandates that “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement . . . unless each client gives informed consent.” MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2003).

\textsuperscript{15} See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.18 (2010).

\textsuperscript{16} See infra Part IV.A.
rejection and approval of the 9/11 settlement was a foreseeable extension of past practice.

Finally, Part IV presents a procedural argument for why non-class mass settlement should not be subject to judicial approval and rejection. Despite admirable intentions on the part of judges as well as the similarities that may exist between the class action and non-class mass action, the Federal Rules provide that a non-class mass settlement, which is a private contract, is binding without judicial approval. By adding an approval requirement to non-class mass actions, courts misalign the parties and interests in mass litigation, and come precariously close to fundamentally altering the American adversarial system.

I. THE RISE OF THE NON-CLASS MASS ACTION

Non-class mass actions comprise a significant portion of today’s mass litigation. As such, defining the judicial role in non-class mass settlement is a valuable inquiry. Part I introduces the non-class mass action by distinguishing it from its better-known counterpart, the class action. This part then presents the recent judicial practice of labeling non-class mass actions as “quasi-class actions,” and in doing so, extending certain class action elements to this form of mass litigation.

A. The Class Action: A Primer

In the simplest of terms, a class action is a “representative” action. One person files a lawsuit on behalf of others, and the claim proceeds under the theory that everyone is a member of the same class. This mechanism, set forth in Federal Rule 23, allows individuals to protect certain rights they might be unwilling or unable to protect without the class action device. Notwithstanding this benefit, the class action raises a host of due process, collective action, and agency problems.

17. See FED. R. CIV. P. 23(a) (setting out the procedural requirements whereby “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all”).

18. See id.

19. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (describing class actions as a means to vindicate “‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all’” (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. IND. & COM. L. REV. 497, 497 (1969))).

20. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (“[W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”); Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (“[M]embers of a class . . . may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .”)


Court has suggested approaching class actions with restraint,\textsuperscript{23} and recent Supreme Court jurisprudence reflects such restraint.\textsuperscript{24}

To lessen the concerns inherent in class actions, the Rules impose stringent procedural requirements on class certification.\textsuperscript{25} Federal Rule 23(a) sets out four prerequisites for maintaining a class action: the class must be “so numerous that joinder of all members is impracticable,” there must be “questions of law or fact common to the class,” the “claims or defenses of the representative parties [must be] typical of the claims or defenses of the class,” and “the representative parties [must] fairly and adequately protect the interests of the class.”\textsuperscript{26} In addition to these elements, the action must fit into one of three types of class actions defined in Rule 23(b).\textsuperscript{27} Most relevant to this Note are class actions certified under Rule 23(b)(3). This Rule permits class actions for monetary damages where common questions of law or fact predominate.\textsuperscript{28} Non-class mass litigation tends to arise in cases that cannot be certified under Rule 23(b)(3).\textsuperscript{29}

Finally, the relationship among the parties and judge changes after a court certifies a class action. First, the judge overseeing the class action appoints class counsel, who assumes a new responsibility to the entire class.\textsuperscript{30} Second, the judge adopts the role of “guardian” for those absent class members whom the settlement will also bind.\textsuperscript{31}

\textsuperscript{23} See Amchem, 521 U.S. at 629 (“[T]he rulemakers’ prescriptions for class actions may be endangered by ‘those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.’” (quoting Charles Alan Wright, \textit{Law of Federal Courts} 508 (5th ed. 1994))).

\textsuperscript{24} See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (rejecting class certification in a nationwide employment discrimination case); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1756 (2011) (holding that the Federal Arbitration Act preempts state laws prohibiting contracts that exclude class action arbitration).

\textsuperscript{25} See \textit{Fed. R. Civ. P.} 23(a)–(b).


\textsuperscript{27} See id. at 163 (“[A] class action must also qualify under one of the three subdivisions of 23(b).”).

\textsuperscript{28} See \textit{Fed. R. Civ. P. 23}(b)(3).


\textsuperscript{30} See \textit{Fed. R. Civ. P. 23}(g) advisory committee’s note (“[T]he primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligation of counsel to individual clients.”); Parker v. Anderson, 667 F.2d 1204, 1211 (Former 5th Cir. 1982) (“The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit.”).

\textsuperscript{31} See \textit{Weinberger v. Kendrick}, 698 F.2d 61, 69 n.10 (2d Cir. 1982) (“[T]he judge should not regard himself as an umpire in typical adversary litigation. He sits also as a guardian for class members who have not received a notice or who lack the intellectual or financial resources to press objections.”).
B. The Non-class Mass Action

Beyond the procedural confines of Rule 23, there exists an entire body of mass litigation. In these non-class mass actions, each claimant files a lawsuit on his or her own behalf. All claimants are present; unlike class actions, there are no absent class members. Similar to the class action, however, the size of non-class mass litigation prevents many claimants from exercising meaningful control over the litigation. At the federal level, this form of mass litigation can arise through joinder, interpleader, multiparty, multiforum litigation, consolidation, and multidistrict litigation (MDL). At the state level, courts utilize consolidation and centralization provisions to achieve similar results.

Centralization as part of an MDL is an increasingly common method of aggregation, and one that is particularly relevant to the mass actions
discussed in this Note. In 1968, Congress created the Judicial Panel on Multidistrict Litigation (the Panel), and charged the Panel with two tasks. First, the Panel would determine whether civil actions pending in various federal districts involved similar questions of law and fact such that they should be transferred to one district court for pretrial proceedings. Second, the Panel would assign the consolidated proceedings to one district court and judge. The purpose of the transfer was to further the convenience of the parties and to promote the just and efficient conduct of the litigation.

Over time, transferee judges developed a practice of assigning MDL cases to themselves for final judgment. However, in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the Supreme Court invalidated this practice and held that MDL transferee judges must send cases back to the court in which they were originally filed once the pretrial process is complete. Notwithstanding the holding in *Lexecon*, transferee judges rarely return these cases to their original court; instead, eighty percent of MDL cases today settle or are otherwise disposed of in the transferee court itself.

C. The “Quasi-class Action”

The divide between the class action and non-class mass action is not as clear as it may initially seem. Recently, non-class mass litigation has shifted closer to the class action under the judicially-coined label of the “quasi-class action.” Judges have observed that, even though not all mass litigation...
litigation is certifiable as a class action,\textsuperscript{53} the litigation nonetheless shares certain similarities with the class action.\textsuperscript{54} Under the quasi-class action label, judges have taken an increasingly active role in non-class mass litigation, treating non-class mass actions as if they were class actions.\textsuperscript{55} For example, judges have appointed leadership committees of attorneys to coordinate pretrial discovery, controlled the leadership attorneys’ compensation, and capped fees for other counsel.\textsuperscript{56} Judges have also appointed special masters, a tool the Federal Rules contemplate for use in complex cases,\textsuperscript{57} to expedite the litigation and settlement process.\textsuperscript{58} Essentially, judges have extended their equity-based authority from the class action device to the non-class mass action.\textsuperscript{59}
II. JUDICIAL APPROVAL OF SETTLEMENT

Part II provides the relevant background on judicial approval of settlement. In an ordinary civil lawsuit, a plaintiff and defendant may settle an action without court approval. A plaintiff need only file a notice of dismissal with the court, or if the case has moved beyond the preliminary stage, file a stipulation of dismissal signed by all parties. This approach to settlement reflects the judicial system’s appreciation for voluntary settlement. There are, however, special situations, including the class action, where settlement is not binding without judicial approval. This part first discusses the class action settlement. This part then introduces other settlement scenarios that are not binding without judicial approval, focusing in particular on settlement that involves minors or incompetents as well as settlement through consent decree or consent judgment. Finally, this part explains the judge’s role when settlement does not require judicial approval.

A. The Class Action Settlement

Federal Rule 23(e) states that “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” The presiding judge, pursuant to Rule 23(e), must assess whether the class action settlement is “fair, reasonable, and adequate.” The drafters added this language as part of the 2003 amendments to the Rules in an attempt to codify the then-existing case law on Rule 23. Although the circuit courts have devised different tests for meeting the “fair, reasonable, and adequate” standard, Rule 23(e)(2) prescribes that a judge hold a fairness hearing in which class members are

60. See, e.g., Hester Indus., Inc. v. Tyson Foods, Inc., 160 F.3d 911, 916 (2d Cir. 1998) (holding that a settlement and dismissal was effectuated by “mutual agreement of the parties, and did not require any judicial action”); United States v. Miami, 614 F.2d 1322, 1330 (5th Cir. 1980) (“[T]he judge . . . stands indifferent when the parties, for whatever reason commends itself to them, choose to settle a litigation.” (quoting Heddendorf v. Goldfine, 167 F. Supp. 915, 926 (D. Mass. 1958))).


63. See Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969) (“Voluntary settlement . . . is in high judicial favor.”).

64. See Miami, 614 F.2d at 1330 & n.16 (noting that four such special situations are proposed class action settlements, shareholder derivative suit settlements, compromises of claims in bankruptcy court, and consent decrees in antitrust suits).

65. FED. R. CIV. P. 23(e).

66. See FED. R. CIV. P. 23(e)(2).

67. The prior version of Rule 23(e) simply provided that “a class action shall not be dismissed without the approval of the court.” See In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158 (4th Cir. 1991) (quoting FED. R. CIV. P. 23(e) (2002)).

afforded the opportunity to present objections to the settlement. The judge then decides whether or not to approve the settlement.

The Federal Rules mandate that a class action settlement is not binding without judicial approval in order to protect absent class members from unfair settlement. A settlement in a class action, unlike ordinary litigation, has the potential to bind absent class members without their approval. Therefore, a judge is needed to ensure that the settlement is fair. In this capacity, the judge is not a mere “umpire in typical adversary litigation.” Instead, a judge “sits also as a guardian for class members.” Courts have gone as far as describing the judge as a “fiduciary of the class.” Some academics have resisted this classification, instead urging judges to rely on their regular adjudicative abilities when overseeing a class action settlement. Nonetheless, whether fiduciary or not, Rule 23(e) serves as an important backstop in the class action settlement process to ensure that absent class members are adequately protected.

Rule 23(e) also has its limits. The Rule does not, for example, apply to every settlement that is related to a class action. In Rogers v. U.S. Steel Corp., the U.S. District Court for the Western District of Pennsylvania held that Rule 23(e) does not apply to individual settlements with claimants who are also members of a class action. Rogers involved individual settlements for back pay with six hundred African American steel workers. These workers were also members of a class in a pending class action. Non-settling class members challenged the plaintiffs’ individual settlements on the grounds that the settlements lacked judicial approval.

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69. See FED. R. CIV. P. 23(e)(2).
70. See FED. R. CIV. P. 23(e).
71. See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 805 (3d Cir. 1995) (“Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court’s assuring that the settlement represents adequate compensation for the release of the class claims.”). But see Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 YALE L.J. 27, 110–18 (2003) (describing current judicial approval under Rule 23(e) as inadequate).
72. See In re Gen. Motors, 55 F.3d at 805.
73. Id.
74. See Weinberger v. Kendrick, 698 F.2d 61, 69 n.10 (2d Cir. 1982).
75. Id.
76. See Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 280 (7th Cir. 2002); see also In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987).
77. See BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 9 (2005) (explaining that a judge should use “traditional judging skills” when reviewing a proposed class action settlement); Lisa L. Casey, Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging, 2003 BYU L. REV. 1239, 1314–23 (resisting the trend to label judges as fiduciaries in the context of securities class actions).
78. See Sanford I. Weisburst, Judicial Review of Settlements and Consent Decrees: An Economic Analysis, 28 J. LEGAL STUD. 55, 82 (1999) (describing the role of Rule 23(e)).
80. Id. at 642–43.
81. Id.
82. Id.
83. Id. at 639.
The court in Rogers noted the “natural wont to approach [the] unique question [of individual settlements within a class action] by fitting it neatly within a well-defined area of related legal principle[,]” namely the class action. Nonetheless, the Rogers court concluded that neither the plain language nor the underlying rationale of Rule 23(e) warranted judicial approval beyond the class action settlement. The court described as “paternalistic [the] notion that it is in the best interests of competent adults that they be deprived of their right to receive and freely choose whether to accept or reject defendants’ compromise offer.” In the end, the Rogers court joined many other courts in concluding that Rule 23(e), although an important protection, does not reach beyond the class action settlement.

The Advisory Committee Notes to the 2003 amendments to the Rules confirm that Rule 23(e) does not apply to settlements or dismissals that occur before class certification. Prior to 2003, courts divided over whether a pre-certification settlement or dismissal required judicial approval. During this period, courts subjected some non-class action dismissals to rigorous review. In 2003, however, the drafters added the words “certified class” to Rule 23(e), and in doing so, limited the reach of judicial approval. These amendments were part of a larger effort to “strengthen the procedure for reviewing a proposed settlement.” Accordingly, the modification is a meaningful omission; it indicates that the

84. Id. at 642.
85. Id.
86. Id. at 644.
87. See id. at 643 n.10 (citing cases with similar conclusions). The Western District of Pennsylvania went on to review the settlement, see id. at 644, because the settlement was made pursuant to a national consent decree, see United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974), aff’d, 517 F.2d 826 (5th Cir. 1975).
88. See Fed. R. Civ. P. 23(e) advisory committee’s note (“The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.”).
89. See id. (explaining that Rule 23 “was [ ] read to require court approval of settlements with putative class representatives that resolved only individual claims”). Compare Diaz v. Trust Territory of the Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) (“[D]uring the interim between filing and certification, a court must assume for purposes of dismissal or compromise that an action containing class allegations is really a class action.”), and Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 625–28 (7th Cir. 1986) (finding that dismissal of an action by a named plaintiff without notice may injure putative class members by leaving them to “fend for themselves”), and Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970) (“[A] suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper.”), with Shelton v. Pargo, Inc., 582 F.2d 1298, 1303, 1315 (4th Cir. 1978) (deciding that Rule 23(e) does not apply prior to class certification).
90. See In re Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429 (D.N.J. 2000) (reviewing a dismissal pursuant to a diplomatic settlement absent class certification).
91. See Fed R. Civ. P. 23, Summary of Proposed Amendments (Nov. 18, 2002) (explaining that approval “is not required if class allegations are withdrawn as part of a disposition reached before a class is certified, because in that case, putative class members are not bound by the settlement”), available at http://www.blankrome.com/index.cfm?contentID=37&itemID=284 (last visited Sept. 21, 2011).
drafters were not concerned about non-class mass settlement occurring without judicial approval.

B. Other Settlements that Require Judicial Approval

Class actions are not the only type of settlement that requires judicial approval. Settlement in shareholder derivative suits, bankruptcy proceedings, cases involving minors or incompetents, and consent decrees or consent judgments also require judicial approval. Likewise, unsupervised settlement under the Fair Labor Standards Act (FLSA) and criminal plea agreements require judicial consent.

The specific rationales for requiring approval vary, although the desire to protect claimants is a theme common to all contexts. Moreover, each situation reflects a deliberate decision on the part of Congress or a state’s legislature to augment the judiciary’s power. This part first discusses settlement involving minors or incompetents. This part then presents settlement through consent decree or consent judgment.

1. Settlement Involving Minors or Incompetents

Regardless of the nature of the suit, a settlement in which a minor or an incompetent is a party is not binding without judicial approval. Courts...
impose this requirement to overcome the concern that minors or incompetents, due to limited age, experience, or capacity, cannot protect their own interests.103 When justifying this exercise of control, courts primarily rely on statutory power,104 although they also reference their inherent authority.105

The requirement that a judge approve a settlement involving a minor or an incompetent is not unique to the settlement context. Rather, contract doctrine generally provides that minors and incompetents lack “full legal capacity to incur contractual duties.”106 Indeed, contract jurisprudence prescribes that any contract entered into by minors or incompetents is “voidable.”107 Because a settlement agreement is a type of contractual relationship, this approval requirement is consistent with the broader protections society affords to minors and incompetents.

2. Settlement Through Consent Decree or Consent Judgment

Settlement through consent decree or consent judgment also requires judicial approval.108 A consent decree or consent judgment is a “court decree that all parties agree to.”109 This settlement requires judicial approval because the decree or judgment becomes a judicial act.110 As such, a judge must be confident that the settlement achieved through the consent decree or consent judgment is in the public interest.111

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103. See id. But see Weisburst, supra note 78, at 75–76 (suggesting that a court automatically approve a settlement when the interests of the parent or guardian “perfectly align[]” with the minor’s interests).
104. See, e.g., MICH. CT. R. 2.420(B) (“[A] proposed . . . dismissal pursuant to settlement must be brought before the judge to whom the action is assigned, and the judge shall pass on the fairness of the proposal.”); PA. R. CIV. P. 2039(a) (“No action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor.”).
105. See, e.g., Keith ex rel Eagan v. Jackson, 855 F. Supp. 765, 775 (E.D. Pa. 1994) (observing that a court has an “inherent duty to protect the interests of minors and incompetents that come before it”).
106. See RESTATEMENT (SECOND) OF CONTRACTS (1979) § 12(2) (“A natural person . . . has full legal capacity to incur contractual duties . . . unless he is . . . an infant, or [] mentally ill or defective . . . .”).
107. See id. § 14 (“Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday”); id. § 15 (contractual duties are voidable if contracting party has a mental illness or defect).
109. BLACK’S LAW DICTIONARY 471 (9th ed. 2009).
110. See United States v. Swift & Co., 286 U.S. 106, 115 (1932) (“We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act.”).
In a recent case that generated great publicity, Judge Jed S. Rakoff of the Southern District of New York rejected a proposed consent judgment between the Securities and Exchange Commission (SEC) and Bank of America Corp. The settlement provided for $33 million in damages for the bank’s alleged false statements regarding bonuses. Judge Rakoff opined that the settlement was “neither fair, nor reasonable, nor adequate;” it failed to “comport with the most elementary notions of justice and morality.” In the judge’s words, the settlement was a “contrivance designed to provide the SEC with the facade of enforcement and the . . . Bank with a quick resolution of an embarrassing inquiry.” Judge Rakoff rejected the terms of the agreement and sent the SEC and the bank away to prepare for trial.

Five months later, the SEC and Bank of America returned with an amended consent judgment. The amended settlement was more favorable, providing that the bank would pay a $150 million fine and implement oversight measures to prevent future abuse. Nonetheless, Judge Rakoff described this consent judgment as “inadequate and misguided.” The law required, however, that the judge “give substantial deference to the S.E.C.,” and the agency had endorsed the settlement. As such, Judge Rakoff approved the settlement while acknowledging that he was “shaking [his] head” at “half-baked justice.” By his actions, Judge Rakoff exhibited restraint, and demonstrated that the authority to approve a settlement is not the same as the authority to craft a settlement.

C. Settlement when Judicial Approval Is Not Required

Notwithstanding the previous discussion on judicial approval of settlement, the distinction between cases where settlement requires judicial approval and those where settlement does not require such approval is not absolute. Judges often get involved in encouraging parties to settle, regardless of their authority to approve the settlement at the end of the process. The Federal Rules explicitly authorize judges to promote
settlement. For example, the 1983 and 1993 amendments to Federal Rule 16 clarified that judges may use pretrial conferences to foster settlement. There are, of course, limitations on this power. For example, the Rules provide that the ultimate decision to settle rests with the parties. Some scholars have criticized the notion of such an active judiciary. Others have called for clearer guidelines with respect to the judge’s role in settlement.

If a judge does approve a settlement, while lacking the authority to do so, observers respond sternly. The Eighth Circuit elaborated on this point in Gardiner v. A.H. Robins Co., a case that was part of the national litigation surrounding the Dalkon Shield intrauterine contraceptive device. The trial judge presiding over Gardiner wrote “So Ordered” on the bottom of the parties’ agreement dismissing a civil action in favor of

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126 See Fed. R. Civ. P. 16(a)(5) (“[T]he court may order the attorneys and any unrepresented parties to appear for . . . facilitating settlement.”); Fed. R. Civ. P. 16(c)(2)(I) (“[T]he court may consider and take appropriate action on . . . settling the case . . . .”).


129 See 1983 Advisory Notes, supra note 127 (“The reference to [judicial] ‘authority’ is not intended to insist upon the [judge’s] ability to settle the litigation.”); see also 1993 Advisory Notes, supra note 127 (“Of course settlement is dependent upon agreement by the parties . . . .”).

130 See Fiss, supra note 127, at 1280 (“Judges [should] confine themselves to the core activity of their profession, and adhere to the procedures that have long allowed them to wear the mantle of the law. Judges are . . . not brokers of deals [and a] too-ready acquiescence in the directives of those who want them to behave otherwise will . . . diminish their authority in the eyes of the community.”). See generally Molot, supra note 71.

131 See Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 593, 666 (2005) (suggesting that a project be undertaken to “write rules captioned ‘settlement,’ to explain the forms and kinds of bargains permitted, and to detail the position of the judge over the life span of a settlement (as contrasted to the life span of a lawsuit(”)). Resnik argues that “today’s ‘Civil Procedure’ classes need . . . understand . . . the rights and obligations of those who agree to settle cases.” Id. at 595. She raises several questions concerning the judges’ role in settling, including whether a judge’s presence during settlement negotiations might “blur[]” the line of private settlements, which are supposed to occur without a judicial presence. Id. at 637.

132 See, e.g., Fiss, supra note 127, at 1278 (“I also believe that it is impermissible for judges to approve settlements and lend their authority to them . . . . This is true not only in . . . institutional reform or civil rights cases . . . but in the mass tort cases that dominate the contemporary docket.”).

133 747 F.2d 1180 (8th Cir. 1984).

settlement.\textsuperscript{135} This language turned the agreement into a court order; however, the judge lacked the authority to do this because the settlement was a private agreement.\textsuperscript{136} On appeal, the Eighth Circuit explained that the judge’s action “imposed a material condition on the parties’ right to a stipulated dismissal.”\textsuperscript{137} This condition was inconsistent with the private nature of the settlement.\textsuperscript{138} Therefore, the appellate court in \textit{Gardiner} deemed the approval improper and voided the trial judge’s action.\textsuperscript{139}

III. THE TREND OF JUDGES “APPROVING” AND “REJECTING” NON-CLASS MASS SETTLEMENT

Parts I and II introduced non-class mass litigation and judicial approval of settlement. Against this backdrop, Part III presents the trend of judges approving and rejecting non-class mass settlement. This part first discusses three MDLs in which transferee judges expressly approved or extensively reviewed proposed settlement agreements. This part then discusses the World Trade Center litigation, where a federal judge went one step further and rejected the first settlement proposal before approving the second proposal. Although this part discusses each settlement in turn, it seeks to draw out the connections among these settlements and present a cohesive picture of the judicial role in non-class mass settlement.

\textit{A. The Big Three MDLs}

MDLs are big news. They generate much publicity, engage many parties, and involve an enormous amount of money.\textsuperscript{140} The \textit{Zyprexa}, \textit{Vioxx}, and \textit{Guidant} MDLs are no exception. This part presents the facts of each MDL, paying particular attention to the steps the transferee judges took to create a mass settlement. In many respects, the \textit{Zyprexa}, \textit{Vioxx}, and \textit{Guidant} MDLs built upon one another, and the transferee judges in each laid the foundation for the more explicit approval and rejection to be discussed in Part III.B.

1. \textit{In re Zyprexa Products Liability Litigation}

The trilogy of MDLs begins with \textit{Zyprexa}, an MDL consolidated in the U.S. District Court for the Eastern District of New York before Senior

\begin{footnotesize}
\begin{enumerate}
\item[135.] \textit{Gardiner}, 747 F.2d at 1183.
\item[136.] \textit{Id.} at 1185.
\item[137.] \textit{Id.} at 1190. The plaintiffs characterized the consolidated proceeding “as a quasi-class action” to justify the judge’s action, but the court rejected this argument on the grounds that, although “[t]he instant litigation may indeed bear many of the characteristics of a class action . . . the record is unequivocal that neither the parties nor the district court regarded the agreement as binding other plaintiffs.” \textit{Id.} at 1188.
\item[138.] \textit{Id.}
\item[139.] \textit{See id.} at 1190.
\item[140.] \textit{See, e.g.}, Alex Berenson, \textit{Lilly to Pay $690 Million in Drug Suits}, N.Y. TIMES, June 10, 2005, at C1.
\end{enumerate}
\end{footnotesize}
Judge Jack B. Weinstein. The Zyprexa MDL arose from the allegation that Zyprexa, a prescription drug used to treat schizophrenia, caused diabetes and weight gain in patients who took the medication. Thousands of individuals filed lawsuits across the country, and in April 2004, the Panel transferred these cases to Judge Weinstein. Less than two years later, the judge approved a final settlement, which had the potential to resolve nearly 8,000 claims for $700 million. Judge Weinstein’s approval, however, was a curious addition because Zyprexa, like the other cases discussed in Part III, was not a class action.

Consistent with his reputation, Judge Weinstein shepherded Zyprexa from consolidation to settlement. He appointed a Plaintiffs’ Steering Committee (PSC) and charged it with pursuing settlement options. He selected a Special Master to expedite discovery. The judge also set a firm trial date for December 5, 2005. With December rapidly...
approaching, counsel for the Defendants and the PSC notified Judge Weinstein that they had reached a settlement in principle.151

Judge Weinstein’s involvement continued as counsel turned the settlement in principle into a final agreement. He appointed Special Settlement Masters (Settlement Masters)152 to oversee the administration, evaluation, and resolution of all claims.153 In addition to deciding how the settlement would be distributed, the Settlement Masters were to ensure that law firms “provide[d] adequate information and obtain[ed] appropriate consent” from all clients.154 This requirement was more stringent for settlements involving minors and incompetents, where the Settlement Masters needed to “hear and adjudicate petitions for the compromise of settled claims.”155 Three months after charging the Settlement Masters with their tasks, Judge Weinstein ordered the parties to report on the settlement.156

On November 9, 2005, counsel and the Settlement Masters convened for a conversation on the terms of the Zyprexa settlement.157 As presented to Judge Weinstein, the proposal had three tracks for recovery. Track A offered a quick payment to resolve the majority of the claims,158 Track B offered additional compensation for more serious injuries,159 and Track C allowed claimants to postpone the decision to join the settlement.160 The judge suggested raising the recovery in Track A because “we want . . . to see as many [claimants] in Track A as possible.”161 He also suggested simplifying the requirements for recovery in Track B.162 Finally, Judge Weinstein wanted to eliminate Track C altogether.163 Although these were

152. See id.
155. Id.
157. See Zyprexa November Transcript, supra note 146, at 2.
158. Id. at 3.
159. Id. at 4.
160. Id. at 5.
161. Id. at 3.
162. Id. at 4.
163. Id. at 5 (“I saw that, and I don’t care for it.”).
only suggestions, the Settlement Masters assured the judge that they would implement his changes.164

Still concerned, however, that claimants might receive inadequate relief, Judge Weinstein warned that he would adjust attorney’s fees as well.165 In doing so, he elaborated on the reasons for his involvement in the settlement agreement. First, Zyprexa was a “quasi-class action,”166 and as such, he had a “fiduciary obligation” to guarantee that the money was properly spent.167 Second, public interest concerns compelled his involvement.168 In a pharmaceutical products liability case like Zyprexa, where the Food and Drug Administration (FDA) and Congress had failed to protect and compensate consumers adequately, the judiciary was the “failsafe, default” branch of government that was imbued with such a responsibility.169 With this in mind, the judge went on to approve the Zyprexa settlement.170 The Zyprexa settlement became effective as soon as 90 percent, or 7,993 plaintiffs, released their claims—a feat that was easily accomplished.171

In light of Judge Weinstein’s approach to non-class mass litigation, it is no surprise that he managed the 1984 settlement in In re “Agent Orange” Products Liability Litigation,172 a certified class action,173 in a similar

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164. Id. at 7. But see Discussion on Class and Multiple-Party Actions, supra note 53, at 40 (“I prefer that others work out settlements. . . . I prefer not to express my view.”).


166. See Zyprexa November Transcript, supra note 146, at 23 (“So it’s a quasi-class action for purposes of ethics.”).

167. Id.

168. See In re Zyprexa, 424 F. Supp. 2d at 494 (“Litigations like the present one are an important tool for the protection of consumers in our modern corporate society, and they must be conducted so that they will not be viewed as abusive by the public . . . .”); see also Discussion on Class and Multiple-Party Actions, supra note 53, at 38 (“I will consider the impact on society generally and also keep in mind the facts that our federal drug administration is not as effective as it should be; many other people may be affected; and we do not want laws which are too onerous in providing compensation . . . .”).

169. See Jack B. Weinstein, Comments on Owen M. Fiss, Against Settlement (1984), 78 FORDHAM L. REV. 1265, 1272 (2009) (“Given the political failure to provide adequate protection, the courts have a failsafe, default obligation to provide constitutionally required protection of the public through deterrence against dangerous conduct and reasonable compensation to harmed individuals.”).

170. See supra note 144 and accompanying text.

171. See Master Settlement Agreement, supra note 145, at 6; see also In re Zyprexa Prods. Liab. Litig., MDL No. 1596, 467 F. Supp. 2d 256, 261 (E.D.N.Y. 2006) (“The settlement resolved virtually all cases pending in the MDL at that time, along with many state cases and some claims not yet filed.”).

172. MDL No. 381, 597 F. Supp. 740 (E.D.N.Y. 1984), aff’d, 818 F.2d 145 (2d Cir. 1987). In 1979, tens of thousands of Vietnam veterans brought a products liability lawsuit against the U.S. government and the chemical production industry claiming injury from exposure to Agent Orange during their military service abroad. Id. at 746. For an in-depth discussion of Judge Weinstein’s role in the Agent Orange litigation, see generally Peter H. Schuck, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986). For Judge Weinstein’s reflections, see Weinstein, supra note 142, at 6–10.
manner. Upon receiving Agent Orange, the judge assessed the case’s merits and informed lawyers that it would be “better settled than tried”. He appointed Kenneth Feinberg as Settlement Master, set a firm trial date, and with only a few days until trial, ordered the lawyers to report to the courthouse for an “around-the-clock negotiating marathon.” Feinberg and Judge Weinstein drafted parts of the agreement, the judge capped the settlement amount at $180 million, and in the end, counsel agreed to the terms. The judge cited his obligation to the legal system as the reason he imposed a settlement cap on the parties. Thereafter, Judge Weinstein presided over Fairness Hearings and approved the settlement.

In sum, much of Zyprexa followed the Agent Orange model; the primary difference was that Agent Orange was a class action, for which the Federal Rules mandate judicial approval of settlement, and Zyprexa was not.

2. In re Vioxx Products Liability Litigation

As Zyprexa moved from consolidation to settlement, the Vioxx MDL was just beginning in the U.S. District Court for the Eastern District of


174. SCHUCK, supra note 172, at 111–15; see also Weinstein, supra note 142, at 7 (“It was clear that the dispute should be settled without a trial. Litigation would have gone on forever and probably would have been inconclusive.”); Weinstein, supra note 169, at 1268 (“There are cases in which timely and efficient settlement is essential. The Agent Orange dispute is one such example.”).

175. See Weinstein, supra note 169, at 1268 (describing Agent Orange as a “serious national issue presented by sick Vietnam veterans who were being ignored by their government”).

176. SCHUCK, supra note 172, at 144; see Weinstein, supra note 142, at 8 (describing how the settlement masters “resolved the case”).

177. SCHUCK, supra note 172, at 150.

178. See id. at 145 (“Feinberg energetically set to work and by mid-March had drafted an eighty-page settlement plan, which the judge, after making some changes, distributed to the lawyers.”).

179. See id. at 159 (explaining that “the real obstacle to a $200 million settlement [was] . . . Judge Weinstein”).

180. See id. at 163 (explaining how Judge Weinstein “use[d] ambiguity of his roles—as mediator and as ultimate decision maker—to play upon their fears, magnify the risk, and whittle down their resistance”).


182. See In re “Agent Orange” Prods. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), aff’d, 818 F.2d 145 (2d Cir. 1987). Some questioned whether this review was meaningful because Judge Weinstein had brokered the deal. See, e.g., SCHUCK, supra note 172, at 178–79 (“It was inconceivable that Judge Weinstein would fail to find the agreement ‘fair, reasonable, and adequate.’ In effect, he was acting as judge in what had come to be his own case . . . .”); Marcus, supra note 181, at 1295 (labeling Judge Weinstein’s review “inherently flawed”).

183. See FED. R. CIV. P. 23(e).
Louisiana. In September 2004, news broke that Vioxx, a prescription painkiller, increased the risk of heart attack and stroke in those who took the medication. It was estimated that doctors wrote 105 million Vioxx prescriptions and 20 million patients took Vioxx before Merck & Co. (Merck) pulled Vioxx from the shelves. Shortly thereafter, thousands of lawsuits poured into state and federal court. In February 2005, the Panel categorized the rapidly expanding products liability cases as an MDL and transferred the cases to Judge Eldon E. Fallon for pretrial proceedings.

The Vioxx MDL began in a similar fashion to Zyprexa, but went on to surpass Zyprexa in terms of the settlement size and the degree of judicial control. Like Judge Weinstein in Zyprexa, Judge Fallon appointed committees of counsel to represent the parties and conduct negotiations. The judge also followed Judge Weinstein’s lead by refusing to certify Vioxx as a class action. However, the Vioxx settlement, which was valued at $4.85 billion, vastly exceeded the Zyprexa settlement at the end of the process. Moreover, Judge Fallon exercised greater control over the Vioxx settlement, serving as Claims Administrator of the settlement agreement.

Judge Fallon expressly encouraged settlement, and on November 9, 2007, Merck issued a press release in which it announced that the parties
had reached a settlement.\textsuperscript{196} Merck noted that it had met with three of the four judges in the case earlier that morning to discuss the settlement agreement.\textsuperscript{197} During this meeting, the judge “tweak[ed]” the terms of the agreement,\textsuperscript{198} and agreed to serve as the Chief Administrator.\textsuperscript{199} In this capacity, Judge Fallon was to control common benefit fees and ensure compliance with Section 1.2.8 of the agreement,\textsuperscript{200} which required counsel to recommend the settlement to all clients or withdraw representation.\textsuperscript{201}

Two status conferences followed this settlement announcement. The first conference, held the same day that Merck issued its press release, afforded Judge Fallon and the other judges involved in the litigation an opportunity to praise the settlement as “fair and reasonable.”\textsuperscript{202} At the second conference, held in January of the following year, Judge Fallon augmented this praise by describing the settlement as an agreement in “the best interests of all concerned.”\textsuperscript{203}

Notwithstanding the control that Judge Fallon exercised over the settlement, he repeatedly affirmed that the settlement was a private agreement. For example, when plaintiffs’ counsel challenged Judge Fallon’s decision to cap attorney’s fees at 32 percent, the judge explained that the settlement, by its very terms, authorized this cap.\textsuperscript{204} Likewise,


\textsuperscript{197} See id.

\textsuperscript{198} See Transcript of Status Conference Before the Hon. Eldon E. Fallon at 12, \textit{In re Vioxx Prods. Liab. Litig.}, MDL No. 1657 (E.D. La. Jan. 18, 2008) [hereinafter Vioxx January Transcript], available at http://vioxx.laed.uscourts.gov/Transcripts/01182008trans.pdf (“We went over the document into the wee hours of the morning. There were some changes and some tweaking that was necessary at that time.”).

\textsuperscript{199} See Master Settlement Agreement, supra note 192, § 6.1.1.

\textsuperscript{200} See id. §§ 1.2.9, 9.

\textsuperscript{201} See id. §§ 1.2.8.1, 1.2.8.2.

\textsuperscript{202} See Vioxx November Transcript, supra note 195, at 38.

\textsuperscript{203} See Vioxx January Transcript, supra note 198, at 13. One change between the November and January conferences was that counsel added an amendment to clarify Section 1.2.8. See Amendment to Settlement Agreement § 1.2.2, \textit{In re Vioxx Prods. Liab. Litig.}, MDL No. 1657 (E.D. La. Jan. 17, 2008), available at http://www.officialvioxxsettlement.com/documents (“Each Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program.” (internal quotations omitted)). Judge Fallon considered the amendment adequate. See Vioxx January Transcript, supra note 198, at 12. Some questioned whether the amendment changed anything. See, e.g., Adam Liptak, \textit{In Vioxx Settlement, Testing a Legal Ideal: A Lawyer’s Loyalty}, N.Y. TIMES, Jan. 22, 2008, at A12 (“The new language is surprising only in that it needed to be said at all, and it did nothing to alter the fundamental structure of the deal.”); Howard M. Erichson, \textit{The Vioxx Settlement}, MASS TORT PROFS BLOG (Nov. 10, 2007), http://lawprofessors.typepad.com/mass_tort_litigation/2007/11/the-vioxx-settl.html (raising ethical concerns that remained).

\textsuperscript{204} See \textit{In re Vioxx Prods. Liab. Litig.}, MDL No. 1657, 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (“[T]he parties in this case clearly contemplated that this Court would be heavily involved . . . because [t]he parties expressly granted the Court authority to affect the distribution of the settlement fund.”). Judge Fallon also cited the court’s equitable power. See id. at 558–59 (noting that “several previous MDL courts have . . . accepted the
when a group of private insurers moved to enjoin the disbursement of interim payments to claimants, Judge Fallon denied the motion on the grounds that the settlement only authorized injunctions for governmental liens, not private liens.\textsuperscript{205} He refused to “rewrite the terms of [a] private, contractual Settlement Agreement.”\textsuperscript{206} In sum, the judge crafted the settlement in \textit{Vioxx}, afforded the settlement a hearty recommendation, and served as its Claims Administrator, all the while categorizing the settlement as a private agreement.\textsuperscript{207}

3. \textit{In re Guidant Corporation Implantable Defibrillators Products Liability Litigation}

The third case in the trilogy, \textit{Guidant}, arose before Judge Donovan W. Frank of the U.S. District Court for the District of Minnesota around the same time as \textit{Vioxx}.\textsuperscript{208} In 2005, Guidant, a manufacturer of defibrillators and pacemakers, notified physicians of certain defects with its implantable devices.\textsuperscript{209} Individuals with Guidant-made implants filed personal injury actions in state and federal court.\textsuperscript{210} In November 2005, the Panel consolidated and transferred the federal cases to Judge Frank. Two years later, Judge Frank reviewed and recommended the settlement in \textit{Guidant}.\textsuperscript{211} Once again, the \textit{Guidant} MDL was not a class action.\textsuperscript{212}

Although \textit{Guidant} continued many trends from \textit{Zyprexa} and \textit{Vioxx},\textsuperscript{213} the settlement in \textit{Guidant}, more so than the others, came about through Judge Frank’s efforts.\textsuperscript{214} Only months after the MDL formed, Judge Frank
ordered counsel for each side to confer with Magistrate Judge Arthur J. Boylan to discuss “the parties’ positions regarding early settlement efforts.”

Thereafter, counsel was to keep Judge Boylan informed of all settlement discussions. Judge Boylan was active enough in the settlement process that the parties described him as the settlement’s “architect.” In July 2007, counsel for each side notified Judges Frank and Boylan that they had reached a proposed settlement for $195 million. Guidant increased this amount to $240 million after an influx of claims following the July announcement.

In early December 2007, counsel presented the settlement to Judge Frank’s review. After considering the terms, the judge recommended the settlement to all claimants. According to Judge Frank, the settlement was more than fair; it was the best deal for the claimants, perhaps better than what they would receive if they litigated their claims independently. At the same time, Judge Frank acknowledged that his job was to make sure that all parties, and not only the plaintiffs, received a fair outcome.

Judge Boylan also spoke at the conference, and joined Judge Frank in his review and recommendation. In sum, the Guidant MDL reflects how the judiciary can lead counsel to settlement, and then ensure that the settlement receives claimant approval.

B. The Big Rejection: In re World Trade Center Disaster Site Litigation

Whereas Part III.A addressed the implicit ways that MDL transferee judges exercised control over non-class mass settlement, Part III.B presents the explicit rejection and subsequent approval of a non-class mass settlement in In re World Trade Center Disaster Site Litigation. The World Trade Center litigation and settlement involved thousands of first responders and rescue workers who alleged respiratory injuries stemming from the 9/11 terrorist attacks in New York City. This part discusses the litigation process, settlement rejection, and settlement approval, and in doing so, suggests that much of what happened in World Trade Center was
a natural, though novel, extension of the judicial practices from Zyprexa, Vioxx, and Guidant.

1. The World Trade Center Litigation

The 9/11 terrorist attacks spawned a prolonged and complicated litigation process. The World Trade Center litigation, in which thousands of first responders and rescue workers sued the City of New York, was no exception. The initial claimants filed lawsuits in New York State Court in 2002. The City removed these cases to federal court under the Air Transportation Safety and System Stabilization Act, and the cases were randomly assigned to Judge Hellerstein of the Southern District of New York. The judge received nearly 1,200 cases and soon oversaw litigation that involved some 10,000 individuals.

Thereafter, World Trade Center started to look similar to the MDLs discussed in Part III.A. Judge Hellerstein adopted some of the same case management techniques from the MDLs, such as appointing Special

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226. To further complicate the mass litigation, the mass settlement discussed in this part involved three negotiating groups: the first responders and rescue workers, the City of New York, and the City’s Captive Insurance Fund. In 2003, Congress appropriated $1 billion to the City to establish a Captive Insurance Fund, which the City would use to pay out awards or settlements. See Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11, 517–18 (2003).
228. Air Transportation Safety and System Stabilization Act (ATSSA), Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (2006)). ATSSA granted the Southern District of New York “original and exclusive jurisdiction” over all actions resulting from the terrorist attacks. Id. § 408(b)(3). ATSSA also limited the airlines’ liability to their insurance coverage, id. § 408(a), and established the September 11th Victim Compensation Fund to “provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001,” id. § 403.
230. See In re World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 360 (S.D.N.Y. 2003), aff’d in part, dismissed in part by In re World Trade Ctr. Disaster Site, 414 F.3d 352 (2d Cir. 2005). Some plaintiffs moved to remand to state court. See id. at 363. Judge Hellerstein partially granted this motion, finding that Congress had intended temporal and geographical limitations to federal jurisdiction, and remanded cases that occurred in locations beyond the World Trade Center site or after September 29th. See id. at 374. The Second Circuit expressed in dicta its disagreement with Judge Hellerstein. See In re World Trade Ctr. Disaster Site, 414 F.3d at 380 (“We need not take the phrase ‘relating to’ to any metaphysical extreme.”). On remand, Judge Hellerstein adopted the reasoning of the Second Circuit and extended jurisdiction to all claims. See In re World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 539 (S.D.N.Y. 2006).
231. See infra note 285 and accompanying text.
Masters to encourage settlement. Judge Hellerstein also refused to
certify the cases as a class action, finding that the commonality requirement
of Rule 23 was unmet because each claimant would need to prove
individual causation. Instead, the cases were consolidated under Federal
Rule 42 and progressed as a non-class mass action.

Here, Judge Hellerstein went further than the transferee judges discussed
previously. Months before the City announced that it had reached a
settlement with the first responders and rescue workers, the judge
forewarned that he would review any such settlement to make sure that it
was fair and reasonable. He explained that he would evaluate whether
the settlement was fair both in its “aggregate size” and in the “individual
settlements” afforded to each claimant. According to Judge Hellerstein,
the extraordinary public interest and the limited funds available for the
claimants demanded that there be “fairness proceedings.” Judge
Hellerstein would take these actions, even though he explicitly stated that
the World Trade Center litigation was a grouping of “separate cases.”

2. The Settlement Rejection

On March 12, 2010, news broke that counsel for the plaintiffs and the
City had reached a settlement. Under the agreement, the City would pay
$575 million if 95 percent of eligible claimants released their claims. The
settlement reserved $23.4 million for future claims and allocated 33
percent to counsel in fees. Counsel would jointly select a claims
administrator to divide the settlement sum among claimants. The City’s
Mayor, Michael R. Bloomberg, described the settlement as “a fair and
reasonable resolution to a complex set of circumstances.”

Judge Hellerstein disagreed. One week after the initial announcement,
Judge Hellerstein rejected the settlement and took “judicial control” over
the process. First, the judge prohibited the parties from appointing a claims administrator absent his approval. Then, he officially announced that the settlement amount was “not enough” and sent counsel back to the negotiating table to reach a “better and fair settlement.” Judge Hellerstein opined that the settlement awarded claimants inadequate relief in two ways: it set aside too much money for future claimants and afforded counsel excessive fees. Moreover, the settlement terms were too confusing for the average claimant to understand what they were signing. Judge Hellerstein demanded “an agreement under judicial supervision that will make us all proud.” To accomplish this, Judge Hellerstein put himself in charge.

Counsel appealed Judge Hellerstein’s decision but also returned to the negotiating table. Three months later, counsel presented the judge with an amended settlement. The amended settlement provided claimants with $125 million in additional relief. The Captive Insurance Fund contributed an additional $55 million, the City and its World Trade Center workers compensation insurer waived liens against the plaintiffs, and the plaintiffs’ counsel reduced its fees from 33 percent to 25 percent and forewent fees on a portion of the amended settlement. The amended settlement also included a redesigned “settlement grid” to calculate the relief for each claimant. The court appointed Matthew Garretson as an Allocation Neutral to ensure that awards were correctly processed, and Kenneth Feinberg as a Claims Appeal Neutral for those individuals who challenged their awards. The court also appointed Professor Roy Simon of Hofstra University to ensure that all lawyers followed ethical guidelines.

245. See Navarro, supra note 2.
246. See Order, In re World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Mar. 15, 2010).
247. See Navarro, supra note 2.
248. See Transcript of Public Meeting, supra note 229, at 74–75. For an argument that judges should approve settlements that affect future claimants, see Hensler, supra note 14, at 612; see also supra note 242.
249. See Transcript of Public Meeting, supra note 229, at 75.
250. Navarro, supra note 2.
251. See id. Judge Hellerstein said that his decision to take control was not an “ego trip.” Id. But see Mireya Navarro, Empathetic Judge in 9/11 Suits Seen by Some as Interfering, N.Y. TIMES, May 3, 2010, at A18 (quoting Arthur Miller, a professor at New York University School of Law, as saying “[t]his is history for [Judge Hellerstein] . . . . He wants to be the person who brought peace to this entire situation.”). Judge Hellerstein later described the amended settlement as “the most significant thing I have done in my life.” See Transcript of Public Meeting, supra note 229, at 91.
253. See WTC June Transcript, supra note 3, at 5.
254. See id. at 7.
255. See id. at 7–8.
256. See id. at 9.
257. See id. at 19.
when communicating the terms of the amended settlement to their clients.258

3. The Settlement Approval

With the amended settlement in place, Judge Hellerstein approved the agreement in two stages. First, after counsel presented the terms of the amended settlement, the judge encouraged all claimants to release their claims and join the settlement.259 He then set a Fairness Hearing for June 23, 2010, during which all claimants would have the opportunity to speak on whether they felt that the settlement was fair.260 At this Fairness Hearing, Judge Hellerstein officially approved the agreement:

[This is a] fair, adequate and reasonable settlement, reflecting hard bargaining and concern for fairness of varying parties. It is fair in amount, it is fair in procedure, it is fair in the continued procedures that will be used to hear and decide the various claims. So as of this date, June 23, I sign this order approving the modified and improved agreement of settlement.261

Judge Hellerstein concluded that he had “signed everything [he was] required to sign to make this a fully effective approved settlement, ready for vote by the people affected.”262

The media closely followed the World Trade Center litigation and settlement.263 As part of this coverage, many questioned whether Judge Hellerstein had the authority to reject and then approve the non-class mass settlement.264 Even Judge Hellerstein acknowledged that he stood on

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258. See id. at 43.
259. See id. at 42 (“There are 10,000 people out there, and I hope 100 percent of them will come . . . into this settlement, because it is worth it.”); see also id. at 39 (“This is a very good deal. I am very excited about this deal.”).
260. See Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement at 2, In re World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. June 10, 2010); see also WTC June Transcript, supra note 3, at 46.
262. Id. at 216.
264. See, e.g., Mark Hamblett, Judge’s Rejection of 9/11 Settlement Raises Questions About His Asserted ‘Power of Review,’ N.Y. L.J., Mar. 24, 2010, at 1 (quoting Professor Howard M. Ericson of Fordham University School of Law as stating “[o]utside of those special situations where you need a judge’s power to make it happen, I simply don’t understand what gives the judge the authority here”); id. (quoting Professor Geoffrey Miller of New York University School of Law as stating “[t]he judge’s authority to exercise this kind of review of the settlement to protect the plaintiffs that you would see in a class action, it’s very controversial. . . . [T]he legal basis for the judge exercising that kind of powerful equitable authority is questionable.”); Alexandra D. Lahav, 9/11 First Responder’s Settlement Rejected by Judge, MASS TORT LITIGATION BLOG (Mar. 20, 2010), http://lawprofessors.typepad.com/mass_tort_litigation/911 (“The judge does not have formal
untested legal grounds. Judge Hellerstein did not shy away from his
decision, however. Instead, he wanted the public to understand why he
rejected the first settlement and approved the second settlement.

Much like Judge Weinstein in Zyprexa, Judge Hellerstein offered an
assortment of reasons for his actions. He explained that there were
“precedents for judicial supervision of settlement,” there was the risk that
counsel would not afford fair settlements to all claimants and the
litigation implicated the public interest. The September 11th Victim
Compensation Fund (the Fund), for which the claimants were ineligible
because the Fund’s time period had expired before their injuries manifested
themselves, lurked in the background. Judge Hellerstein had urged
Congress to renew the Fund, but Congress refused to do so. In the
absence of the Fund, the judge set out to ensure that the amended settlement
afforded claimants adequate relief.

Last, though not least important, Judge Hellerstein explained that the
“proof” for his authority was in “the traditional flavor, the savored flavor of
an approved settlement in terms of process, amounts, fairness, [and]
distribution.” For those who challenged his authority to approve the
veto over the settlement the way that he would had this case been certified as a class
action . . . . And the right of a judge to reject a settlement like this has never been tested on
appeal.”).

265. See WTC June Transcript, supra note 3, at 47 (“It is clear that there are no sound precedents either to guide the judge or not to guide the judge.”); see also Transcript of Public Meeting, supra note 229, at 75 (“Since the issue of whether a district judge has the jurisdiction and competence to rule on fair and reasonableness is a new question and something that is at the very heart of federal jurisdiction, my feeling was that the Supreme Court would take that question . . . the outcome of which would be uncertain.”).

266. See Transcript of Fairness Hearing, supra note 261, at 9 (“I wanted people to understand . . . why I did what I did.”); id. at 6 (“I’ve expressed myself previously. There are numbers of reasons we’re making [a fairness] ruling.”).

267. See supra notes 165–69 and accompanying text.

268. See WTC June Transcript, supra note 3, at 47.

269. See Transcript of Fairness Hearing, supra note 261, at 108 (“We have some settlements at $3,250, and we have another possibility of settlement at $1,800,000. That’s an extraordinary range, with the same lawyer representing possibly both people. It’s important that there be a judge to evaluate that kind of fairness.”).

270. See WTC June Transcript, supra note 3, at 47–48, 108 (“And in a basic way, what we are about in a settlement of all these cases, investing so much time of the court, and involving so many people and invested with all the public involvement of public money and public activity, it just begs for judicial supervision.”); see also In re World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 575 (S.D.N.Y. 2006) (“The scar to the public interest needs to be cleansed, speedily, in good time.”).

271. See WTC June Transcript, supra note 3, at 52.

272. See id. at 53 (“I have publicly stated over and over again that something must be done to correct this unfairness.”).

273. The struggle to reestablish a Victim Compensation Fund spanned many years and many drafts in Congress. It was not until 2011 that the measure was signed into law. See infra notes 286–87 and accompanying text.

274. See WTC June Transcript, supra note 3, at 53. Judge Hellerstein even described the amended settlement as better than the Fund. See id. (“[W]hen I examine this settlement, it is actually in many respects an improvement over the 9/11 Victim Compensation Fund.”).

275. See Transcript of Fairness Hearing, supra note 261, at 9; see also Alexandra D. Lahav, Profile of WTC Litigation Judge in the NY Times, MASS TORT LITIGATION BLOG
settlement, the judge dismissed their concerns as “academic.” Put simply, the “niceties of federal practice [were] secondary to the compelling needs of people to get a recovery that [was] almost, almost, almost within their grasp.”

Judge Hellerstein’s involvement did not end with his approval of the amended settlement. The judge held two public meetings where claimants were encouraged to ask questions about the settlement. Although maintaining his judicial independence, the judge spoke as if he were a party to the agreement. He granted deadline extensions and offered legal assistance to those claimants who had yet to respond to the settlement by the various deadlines. In the end, 10,043 of the 10,563 eligible plaintiffs, more than the required 95 percent, opted into the settlement. Less than two months later, President Barack Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010, which created a long-awaited $4.3 billion fund to assist the first responders and rescue workers with their medical expenses.
IV. CUTTING JUDICIAL “APPROVAL” AND “REJECTION” OUT OF NON-CLASS MASS SETTLEMENT

Parts I and II of this Note introduced non-class mass litigation and the various justifications for judicial approval of settlement. Part III discussed the recent trend of judges approving and rejecting non-class mass settlement. Part IV criticizes this shift towards judicial approval and rejection. What started under the auspices of the quasi-class action doctrine as a pragmatic approach to managing non-class mass litigation has grown into a situation where judges push for settlement, tweak settlement terms, and most recently, reject settlement on the grounds that the settlement is “not enough.”

Through this evolution, judges have transformed non-class mass settlement from a private contract into an agreement that is dependent on judicial approval. This shift is plainly inconsistent with the Federal Rules. This part presents the problems of such a shift and suggests alternatives courts can employ with respect to mass settlement.

A. The Limits of the “Quasi-class Action”

The quasi-class action is a handy device. Under this label, judges can manage thousands of cases and clear their busy courtroom dockets. They can appoint lead counsel to direct pretrial discovery, compensate counsel for their work, and maintain the integrity of the process by keeping money in claimants’ pockets. Much of this makes sense because non-class mass litigation shares certain attributes with class actions. The quasi-class action label, however, is not a panacea or a blank check. More specifically, the quasi-class action label does not afford judges the authority to approve or reject non-class mass settlement.

A class action settlement is subject to judicial approval because the settlement has the power to bind absent class members. In the interests of protecting these class members, a judge must verify that the settlement is “fair, reasonable, and adequate.” The same concerns do not apply in a non-class mass settlement, because there are no absent class members. Each claimant has filed a lawsuit and has the option to accept or reject the settlement. There are procedures in place that adequately protect claimants. No claimant is bound against his or her will. Therefore, even if judges refer to a non-class mass action as a quasi-class action, the mass settlement does not require judicial approval.

Recent jurisprudence on Federal Rule 23(e) supports this position. Rule 23(e) does not apply to settlements with individuals who are also class

288. See supra Part III.B.2.
289. See supra note 262 and accompanying text.
290. See supra notes 55–59 and accompanying text.
291. See supra note 54 and accompanying text.
292. See supra note 71 and accompanying text.
293. See supra note 66 and accompanying text.
294. See supra note 34 and accompanying text.
295. See supra notes 32–39 and accompanying text.
296. See supra notes 79–91 and accompanying text.
members, nor does it apply to settlements that occur before a class action is certified. Rule 23(e) only applies when doing so would protect absent class members. Therefore, it is inapplicable in non-class mass litigation. Moreover, this understanding of Rule 23(e) arose through the 2003 amendments to the Federal Rules, which “strengthened judicial review of settlement.” As such, if the drafters, who intended to strengthen judicial review, sanctioned non-class mass settlement without judicial approval, courts should not impose such a requirement today.

Moreover, judicial approval and rejection of non-class mass settlement cannot draw support from the other types of settlement discussed in Part II. First, settlement involving minors or incompetents is predicated on the need to protect individuals who cannot protect themselves. It would be paternalistic to assume that all claimants in non-class mass litigation are unable to protect themselves. Second, a consent decree or consent judgment is subject to judicial approval because the decree or judgment is a judicial act. This, however, is inapplicable to a non-class mass settlement, which is a private contract. Therefore, even though judges may invoke the language of these situations, citing the need to protect claimants or safeguard the public interest, non-class mass settlement does not fit into either category. Finally, the situations discussed in Part II demonstrate that judges approve settlement in well-delineated, narrow contexts; a mere similarity to another type of settlement is hardly adequate.

B. The Unwanted Consequences of Judicial Approval

Even more than the history and language of the Federal Rules, the practical consequences of adding a judicial approval requirement to non-class mass settlement counsel against such action. Judges alter civil litigation when they approve non-class mass settlement. Despite arguments that minimize these concerns or describe judicial approval in beneficial terms, judicial approval of non-class mass settlement removes a claimant’s autonomy to settle. Judge Hellerstein, when approving the amended settlement in World Trade Center, spoke as if his approval was a necessary precondition to settlement. This means that, without his approval, an individual could not release his or her claim. This approach conflicts with treating non-class mass settlement as a private contract.

297. See supra notes 79–86 and accompanying text.
298. See supra notes 88–92 and accompanying text.
299. See supra note 78 and accompanying text.
300. See supra note 92 and accompanying text.
301. See supra Part II.B.
302. See supra note 103 and accompanying text.
303. See supra notes 110–11 and accompanying text.
304. See supra notes 167–69, 268–75 and accompanying text.
305. See supra notes 99–101 and accompanying text.
306. See supra notes 166–67, 268 and accompanying text.
307. See supra note 275.
308. See supra note 262 and accompanying text.
309. See supra notes 204–06 and accompanying text.
is also inconsistent with precedent that has rejected judicial attempts to approve a settlement when such approval was unsolicited.\textsuperscript{310}

Adding a judicial approval requirement detracts from the adversarial nature of the judicial system as well. In \textit{Zyprexa}, \textit{Vioxx}, \textit{Guidant}, and \textit{World Trade Center}, the judges seemed to be acting as advocates for the claimants.\textsuperscript{311} Judge Weinstein in \textit{Zyprexa} believed that it was his responsibility to compensate claimants because the other branches of government had failed.\textsuperscript{312} Judge Fallon in \textit{Vioxx} described the settlement as an outcome in the claimants’ best interests.\textsuperscript{313} Similarly, Judge Frank in \textit{Guidant} explained that the settlement would provide claimants, who might face difficulty in proving their claims, with the best relief.\textsuperscript{314} Finally, Judge Hellerstein in \textit{World Trade Center} believed that the 9/11 first responders and rescue workers were entitled to some form of compensation, and in the absence of a compensation fund, a mass settlement was their best option.\textsuperscript{315}

The idea that a judge should determine what is or is not in a claimant’s best interests is inconsistent with the adversarial system. Counsel, not the judge, should act in the client’s interests.\textsuperscript{316} The judge, as Judge Frank noted in \textit{Guidant}, should provide a “fair shake” for everyone.\textsuperscript{317} Judge Rakoff’s actions in \textit{SEC v. Bank of America Corp.} well illustrate this point. Although Judge Rakoff could have rejected the amended consent judgment, he exercised restraint and approved the settlement.\textsuperscript{318}

\textbf{C. A Pragmatic Solution to Protect Claimants}

Implicit in this argument, however, is the assumption that claimants have meaningful opportunities to review the terms of settlement agreements. Practice indicates that this is not always the case.\textsuperscript{319} The risk of self-interested counsel is real. Yet those who advocate for judicial approval of non-class mass settlement present this danger as a zero-sum game.\textsuperscript{320} Either the judicial system grants judges the authority to approve settlements or individuals will endure unfair settlements. This argument is flawed for two reasons. First, it ignores that the judicial system has procedures in place to regulate attorney conduct and punish attorneys who misrepresent clients.\textsuperscript{321} Second, it assumes that individuals are unable to choose whether to accept a settlement in the absence of legal counsel. This assumption is

\begin{footnotes}
\item[310] See \textit{supra} notes 133–39 and accompanying text.
\item[311] See \textit{supra} Part III.A–B.
\item[312] See \textit{supra} note 169 and accompanying text.
\item[313] See \textit{supra} note 203 and accompanying text.
\item[314] See \textit{supra} note 221 and accompanying text.
\item[315] See \textit{supra} note 259 and accompanying text.
\item[316] See \textit{supra} note 203.
\item[317] See \textit{supra} note 221.
\item[318] See \textit{supra} notes 113–24 and accompanying text.
\item[319] See \textit{supra} note 35 and accompanying text.
\item[320] See \textit{supra} note 14 and accompanying text.
\end{footnotes}
Bringing an End to the Trend