Fordham Law Review

Volume 80 | Issue 1 Article 8

October 2011

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

Alexandra N. Rothman

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.

TABLE OF CONTENTS

* J.D. Candidate, 2012, Fordham University School of Law; A.B., 2007, Princeton University. I would like to thank Professor Howard M. Erichson for his enthusiasm for civil procedure and guidance in writing this Note. I would also like to thank my family and friends for their endless support.

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

1. Bertelson v. City of Norwich, No. 119199, 2000 WL 1624512, at *4 (Conn. Super. Ct. Oct. 5, 2000).

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

3. *See* Transcript of Status Conference at 5, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. June 10, 2010) [hereinafter WTC June Transcript] (on file with the Fordham Law Review).

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

5. *See* Transcript of Status Conference at 19, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Jan. 25, 2010) [hereinafter WTC January Transcript] (on file with the Fordham Law Review) ("I have not certified a class action.").

6. *See* Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199, 204 (2008).

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.[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.[14] Indeed, the American Law Institute has proposed a limited form of judicial review when claimants give advanced consent to such a settlement.[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.[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

---

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.").

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* Shutts *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).

15. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.18 (2010).

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.[17] 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.[18] 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.[19] Notwithstanding this benefit, the class action raises a host of due process,[20] collective action,[21] and agency problems.[22] As such, the U.S. Supreme

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 . . . .").

21. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 77 (2007) ("The class action vehicle . . . creates new collective action dilemmas.").

22. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 377 (2000) (discussing agency problems in class actions).

Court has suggested approaching class actions with restraint,[23] and recent Supreme Court jurisprudence reflects such restraint.[24]

To lessen the concerns inherent in class actions, the Rules impose stringent procedural requirements on class certification.[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."[26] In addition to these elements, the action must fit into one of three types of class actions defined in Rule 23(b).[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.[28] Non-class mass litigation tends to arise in cases that cannot be certified under Rule 23(b)(3).[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.[30] Second, the judge adopts the role of "guardian" for those absent class members whom the settlement will also bind.[31]

---

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, LAW OF FEDERAL COURTS 508 (5th ed. 1994))).

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).

25. *See* FED. R. CIV. P. 23(a)–(b).

26. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 162 (1974) (quoting FED. R. CIV. P. 23(a)).

27. *See id.* at 163 ("[A] class action must also qualify under one of the three subdivisions of 23(b).").

28. *See* FED. R. CIV. P. 23(b)(3).

29. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 239 F.R.D. 450, 460–63 (E.D. La. 2006) (denying class certification under Rule 23(b)(3) because common issues of fact did not predominate). *See generally* Martin L.C. Feldman, *Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?*, 74 TUL. L. REV. 1621 (2000) (noting the resistance to certification under Rule 23(b)(3) for products liability cases).

30. *See* 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.").

31. *See* 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.[32] In these non-class mass actions, each claimant files a lawsuit on his or her own behalf.[33] All claimants are present; unlike class actions, there are no absent class members.[34] Similar to the class action, however, the size of non-class mass litigation prevents many claimants from exercising meaningful control over the litigation.[35] At the federal level, this form of mass litigation can arise through joinder,[36] interpleader,[37] multiparty, multiforum litigation,[38] consolidation,[39] and multidistrict litigation (MDL).[40] At the state level, courts utilize consolidation[41] and centralization provisions[42] to achieve similar results.

Centralization as part of an MDL is an increasingly common method of aggregation,[43] and one that is particularly relevant to the mass actions

---

32. *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1485–99 (2005) (discussing the various procedures for non-class joinder). *See generally* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519.

33. *See, e.g.*, Effron, *supra* note 6, at 212 (noting that Judge Hellerstein required claimants in the 9/11 litigation to file individual claims).

34. *See* Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 89 (2011) ("Nonclass aggregation . . . plaintiffs have names and faces and concerns; these are not the absent class members of the past: they care and they're present.").

35. *See* Chamblee, *supra* note 14, at 160–61 ("[M]ass tort claimants have an attenuated attorney-client relationship with their lawyer and exercise little or no meaningful control over their case."); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1774 (2005) ("[M]ost mass tort plaintiffs in[] non-class collective representation . . . are treated much like absent class members . . . ."); Hensler, *supra* note 14, at 596–98, 601 (suggesting that claimants in non-class mass litigation are "about as absent from the proceedings as legally absent class members"). To emphasize this absence, scholars point to instances when attorneys have taken advantage of mass action claimants. *See* Brickman, *supra* note 14, at 710–16 (describing how attorneys selfishly settled claims for the 126 victims in the Phillips Petroleum Explosion). For a description of the Phillips Petroleum Explosion litigation, see Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6.

36. *See* FED. R. CIV. P. 19–20.

37. *See* 28 U.S.C. § 1335 (2006); FED. R. CIV. P. 22.

38. *See* 28 U.S.C. § 1369.

39. *See* FED. R. CIV. P. 42(a) ("If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions.").

40. *See* 28 U.S.C. § 1407.

41. *See, e.g.*, N.J. CT. R. 4:29 (2010).

42. *See, e.g.*, KAN. STAT. ANN. § 60-242(c) (Supp. 2006) (providing for multidistrict centralization); N.J. CT. R. 4:38-1(b) (same). Some states have provisions that specifically centralize mass tort cases. *See, e.g.*, N.J. CT. R. 4:38A (providing that "[t]he Supreme Court may designate a case or category of cases as a mass tort to receive centralized management"); W. VA. T.C.R. 26.08 (2010) (transferring mass tort cases filed in any county in the state to one judge for case management and trial).

43. *See, e.g.*, Deborah Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 884 (2001) (describing the rise of MDLs in personal injury litigation); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 793–803 (2010) (suggesting that "the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements");

discussed in this Note.[44] In 1968, Congress created the Judicial Panel on Multidistrict Litigation (the Panel), and charged the Panel with two tasks.[45] 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.[46] Second, the Panel would assign the consolidated proceedings to one district court and judge.[47] The purpose of the transfer was to further the convenience of the parties and to promote the just and efficient conduct of the litigation.[48]

Over time, transferee judges developed a practice of assigning MDL cases to themselves for final judgment.[49] 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.[50] 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.[51]

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."[52] Judges have observed that, even though not all mass

---

Panel Promotes Just and Efficient Conduct of Litigation, THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS, Feb. 2010, at 1 (interview of Hon. John G. Heyburn, Judge for the U.S. District Court for the Western District of Kentucky and Chairman of the Judicial Panel on Multidistrict Litigation (the Panel)).

44. The three cases discussed in Part III.A are MDLs. *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).

45. *See* 28 U.S.C. § 1407. For background on the origins of the MDL, see Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 314–18 (2009).

46. *See* 28 U.S.C. § 1407.

47. *See id.*

48. *See id.*

49. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

50. *See id.* at 40.

51. *See* Richards, *supra* note 45, at 317.

52. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 110 n.7 (2010) (marking the growth of the quasi-class action); *see also* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994) ("What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions. . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much

litigation is certifiable as a class action,[53] the litigation nonetheless shares certain similarities with the class action.[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.[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.[56] Judges have also appointed special masters, a tool the Federal Rules contemplate for use in complex cases,[57] to expedite the litigation and settlement process.[58] Essentially, judges have extended their equity-based authority from the class action device to the non-class mass action.[59]

---

the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations.").

53. This progression away from the class action, particularly in the context of mass torts, is an oft-told story. *See Discussion on Class and Multiple-Party Actions* (May 6, 2010), *available at* http://ssrn.com/abstract=1640796 (discussion between Judge Atsuo Nagano and Judge Jack B. Weinstein recounting the history of the class action and mass torts). The 1966 amendments to the Federal Rules did not contemplate that Rule 23 would apply to mass torts. *See* FED. R. CIV. P. 23 advisory committee's notes ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."). Nonetheless, the increasing frequency of mass torts cases led trial courts to certify class actions. The appellate courts pushed back, first in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), then in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), to limit class certification for mass torts.

54. *See In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1012 (5th Cir. 1977) ("[T]he number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large.").

55. *See* Silver & Miller, *supra* note 52, at 113–59.

56. *See id.* at 110. Silver and Miller criticize this trend on the grounds that "judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs' lawyers' incentives to serve clients well." *Id.* at 111. Silver and Miller suggest that judges appoint a "Plaintiffs' Management Committee" to handle case management. *Id.* at 112, 159–77. This solution would "safeguard[] judicial independence[] and . . . achieve fairness." *Id.* at 169. For one example of a judge adopting a hands-off approach to mass litigation, see Paul D. Rheingold, *The MER/29 Story: An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 122–30, 142 (1968).

57. *See* FED. R. CIV. P. 53.

58. *See* FED. R. CIV. P. 53 advisory committee's note ("The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation."); *see also Discussion on Class and Multiple-Party Actions*, *supra* note 53, at 35 ("I utilize [special masters] to help settle because I do not want to be caught between the defendant and the plaintiff and reduce my impartiality.").

59. *See* Silver & Miller, *supra* note 52, at 111 (noting that judges in non-class mass actions believe that they have the "same broad equitable powers as a judge presiding over a class action"). For a criticism of treating non-class mass litigation like a class action, see Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1171 (2010). Nagareda describes the non-class mass action as a "hybrid[] of traditional litigation features with aggregate ones" and warns against "shoehorn[ing] [it] awkwardly within either the class action device or the traditional model of the one-on-one lawsuit." *Id.*

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.[60] A plaintiff need only file a notice of dismissal with the court,[61] or if the case has moved beyond the preliminary stage, file a stipulation of dismissal signed by all parties.[62] This approach to settlement reflects the judicial system's appreciation for voluntary settlement.[63] There are, however, special situations, including the class action, where settlement is not binding without judicial approval.[64] 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."[65] The presiding judge, pursuant to Rule 23(e), must assess whether the class action settlement is "fair, reasonable, and adequate."[66] 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.[67] Although the circuit courts have devised different tests for meeting the "fair, reasonable, and adequate" standard,[68] 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))).

61. *See* FED. R. CIV. P. 41(a)(1)(A)(i).

62. *See* FED. R. CIV. P. 41(a)(1)(A)(ii).

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. 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)).

68. *See* Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 169 (2009) (describing various tests used to assess the fairness of a class action settlement).

afforded the opportunity to present objections to the settlement.[69] The judge then decides whether or not to approve the settlement.[70]

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.[71] A settlement in a class action, unlike ordinary litigation, has the potential to bind absent class members without their approval.[72] Therefore, a judge is needed to ensure that the settlement is fair.[73] In this capacity, the judge is not a mere "umpire in typical adversary litigation."[74] Instead, a judge "sits also as a guardian for class members."[75] Courts have gone as far as describing the judge as a "fiduciary of the class."[76] Some academics have resisted this classification, instead urging judges to rely on their regular adjudicative abilities when overseeing a class action settlement.[77] 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.[78]

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.*,[79] 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.[80] *Rogers* involved individual settlements for back pay with six hundred African American steel workers.[81] These workers were also members of a class in a pending class action.[82] Non-settling class members challenged the plaintiffs' individual settlements on the grounds that the settlements lacked judicial approval.[83]

---

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)).

79. 70 F.R.D. 639 (W.D. Pa. 1976).

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.[84] 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.[85] 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."[86] 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.[87]

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.[88] Prior to 2003, courts divided over whether a pre-certification settlement or dismissal required judicial approval.[89] During this period, courts subjected some non-class action dismissals to rigorous review.[90] In 2003, however, the drafters added the words "certified class" to Rule 23(e), and in doing so, limited the reach of judicial approval.[91] These amendments were part of a larger effort to "strengthen the procedure for reviewing a proposed settlement."[92] 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).

92. *See* Memorandum from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Hon. Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee 2 (May 20, 2002).

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,[93] bankruptcy proceedings,[94] cases involving minors or incompetents,[95] and consent decrees or consent judgments[96] also require judicial approval. Likewise, unsupervised settlement under the Fair Labor Standards Act[97] (FLSA) and criminal plea agreements[98] require judicial consent.

The specific rationales for requiring approval vary,[99] although the desire to protect claimants is a theme common to all contexts.[100] Moreover, each situation reflects a deliberate decision on the part of Congress or a state's legislature to augment the judiciary's power.[101] 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.[102] Courts

---

93. FED. R. CIV. P. 23.1(c).

94. FED. R. BANKR. P. 9019(a).

95. *See, e.g.*, MICH. CT. R. 2.420(B) (2011).

96. *See, e.g.*, SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010).

97. *See, e.g.*, Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353 (11th Cir. 1982) (rejecting a settlement under the Fair Labor Standards Act (FLSA) absent judicial approval).

98. FED. R. CRIM. P. 11(c).

99. *Compare 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."), *with* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981) (explaining that judicial approval of settlements under the FLSA is designed to protect employees from unequal bargaining power with employers and prevent parties from evading the intention of the FLSA), *and* Motorola, Inc. v. Official Comm. of Unsecured Creditors and JPMorgan Chase Bank, N.A. (*In re* Iridium Operating LLC), 478 F.3d 452, 461 (2d Cir. 2007) ("Bankruptcy Rule 9019 . . . has a 'clear purpose . . . to prevent the making of concealed agreements which are unknown to the creditors and unevaluated by the court.'" (quoting *In re* Masters, Inc., 141 B.R. 13, 16 (Bankr. E.D.N.Y. 1992))).

100. *See In re Iridium*, 478 F.3d at 461 (protecting creditors); *In re Gen. Motors*, 55 F.3d at 805 (protecting absentees).

101. The Rules Enabling Act provides the U.S. Supreme Court with "the power to prescribe general rules of practice and procedure." 28 U.S.C. § 2072 (2000). These rules, which include the Federal Rules of Civil Procedure, are subject to Congressional approval, however. *Id.* § 2074. For a description of the rulemaking process, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–19 (2002). As discussed in this part, one exception may be when a court exercises its inherent authority to approve a settlement involving a minor or incompetent.

102. *See, e.g.*, Leslie v. Estate of Tavares, 984 P.2d 1220, 1228 (Haw. 1999) (requiring approval for a settlement on behalf of an incompetent adult).

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]

---

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).

108. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 n.7 (2001) ("Private settlements do not entail the judicial approval and oversight involved in consent decrees.").

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.").

111. *See* United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 85–86 (D. Alaska 1977).

In a recent case that generated great publicity,[112] 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.[113] The settlement provided for $33 million in damages for the bank's alleged false statements regarding bonuses.[114] 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."[115] 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."[116] Judge Rakoff rejected the terms of the agreement and sent the SEC and the bank away to prepare for trial.[117]

Five months later, the SEC and Bank of America returned with an amended consent judgment.[118] The amended settlement was more favorable, providing that the bank would pay a $150 million fine and implement oversight measures to prevent future abuse.[119] Nonetheless, Judge Rakoff described this consent judgment as "inadequate and misguided."[120] The law required, however, that the judge "give substantial deference to the S.E.C.," and the agency had endorsed the settlement.[121] As such, Judge Rakoff approved the settlement while acknowledging that he was "shaking [his] head"[122] at "half-baked justice."[123] 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.[124]

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.[125] The Federal Rules explicitly authorize judges to promote

112. *See, e.g.*, Zachery Kouwe, *Judge Rejects a Settlement over Bonuses*, N.Y. TIMES, Sept. 15, 2009, at A1; Kara Scannell et al., *Judge Tosses Out Bonus Deal*, WALL ST. J., Sept. 15, 2009, at A1.

113. *See* SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009).

114. *Id.* at 508.

115. *Id.* at 509.

116. *Id.* at 510.

117. *Id.* at 512.

118. *See* SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010).

119. *Id.* at *3–4.

120. *Id.* at *6.

121. *Id.*

122. *Id.*

123. *Id.* at *5.

124. *See id.* at *6 ("[T]he considerable power given federal judges to assure compliance with the law should never be confused with any power to impose their own preferences.").

125. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) ("In growing numbers, judges are . . . meeting with parties in chambers to encourage settlement

settlement.[126] For example, the 1983 and 1993 amendments to Federal Rule 16 clarified that judges may use pretrial conferences to foster settlement.[127] There are, of course, limitations on this power.[128] For example, the Rules provide that the ultimate decision to settle rests with the parties.[129] Some scholars have criticized the notion of such an active judiciary.[130] Others have called for clearer guidelines with respect to the judge's role in settlement.[131]

If a judge does approve a settlement, while lacking the authority to do so, observers respond sternly.[132] The Eighth Circuit elaborated on this point in *Gardiner v. A.H. Robins Co.*,[133] a case that was part of the national litigation surrounding the Dalkon Shield intrauterine contraceptive device.[134] The trial judge presiding over *Gardiner* wrote "So Ordered" on the bottom of the parties' agreement dismissing a civil action in favor of

---

of disputes . . . ."); *see also* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1809–10 (1995) (analyzing the judicial role in pretrial conferences and settlement discussions).

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 . . . .").

127. *See* FED. R. CIV. P. 16 advisory committee's note [hereinafter *1983 Advisory Notes*] ("[P]retrial conferences . . . improv[e], as well as facilitat[e], the settlement process."); FED. R. CIV. P. 16 advisory committee's note [hereinafter *1993 Advisory Notes*] ("The prefatory language . . . is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party."); *see also* Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1279 (2009) ("Rule 16 . . . [has] institutionalized and enlarged the role of the judiciary in the settlement process.").

128. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 764 (2001) ("Federal courts . . . should not . . . be allowed to . . . run roughshod over participants in the judicial process.").

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).

134. For a description of the Dalkon Shield litigation, see generally RONALD J. BACIGAL, THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY (1990).

settlement.[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.[136] On appeal, the Eighth Circuit explained that the judge's action "imposed a material condition on the parties' right to a stipulated dismissal."[137] This condition was inconsistent with the private nature of the settlement.[138] Therefore, the appellate court in *Gardiner* deemed the approval improper and voided the trial judge's action.[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.

A. The Big Three MDLs

MDLs are big news. They generate much publicity, engage many parties, and involve an enormous amount of money.[140] The *Zyprexa*, *Vioxx*, and *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 *Zyprexa*, *Vioxx*, and *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. *In re Zyprexa Products Liability Litigation*

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

135. *Gardiner*, 747 F.2d at 1183.

136. *Id.* at 1185.

137. *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." *Id.* at 1188.

138. *Id.*

139. *See id.* at 1190.

140. *See, e.g.*, Alex Berenson, *Lilly to Pay $690 Million in Drug Suits*, N.Y. TIMES, June 10, 2005, at C1.

Judge Jack B. Weinstein.[141] 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.[142] Thousands of individuals filed lawsuits across the country, and in April 2004, the Panel transferred these cases to Judge Weinstein.[143] Less than two years later, the judge approved a final settlement,[144] which had the potential to resolve nearly 8,000 claims for $700 million.[145] Judge Weinstein's approval, however, was a curious addition because *Zyprexa*, like the other cases discussed in Part III, was not a class action.[146]

Consistent with his reputation,[147] Judge Weinstein shepherded *Zyprexa* from consolidation to settlement. He appointed a Plaintiffs' Steering Committee (PSC) and charged it with pursuing settlement options.[148] He selected a Special Master to expedite discovery.[149] The judge also set a firm trial date for December 5, 2005.[150] With December rapidly

141. *See In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 314 F. Supp. 2d 1380, 1382–83 (J.P.M.L. 2004) (transfer order).

142. *See* Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 16.

143. *See In re Zyprexa*, 314 F. Supp. 2d at 1382–83.

144. *See* Order, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 2005 WL 3117302, at *1 (E.D.N.Y. Nov. 22, 2005).

145. *See* Master Settlement Agreement at 6, *In re Zyprexa*, MDL No. 1596 (E.D.N.Y. Nov. 22, 2005), *available at* http://investor.lilly.com/secfiling.cfm?filingID=950137-05-13258. Judge Weinstein's approval did not bind the claimants; each claimant had to accept the terms and release its claim against Eli Lilly & Co. (Lilly), the manufacturer of Zyprexa. During this process, thousands more filed lawsuits. Judge Weinstein managed these claims as well, and in 2007, oversaw the settlement of an additional 18,000 claims for $500 million. *See In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 467 F. Supp. 2d 256, 262–64 (E.D.N.Y. 2006) (describing the ongoing litigation).

146. *See* Transcript of Status Conference at 23, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596 (E.D.N.Y. Nov. 9. 2005) [hereinafter Zyprexa November Transcript] (on file with the Fordham Law Review) ("This is not a class action, it's a private settlement, right?"). Three individuals filed putative class actions. *See* Master Settlement Agreement, *supra* note 145, at 13–14. Judge Weinstein never certified these class actions, and with the success of the *Zyprexa* settlement, these individuals dismissed their claims. *Id.* Judge Weinstein later reflected that the *Zyprexa* litigation would have fared better as a class action. *See* Weinstein, *supra* note 142, at 17 ("Many pharmaceutical cases have been predicated on individual settlements, which was the case for Zyprexa . . . . I think a properly interpreted class action would be better than individual actions.").

147. *See* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2018 (1997) ("A litigant in Judge Weinstein's court must expect the judge to take initiative in shaping the suit, to establish strict and quick time lines for the litigation, to explore innovative substantive norms, to appoint masters, to work with magistrates . . . while promoting settlement throughout the process.").

148. *See* Case Management Order No. 1, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 2004 WL 3520245, at *1 (E.D.N.Y. June 17, 2004) (appointing a Plaintiffs' Steering Committee (PSC)).

149. *See* Order, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 2004 WL 2792123, at *1 (E.D.N.Y. Dec. 2, 2004) ("Peter Woodin, Esq., an accomplished dispute resolution professional with extensive experience in the negotiation, settlement and administration of complex, multi-party [litigation], was appointed special master to conduct and expedite discovery, pursuant to oral directions.").

150. *See id.* at *1.

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

151. *See* Case Management Order No. 12, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 2005 WL 2237824, at *1 (E.D.N.Y. June 30, 2005).

152. *See id.*

153. *See* Case Management Order No. 13, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 2005 WL 1939339, at *1 (E.D.N.Y. Aug. 10, 2005). Judge Weinstein also suggested that the parties appoint a "plaintiff-discovery special master" to assist with discovery. *See In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 375 F. Supp. 2d 190, 192 (E.D.N.Y. 2005). Judge Weinstein conceded that this position would "be a departure from the usual United States litigation style, with adverse lawyers representing particular clients or groups of clients in discovery." *Id.* The defendants rejected this suggestion. *See* Order, *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-01596, 2005 WL 2988721, at *1 (E.D.N.Y. Nov. 4, 2005) ("Lilly's objections to a 'plaintiff-discovery special master' [] seem compelling." (citation omitted)).

154. *See* Case Management Order No. 13, 2005 WL 1939339, at *1.

155. *Id.*

156. *See* Order, *In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 2005 WL 2464158, at *1 (E.D.N.Y. Oct. 6, 2005).

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

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.").

165. *See* Zyprexa November Transcript, *supra* note 146, at 22. The settlement provided that normal contingency arrangements would remain in effect. *See* Master Settlement Agreement, *supra* note 145, at 20. Judge Weinstein capped fees at 20 percent for Track A recovery, and 35 percent in all other cases. *See In re* Zyprexa Prods. Liab. Litig., MDL No. 1596, 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006).

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";[174] the case involved important national issues that needed a prompt resolution.[175] He appointed Kenneth Feinberg as Settlement Master,[176] 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."[177] Feinberg and Judge Weinstein drafted parts of the agreement,[178] the judge capped the settlement amount at $180 million,[179] and in the end, counsel agreed to the terms.[180] The judge cited his obligation to the legal system as the reason he imposed a settlement cap on the parties.[181] Thereafter, Judge Weinstein presided over Fairness Hearings and approved the settlement.[182] 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,[183] 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

---

173. *In re* "Agent Orange" Prods. Liab. Litig., MDL No. 381, 100 F.R.D. 718, 720 (E.D.N.Y. 1983) (granting class certification).

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").

181. *Id.* Some academics have criticized such behavior. *See, e.g.*, Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 72 (1992) (criticizing judges who "encourage[] settlement based on [a] firm view that the case 'ought' to settle, either generally or for a particular amount"); Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267, 1293–94 (1987) (reviewing SCHUCK, *supra* note 172, and criticizing Judge Weinstein's control over the settlement).

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 ("[I]t 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.[184] In September 2004, news broke that Vioxx, a prescription painkiller, increased the risk of heart attack and stroke in those who took the medication.[185] 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.[186] Shortly thereafter, thousands of lawsuits poured into state and federal court.[187] 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.[188]

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*,[189] Judge Fallon appointed committees of counsel to represent the parties and conduct negotiations.[190] The judge also followed Judge Weinstein's lead by refusing to certify *Vioxx* as a class action.[191] However, the *Vioxx* settlement, which was valued at $4.85 billion,[192] vastly exceeded the *Zyprexa* settlement at the end of the process.[193] Moreover, Judge Fallon exercised greater control over the *Vioxx* settlement, serving as Claims Administrator of the settlement agreement.[194]

Judge Fallon expressly encouraged settlement,[195] and on November 9, 2007, Merck issued a press release in which it announced that the parties

184. *See In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 360 F. Supp. 2d 1352, 1353–55 (J.P.M.L. 2005) (transfer order).

185. *See In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 650 F. Supp. 2d 549, 551–52 (E.D. La. 2009).

186. *Id.*

187. *Id.*

188. *In re Vioxx*, 360 F. Supp. 2d at 1354. The Panel selected Judge Fallon because of his experience with MDLs. *See* Barnaby J. Feder, *Federal Panel Consolidates Vioxx Suits*, N.Y. TIMES, Feb. 17, 2005, at C1 (explaining that Judge Fallon was overseeing the *Propulsid* MDL when he received the *Vioxx* MDL); *see also In re* Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 2047, 626 F. Supp. 2d 1346, 1347 (J.P.M.L. 2009) (assigning the case to Judge Fallon, who had "extensive experience in multidistrict litigation as well as the ability and temperament to steer this complex litigation on a steady and expeditious course").

189. *See supra* notes 147–48 and accompanying text.

190. *See In re Vioxx*, 650 F. Supp. 2d at 552 & nn.2 & 4 (recounting how Judge Fallon appointed a Plaintiff's Steering Committee, Defendants' Steering Committee, and Negotiating Plaintiffs' Counsel to lead the litigation).

191. *See In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 239 F.R.D. 450 (E.D. La. 2006) (denying class certification); *supra* note 146 and accompanying text.

192. *See* Master Settlement Agreement Recitals, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007).

193. *See supra* note 145 and accompanying text.

194. *See infra* note 199 and accompanying text.

195. *See* Transcript of Proceedings Before the Hon. Eldon E. Fallon at 5, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007) [hereinafter Vioxx November Transcript], *available at* http://vioxx.laed.uscourts.gov/Transcripts/11-9-07.pdf ("We appreciate and acknowledge the importance of that effort that was made [in] December [2006] when the judges called us together and asked us . . . how we could try to resolve . . . this litigation.").

had reached a settlement.[196] Merck noted that it had met with three of the four judges in the case earlier that morning to discuss the settlement agreement.[197] During this meeting, the judge "tweak[ed]" the terms of the agreement,[198] and agreed to serve as the Chief Administrator.[199] In this capacity, Judge Fallon was to control common benefit fees and ensure compliance with Section 1.2.8 of the agreement,[200] which required counsel to recommend the settlement to all clients or withdraw representation.[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."[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."[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.[204] Likewise,

196. See Press Release, Merck & Co., Inc, Merck Agreement to Resolve U.S. Vioxx Product Liability Lawsuits (Nov. 9, 2007), http://www.merck.com/newsroom/news-release-archive/corporate/2007_1109.html.

197. *See id.*

198. *See* Transcript of Status Conference Before the Hon. Eldon E. Fallon at 12, *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.").

199. *See* Master Settlement Agreement, *supra* note 192, § 6.1.1.

200. *See id.* §§ 1.2.9, 9.

201. *See id.* §§ 1.2.8.1, 1.2.8.2.

202. *See* Vioxx November Transcript, *supra* note 195, at 38.

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, *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, *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, *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).

204. *See 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.[205] He refused to "rewrite the terms of [a] private, contractual Settlement Agreement."[206] In sum, the judge crafted the settlement in *Vioxx*, afforded the settlement a hearty recommendation, and served as its Claims Administrator, all the while categorizing the settlement as a private agreement.[207]

3. *In re Guidant Corporation Implantable Defibrillators Products Liability Litigation*

The third case in the trilogy, *Guidant*, arose before Judge Donovan W. Frank of the U.S. District Court for the District of Minnesota around the same time as *Vioxx*.[208] In 2005, Guidant, a manufacturer of defibrillators and pacemakers, notified physicians of certain defects with its implantable devices.[209] Individuals with Guidant-made implants filed personal injury actions in state and federal court.[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 *Guidant*.[211] Once again, the *Guidant* MDL was not a class action.[212]

Although *Guidant* continued many trends from *Zyprexa* and *Vioxx*,[213] the settlement in *Guidant*, more so than the others, came about through Judge Frank's efforts.[214] Only months after the MDL formed, Judge Frank

---

classification of an MDL as a quasi-class action and . . . exercise[d] their equitable powers to cap contingent fees").

205. *See In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2008 WL 3285912, at *1–3 (E.D. La. Aug. 7, 2008).

206. *See id.* at *20. Judge Fallon also rejected the motion because an injunction would "limit the ability of members of the public to obtain quick and effective relief" and "the public interest would be far better served by requiring the private health insurance companies to devise a more effective means for identifying their own insureds." *See id.*

207. *See id.*

208. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 398 F. Supp. 2d 1371, 1372 (J.P.M.L. 2005) (transfer order).

209. *See* Press Release, Boston Scientific, Guidant Notifies Physicians Regarding VENTAK 1861 PRIZM 2 DR Implantable Defibrillator (May 25, 2005), http://bostonscientific.mediaroom.com/index.php?s=64&item=178.

210. *See In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *1 (D. Minn. Mar. 7, 2008).

211. *See* Transcript of Status Conference at 16, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (D. Minn. Dec. 17, 2007) [hereinafter Guidant December Transcript], *available at* http://www.mnd.uscourts.gov/MDL-Guidant/Transcripts/121707dwfmdl05-1708.pdf.

212. *See id.* ("[T]his is not a class action.").

213. *See, e.g.*, Pretrial Order No. 1 at 1–4, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (D. Minn. Dec. 19, 2005) (appointing plaintiffs' and defendants' lead and liaison counsel); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *14 (D. Minn. Mar. 7, 2008) (capping fees for counsel); *id.* at *6 (describing the litigation as a quasi-class action).

214. *See* Pretrial Order No. 5 at 7, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (D. Minn. Jan. 31, 2006) ("The Court's goal will be to move the MDL along in an expeditious and fair manner . . . .").

ordered counsel for each side to confer with Magistrate Judge Arthur J. Boylan to discuss "the parties' positions regarding early settlement efforts."[215] Thereafter, counsel was to keep Judge Boylan informed of all settlement discussions.[216] Judge Boylan was active enough in the settlement process that the parties described him as the settlement's "architect."[217] In July 2007, counsel for each side notified Judges Frank and Boylan that they had reached a proposed settlement for $195 million.[218] Guidant increased this amount to $240 million after an influx of claims following the July announcement.[219]

In early December 2007, counsel presented the settlement for Judge Frank's review. After considering the terms, the judge recommended the settlement to all claimants.[220] 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.[221] 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.[222] Judge Boylan also spoke at the conference, and joined Judge Frank in his review and recommendation.[223] 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.*[224] 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

---

215. *See id.* at 5.

216. *See id.* at 6.

217. *See* Guidant December Transcript, *supra* note 211, at 15. Judge Boylan clarified that, as a judge, he "never settled a case. . . . I just assist people in helping them settle cases." *Id.* at 24.

218. *See In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2009 WL 5195841, at *1 (D. Minn. Dec. 15, 2009).

219. *See Guidant Defibrillator Settlement Increased to $240M*, ONLINE LAWYER SOURCE (Nov. 20, 2007), http://www.onlinelawyersource.com/news/guidant-settlement-increa.html.

220. *See* Guidant December Transcript, *supra* note 211, at 19.

221. *See id.* at 17.

222. *See* Transcript of Status Conference at 72, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (D. Minn. Jan. 24, 2006) ("I am hoping . . . we can do our best to represent the interests of justice which [is] a fair shake for everyone."), *available at* http://www.mnd.uscourts.gov/MDL-Guidant/Transcripts/012406dwfmdl05-1708.pdf.

223. *See* Guidant December Transcript, *supra* note 211, at 24.

224. No. 21 MC 100 (S.D.N.Y. 2010).

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.[225] The *World Trade Center* litigation, in which thousands of first responders and rescue workers sued the City of New York, was no exception.[226] The initial claimants filed lawsuits in New York State Court in 2002.[227] The City removed these cases to federal court under the Air Transportation Safety and System Stabilization Act,[228] and the cases were randomly assigned to Judge Hellerstein of the Southern District of New York.[229] The judge received nearly 1,200 cases,[230] and soon oversaw litigation that involved some 10,000 individuals.[231]

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

225. *See* Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror Attack*, N.Y. TIMES, Sept. 9, 2004, at B1.

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).

227. *See* Effron, *supra* note 6, at 208. For a comprehensive narrative of the rescue, recovery, and cleanup efforts, see NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 278–323 (2004), *available at* http://www.gpoaccess.gov/911/index.html. *See generally* Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383 (2007).

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.

229. *See* Transcript of Public Meeting at 91, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Aug. 3, 2010) (on file with the Fordham Law Review).

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.[232] 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.[233] Instead, the cases were consolidated under Federal Rule 42[234] 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.[235] 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.[236] According to Judge Hellerstein, the extraordinary public interest and the limited funds available for the claimants demanded that there be "fairness proceedings."[237] Judge Hellerstein would take these actions, even though he explicitly stated that the *World Trade Center* litigation was a grouping of "separate cases."[238]

2. The Settlement Rejection

On March 12, 2010, news broke that counsel for the plaintiffs and the City had reached a settlement.[239] Under the agreement, the City would pay $575 million if 95 percent of eligible claimants released their claims.[240] The settlement reserved $23.4 million for future claims[241] and allocated 33 percent to counsel in fees.[242] Counsel would jointly select a claims administrator to divide the settlement sum among claimants.[243] The City's Mayor, Michael R. Bloomberg, described the settlement as "a fair and reasonable resolution to a complex set of circumstances."[244]

Judge Hellerstein disagreed. One week after the initial announcement, Judge Hellerstein rejected the settlement and took "judicial control" over

---

232. *See* Order Suggesting a Special Master for Further Proceedings at 2, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Oct. 17, 2006).

233. *See In re World Trade Ctr.*, 456 F. Supp. 2d at 575 ("Plaintiffs . . . worked for various contractors, on various dates, and in different portions of the World Trade Center site."); WTC January Transcript, *supra* note 5, at 19 ("I've expressly been unwilling to certify a class action.").

234. FED. R. CIV. P. 42(a).

235. *See* WTC January Transcript, *supra* note 5, at 5–6 ("[W]hat is fair and reasonable will have to be determined by the Court, subject to the right of appeal.").

236. *Id.* at 19.

237. *Id.* at 5.

238. *See id.* at 19 ("I regard these 9,000 cases as just those, 9,000 separate cases.").

239. *See* Mireya Navarro, *Deal Is Reached on Health Costs of 9/11 Workers*, N.Y. TIMES, Mar. 12, 2010, at A1.

240. *Id.* The amount would increase to $657.5 million if 100 percent of eligible claimants accepted the settlement. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* The claims administrator would design a system for determining awards based upon a claimant's illness severity and past medical history. *Id.*

244. *Id.*

the process.[245] First, the judge prohibited the parties from appointing a claims administrator absent his approval.[246] 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."[247] 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.[248] Moreover, the settlement terms were too confusing for the average claimant to understand what they were signing.[249] Judge Hellerstein demanded "an agreement under judicial supervision that will make us all proud."[250] To accomplish this, Judge Hellerstein put himself in charge.[251]

Counsel appealed Judge Hellerstein's decision but also returned to the negotiating table.[252] Three months later, counsel presented the judge with an amended settlement.[253] The amended settlement provided claimants with $125 million in additional relief.[254] 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.[255] The amended settlement also included a redesigned "settlement grid" to calculate the relief for each claimant.[256] 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.[257] 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.

252. *See* Notice of Appeal, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Apr. 14, 2010); Mark Hamblett, *City Asks Circuit to Override Judge's Rejection of 9/11 Pact*, N.Y. L.J., Apr. 15, 2010, at 1 (reporting the City's appeal).

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

---

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.

261. Transcript of Fairness Hearing at 215–16, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. June 23, 2010) (on file with the Fordham Law Review).

262. *Id.* at 216.

263. *See, e.g.*, Alison Gendar & Corky Siemaszko, *Suffering 9/11 Heroes Applaud Judge Alvin Hellerstein's Ruling to Renegotiate Settlement*, N.Y. DAILY NEWS (Mar. 20, 2010), http://articles.nydailynews.com/2010-03-20/local/27059534_1_judge-alvin-hellerstein-new-hero-ruling; Ashby Jones, *In WTC Settlement, Plaintiffs' Lawyers Take One for the Team*, WALL ST. J. L. BLOG (June 10, 2010, 1:50 PM), http://blogs.wsj.com/law/2010/06/10/in-wtc-settlement-plaintiffs-lawyers-take-one-for-the-team/; *see also* Navarro, *supra* note 2.

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. Erichson 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.[265] 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.[266]

Much like Judge Weinstein in *Zyprexa*,[267] Judge Hellerstein offered an assortment of reasons for his actions. He explained that there were "precedents for judicial supervision of settlement,"[268] there was the risk that counsel would not afford fair settlements to all claimants,[269] and the litigation implicated the public interest.[270] 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.[271] Judge Hellerstein had urged Congress to renew the Fund,[272] but Congress refused to do so.[273] In the absence of the Fund, the judge set out to ensure that the amended settlement afforded claimants adequate relief.[274]

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."[275] 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,[276] the judge dismissed their concerns as "academic."[277] 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."[278]

Judge Hellerstein's involvement did not end with his approval of the amended settlement.[279] The judge held two public meetings where claimants were encouraged to ask questions about the settlement.[280] Although maintaining his judicial independence,[281] the judge spoke as if he were a party to the agreement.[282] He granted deadline extensions[283] and offered legal assistance to those claimants who had yet to respond to the settlement by the various deadlines.[284] In the end, 10,043 of the 10,563 eligible plaintiffs, more than the required 95 percent, opted into the settlement.[285] Less than two months later, President Barack Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010,[286] which created a long-awaited $4.3 billion fund to assist the first responders and rescue workers with their medical expenses.[287]

(May 3, 2010), http://lawprofessors.typepad.com/mass_tort_litigation/2010/05/profile-of-wtc-litigation-judge-in-the-nytimes.html (explaining that Judge Hellerstein's approval gave the settlement "gravitas," just as Judge Fallon's approval in *Vioxx* made "plaintiffs who had no way of knowing what they would get at the end of the day agree to buy a pig in a poke because they could trust the process").

276. *See* Transcript of Fairness Hearing, *supra* note 261, at 5–6 ("[T]he city and the contractors have objected, respectfully, and continue to object, to the Court's assertion of any jurisdiction over the settlement. The parties believe that the private settlement that they have agreed to is fair to all involved, and while the parties very much appreciate the Court's acknowledgment of that fact, it is the parties' position that the settlement is effective and binding without any approval by the Court."). Some scholars voiced similar concerns. *See supra* note 263.

277. *See* WTC June Transcript, *supra* note 3, at 49 ("Plaintiff may be interested in this case, but . . . not . . . in the academic issue whether the judge can or cannot exercise jurisdiction over a settlement.").

278. *Id.*

279. *See* Transcript of Public Meeting, *supra* note 229, at 1.

280. *See id.*

281. *See id.* at 3 ("I'm not here to persuade you one way or another.").

282. *See id.* at 10 ("*We* want to present *our* views and *our* mix of information so that you can make as good and as fair a decision as you can. . . . [M]aybe one or two might think *we* did a good job.") (emphasis added).

283. *See* Order Amending Previous Order Regulating Proceedings of Nov. 8, 2010, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Nov. 9, 2010).

284. *See* Order Setting Hearing Concerning Extension, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Dec. 16, 2010).

285. *See* Allocation Neutral's Report, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Nov. 19, 2010).

286. Pub. L. No. 111-347, 124 Stat. 3623 (2010) (codified at 26 U.S.C. § 5000C (2006)).

287. *See* Sheryl Gay Stolberg, *Obama Signs Bill to Help 9/11 Workers*, N.Y. TIMES, Jan. 3, 2011, at A17. With the passage of this Act, one of Judge Hellerstein's justifications for his involvement in the settlement—to ensure that first responders and rescue workers would receive adequate compensation—became obsolete.

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."[288] Through this evolution, judges have transformed non-class mass settlement from a private contract into an agreement that is dependent on judicial approval.[289] 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.[290] Much of this makes sense because non-class mass litigation shares certain attributes with class actions.[291] 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.[292] In the interests of protecting these class members, a judge must verify that the settlement is "fair, reasonable, and adequate."[293] The same concerns do not apply in a non-class mass settlement, because there are no absent class members.[294] Each claimant has filed a lawsuit and has the option to accept or reject the settlement.[295] 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.[296] 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,[297] nor does it apply to settlements that occur before a class action is certified.[298] Rule 23(e) only applies when doing so would protect absent class members.[299] 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 "strengthen[ed]" judicial review of settlement.[300] 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.[301] First, settlement involving minors or incompetents is predicated on the need to protect individuals who cannot protect themselves.[302] 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.[303] 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,[304] 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;[305] a mere similarity to another type of settlement is hardly adequate.[306]

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,[307] 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.[308] 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.[309] It

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.[310]

Adding a judicial approval requirement detracts from the adversarial nature of the judicial system as well. In *Zyprexa*, *Vioxx*, *Guidant*, and *World Trade Center*, the judges seemed to be acting as advocates for the claimants.[311] Judge Weinstein in *Zyprexa* believed that it was his responsibility to compensate claimants because the other branches of government had failed.[312] Judge Fallon in *Vioxx* described the settlement as an outcome in the claimants' best interests.[313] Similarly, Judge Frank in *Guidant* explained that the settlement would provide claimants, who might face difficulty in proving their claims, with the best relief.[314] Finally, Judge Hellerstein in *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.[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.[316] The judge, as Judge Frank noted in *Guidant*, should provide a "fair shake" for everyone.[317] Judge Rakoff's actions in *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.[318]

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.[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.[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.[321] Second, it assumes that individuals are unable to choose whether to accept a settlement in the absence of legal counsel. This assumption is

310. *See supra* notes 133–39 and accompanying text.
311. *See supra* Part III.A–B.
312. *See supra* note 169 and accompanying text.
313. *See supra* note 203 and accompanying text.
314. *See supra* note 221 and accompanying text.
315. *See supra* note 259 and accompanying text.
316. *See supra* note 203.
317. *See supra* note 221.
318. *See supra* notes 113–24 and accompanying text.
319. *See supra* note 35 and accompanying text.
320. *See supra* note 14 and accompanying text.
321. *See In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2009 WL 5195841, at *1 (D. Minn. Dec. 15, 2009) (sanctioning an attorney for failing to adequately inform his clients about the settlement).

paternalistic, and courts have rejected such paternalism when considering Rule 23(e).[322]

If judges are concerned about claimants signing agreements they do not understand, there are other ways to ensure the integrity of the process. As one solution, judges could approve not the terms of the settlement but the settlement summaries that are presented to claimants. This would ensure that assent is well founded without expanding judicial power.

A closer look at the settlements discussed in Part III reveals that judges are already engaging in this practice. Judge Weinstein accomplished something to this effect in *Zyprexa* when he authorized his Settlement Masters to ensure that all claimants gave informed consent to the settlement.[323] Judge Hellerstein did something similar in *World Trade Center* when he appointed Roy Simon to make sure all communications with claimants followed ethical guidelines.[324] Judge Hellerstein also presided over hearings to answer claimants' questions,[325] and provided claimants with independent counsel.[326] In such solutions, judges leave the substantive terms of the settlement to the claimants, but maintain the integrity of the judicial system. This result is in everyone's best interests.

CONCLUSION

Judges who oversee non-class mass actions find themselves in a bind. The litigation is not a class action, and therefore, judicial approval of the settlement is not required. At the same time, the actions raise different concerns than individual litigation. Faced with such a predicament, judges have tried to stretch the class action device to fit these non-class mass actions. Unfortunately, this practice removes claimant autonomy and damages the adversarial system. Therefore, instead of affording non-class mass actions an ill-suited class action remedy, judges should embrace non-class mass litigation as a private contract in which the parties, and not the judges, choose when and how to settle.

322. *See supra* notes 79–87 and accompanying text.
323. *See supra* note 153 and accompanying text.
324. *See supra* note 258 and accompanying text.
325. *See supra* notes 279–82 and accompanying text.
326. *See supra* note 284 and accompanying text.