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“HELPLESS” GROUPS

Troy A. McKenzie*

“Courts of equity have a tradition of aiding the helpless, such as infants, idiots and drunkards. The average security holder in a corporate reorganization is of like kind.”¹

INTRODUCTION

This Essay considers the idea of the “helpless” group—that is, the group comprising individuals who are thought to be incapable of protecting their own interests. That idea plays a particularly important role in the history of the modern class action, which has been justified as a device providing redress for “small claims held by small people.”² The helpless group is at once hero and victim. The group serves as champion of the law by seeking to vindicate its rights.³ At the same time, the group may be preyed upon by the party opposing it and, potentially, by its own counsel. Indeed, courts, whether in the class action⁴ or in the new world of nonclass aggregate litigation,⁵ are called upon to give special protection to the helpless group for that reason.

But the rhetoric of helplessness can be muddled and contradictory. It is muddled because it collapses a number of different concepts that should be explored separately. Sometimes, the image of the helpless group is invoked when discussing a group of individuals who are not helpless in the ordinary sense of the word. They may be fully capable of participating in the litigation but are rationally indifferent to it—either because they hold negative value claims or because the group’s claims are, for idiosyncratic reasons, ones that individual group members may not wish to pursue. At other times, the image of the helpless group is invoked to justify searching judicial oversight of lawyers. The rhetoric of helplessness under those

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1. Jerome Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 VA. L. REV. 541, 569 (1933).

2. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967) (discussing opt-out classes).

3. *Id.*; see also William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 714 (2006).

4. See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

5. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–94 (E.D.N.Y. 2006).

circumstances serves principally to highlight the perceived failings of counsel owing a fiduciary obligation to the group.

There is also a contradictory side to the image of helplessness. It can hobble aggregation in many cases where the group is most able to give voice to its preferences and to push back against the misdeeds of its lawyers. Precisely when a group shows evidence of being something other than defenseless, that evidence may be used to disfavor group litigation.⁶ Mass tort class actions, for example, were attacked in part because they did not fit the perceived image of helpless individuals who needed the protection of a group litigation device.⁷ This is not to say that we should ignore any of these considerations. Rather, the underlying concerns at play in assessing the needs of claimants, their opponents, and the civil justice system should be laid bare.

This Essay draws from the development of bankruptcy law and, specifically, from the law governing business reorganizations. Bankruptcy serves as a case study in the rhetoric of helplessness. Odd as it may seem, the concern about helpless individuals corralled into a group and preyed upon by their adversaries and their own lawyers originated in bankruptcy before it made its way to the world of the class action. The system of business reorganization that developed in the nineteenth and early twentieth centuries—the equity receivership—relied heavily on the participation of committees representing various classes of creditors and equity holders during the negotiated resolution of a firm’s financial distress. In theory, those committees acted on behalf of the groups they represented, although in practice they were often dominated by the insiders who controlled the reorganization process—corporate debtors’ managers, bankers, and lawyers.

To highlight the exploitation of security holders in large business reorganizations, reformers emphasized the isolation and helplessness of the typical creditor, such as a bondholder with a small stake in the reorganization.⁸ During the New Deal, those reformers successfully

6. See, e.g., *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 496 & n.28 (E.D. Pa. 1997) (describing the litigation as “Goliath versus Goliath” and concluding that a class action would not be superior to other means of adjudication).

7. See, e.g., Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 581 (1994) (“[M]ass tort cases do not pit downtrodden, defenseless claimants against such big, impersonal governmental institutions as prisons, school systems, and mental health facilities.”).

8. See, e.g., E. Merrick Dodd, Jr., *Reorganization Through Bankruptcy: A Remedy for What?*, 48 HARV. L. REV. 1100, 114 (1935) (describing the concern that “the average small bondholder, not knowing where else to turn in his need of finding someone who would act for him,” could be manipulated by those who controlled the reorganization process); Roger S. Foster, *Conflicting Ideals for Reorganization*, 44 YALE L.J. 923, 948 (1935) (“It is probable that in many instances the reorganizers counted on the ignorance and inertia of scattered bondholders, and upon extra-legal pressure to compel general acceptance of . . . [the reorganizers’] plans.”); Frank, *supra* note 1, at 568 (“The bulk of the security holders [in a reorganization] are inevitably uninformed and usually concur in a plan presented to them by the reorganizers because of lack of information and lack of any practical alternatives.”).

overthrew the receivership and replaced it with a form of business reorganization that strictly limited the participation of formal, representative committees of creditors.

The reformers' justification for that radical change was that individual creditors were so ill equipped to monitor the process that creditors' committees would, inevitably, fall prey to the machinations of insiders.⁹ Rather than design a more robust committee system that attempted to counterbalance insider control and thereby give creditors more say in the process, the reformers abandoned group representation in large corporate bankruptcies. Instead, the reforms aimed to replace the committee system with a single guardian—a neutral trustee—under the supervision of an administrative agency (the SEC).¹⁰

The result was a failure. The "reformed" bankruptcy process that emerged from the New Deal era proved to be unsatisfactory to debtors and creditors alike. Rather than facilitating the resolution of firms' financial distress, the reforms made it much more difficult because bargaining among the various interests at stake became too unwieldy without the mediating influence of organized committees.¹¹ When the bankruptcy system underwent its next major overhaul in the 1970s, the New Deal approach to corporate reorganizations was abandoned in favor of a return to a (modified) pre-New Deal model of group resolution.¹²

This historical note has implications beyond bankruptcy. The early academic thinking that shaped the current form of the class action was heavily influenced by the New Deal era bankruptcy reformers. Indeed, the seminal law review article about the class action, written shortly after the New Deal overhaul of the bankruptcy system, began with a discussion of the problem of the individual creditor in a business reorganization case.¹³

A number of lessons can be drawn from the bankruptcy experience of group organization. First, it is necessary to pierce through the rhetoric of the helpless group in order to appreciate what features of a particular group of individual claimants are thought to render them unable or unwilling to participate effectively in litigation. The New Deal reformers assumed that small investors holding small claims in corporate bankruptcies would be indifferent to the running of the case.¹⁴ They failed to recognize, however, the heterogeneous nature of the community of creditors in a large bankruptcy case. Second, greater attention should be paid to ways in which the voice of groups can be harnessed effectively.¹⁵ When the New Deal era

9. *See infra* Part I.A.1.

10. *See infra* Part I.A.2.

11. *See infra* Part II.A.

12. *See infra* Part II.B.

13. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 684–85 (1941).

14. *See infra* Part I.A.1.

15. There are, of course, scholars who have given careful study to that problem. *See generally, e.g.*, Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1 (2008); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*,

reforms of the bankruptcy system were abandoned, creditors' committees were reintroduced as a form of monitor and as a semi-legislative outlet for claimants. There is much to criticize in the use of creditors' committees today in bankruptcy, but the more recent history of the committee system demonstrates that they play a valuable role in enhancing the group resolution process in bankruptcy cases. The class action, on the other hand, remains inhospitable to forms of organization that draw on subgroup representation of the same sort.¹⁶ Nevertheless, the developing form of procedural aggregation that lies outside the formal certification of a class action may once again open the doors to rethinking group representation.

I. THE HELPLESS GROUP AND PROCEDURAL REFORM

In 1941, Harry Kalven and Maurice Rosenfield wrote perhaps the most influential law review article on the class action.¹⁷ Published shortly after *Hansberry v. Lee*,¹⁸ the Supreme Court's landmark decision on due process in representative suits, *The Contemporary Function of the Class Suit* explored routes for reforming the class action.¹⁹ The article provided as its principal insight a model of the class as a group with a shared interest,²⁰ a conceptual innovation that the authors offered as a challenge to the more limited traditional view of the proper role of class suits.²¹ The model put

91 B.U. L. REV. 87 (2011) [hereinafter Burch, *Litigating Together*]; Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451 (2012); see also Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863.

16. To be sure, claimants are not completely voiceless in class actions, as the role of individual objectors demonstrates.

17. Kalven & Rosenfield, *supra* note 13. For a discussion of the article's influence, see Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 603 (2008); Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1978–79 (2004).

18. 311 U.S. 32 (1940).

19. See Kalven & Rosenfield, *supra* note 13, at 701–07 (criticizing the then-current version of Rule 23 of the Federal Rules of Civil Procedure).

20. See Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1128 (2011) (discussing Kalven and Rosenfield's model of the class action); see also STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987) (observing that Kalven and Rosenfield “embrace[d] the interest definition of the class, requiring no more than an (assumedly) shared interest in recouping losses”).

21. Kalven and Rosenfield heaped particularly harsh criticism on the then-recently promulgated Rule 23 of the Federal Rules of Civil Procedure—or, at least, on the interpretation of the Rule offered by Yale Law School Professor J. W. Moore, who was one of its drafters. Moore, a bankruptcy scholar as well as an expert on civil procedure, insisted that the 1938 version of the Rule contemplated only three types of class actions depending on the preexisting legal relationship among the class members. 2 JAMES WILLIAM MOORE, FEDERAL PRACTICE 2235 (1st ed. 1938). Moore called these three categories the “true” class action, in which members of the class held a joint or common right; the “hybrid” class action, in which the class members' rights were several but involved claims to property that required common distribution or management; and the “spurious” class action, in which the class action served as a permissive joinder device. *Id.* at 2235–41. Kalven and Rosenfield showed that these categories were unhelpful in achieving the desired end of effective and inclusive group resolution, because they either duplicated existing procedures or applied

forward by Kalven and Rosenfield sought to give a realistic assessment of the dynamics of widely dispersed groups of claimants who lacked prior communal ties. When those groups comprised individuals who, although sharing a common interest, were “isolated, scattered, and utter strangers to each other,” a procedural intervention was necessary to bring them together and make recovery possible.²²

Ultimately, the authors settled on the solution of a reformed class suit, brought by any one member of the class without the need to solicit other class members’ consent, with an emphasis on the benefits of maximizing the inclusion of claimants.²³ Before reaching that conclusion, however, Kalven and Rosenfield first considered a model of group organization drawn from business reorganization cases—the committee—and rejected it. Why they did so has a fascinating historical explanation that deserves to be retold.

A. *The Helpless Group in Bankruptcy*

Those who have not recently re-read Kalven and Rosenfield’s seminal work probably do not recall that it begins with an examination of developments in bankruptcy law.²⁴ That was not as odd then as it may seem now. When Kalven and Rosenfield first advocated broader use of the class action in 1941, the law of corporate reorganizations had recently undergone a massive reworking, driven by the perceived mistreatment of the individual investor in bankruptcy cases. The SEC had undertaken a lengthy investigation of corporate reorganizations in the 1930s, and the agency’s report, whose final part was published one year before Kalven and Rosenfield’s article, painted a grim picture of security holders systematically exploited by corporate debtors and those who controlled the group resolution process of corporate reorganizations.²⁵ The SEC Report recounted the plight of “the single and isolated security holder” who was, in most cases, “helpless in protecting his own interests or pleading his own cause.”²⁶ Kalven and Rosenfield chose that quotation from the SEC Report to frame the opening passages of their article.²⁷

only to cases of limited importance. *See* Kalven & Rosenfield, *supra* note 13, at 705 (“[T]he rule performs three functions as interpreted by Moore. That of the ‘true’ class suit, no one any longer cares about; that of the ‘hybrid’ suit is well taken care of through another procedure entirely, and the ‘spurious’ simply duplicates a task already performed by another section of the rules.”).

22. Kalven & Rosenfield, *supra* note 13, at 688.

23. *See id.*

24. *See id.* at 684.

25. SEC REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1936–1940) [hereinafter SEC REPORT]. Congress directed the SEC to produce the report, which appeared in eight parts over several years, in a provision of the Securities Exchange Act of 1934. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 211, 48 Stat. 881, 909, *repealed by* Pub. L. No. 100-181, tit. 3, § 330, 101 Stat. 1249, 1259 (1987).

26. 2 SEC REPORT, *supra* note 25, at 1.

27. *See* Kalven & Rosenfield, *supra* note 13, at 684.

At the time, advocates of group litigation reform naturally would have looked to bankruptcy law for guidance, because the dynamics of group resolution had received a great deal of academic and legislative attention in reorganization cases. The SEC Report had prompted Congress to overhaul the bankruptcy laws in 1938. The resulting legislation, the Chandler Act,²⁸ marked a complete break with the former operation of corporate reorganization law. Prior to the Chandler Act, corporate reorganizations had operated through equity receiverships, a nineteenth-century confection created by judges and lawyers that was later codified but largely unchanged.²⁹ A receivership comprised three basic building blocks: (i) the court-ordered appointment of a receiver (a form of prejudgment attachment in which a third party was placed in control of the debtor's assets, thereby preserving the assets from dissipation); (ii) the organization of "protective committees" to represent and bargain on behalf of various classes of those with claims against, or interests in, the debtor; and then (iii) the sale of the debtor's assets in a stylized (and usually fictional) auction at which protective committees would successfully bid, using the assembled claims of creditors as currency.³⁰ Although a receivership took the formal appearance of the seizure and sale of the debtor's property to satisfy creditors, it developed in practice into a method for negotiating the reorganization of a corporate debtor's financial distress.³¹ The sale terminated the debtor's prior obligations and replaced them with a new capital structure negotiated during the receivership as part of a plan of reorganization.

1. Control and Corruption in Group Representation

In Kalven and Rosenfield's day, New Deal reformers had targeted reorganizations for sustained criticism because of the perceived mismatch

28. 52 Stat. 840 (1938) (repealed 1978).

29. See generally Jeffrey Stern, *Failed Markets and Failed Solutions: The Unwitting Formulation of the Corporate Reorganization Technique*, 90 COLUM. L. REV. 783 (1990) (describing the development of the equity receivership).

30. Paul D. Cravath, *Reorganization of Corporations; Bondholders' and Stockholders' Protective Committees; Reorganization Committees; and the Voluntary Recapitalization of Corporations*, in SOME LEGAL PHASES OF FINANCING, REORGANIZATION, AND REGULATION 153, 157–81 (1917) [hereinafter SOME LEGAL PHASES] (setting out in detail the stages of an equity receivership). Before the sale, the various protective committees would assemble into a single reorganization committee holding the vast majority of claims against the debtor. See James Byrne, *Foreclosure of Railroad Mortgages*, in SOME LEGAL PHASES, *supra* at 77, 142. Because the reorganization committee could bid its claims but an outside bidder would have to put up a large cash bid, the reorganization committee typically became the only possible purchaser of the debtor's assets. See Frank, *supra* note 1, at 554–55 (explaining that "while theoretically the judicial sale is an open sale at public auction, actually there is only one possible purchaser—the reorganization committee"). A newly organized entity would serve as the vessel holding the "purchased" assets.

31. As the Supreme Court described the process, a receivership had become "the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about." *Canada S. Ry. v. Gebhard*, 109 U.S. 527, 539 (1883).

between the interests of widely dispersed creditors and the actions of a concentrated group of professionals who ran the receivership process. The receivership system was derided as corrupt and ineffectual. It was corrupt because insiders—corporate managers, their bankers, and their lawyers—were said to control the process for their own benefit at the expense of creditors.³² It was ineffectual because the protective committees were said to fail in effectively representing their constituents.³³ In a typical receivership, the professionals organizing the case would solicit, say, individual bondholders to give their proxy to the committee representing that particular class of bonds.³⁴ A bondholder who dissented from the resulting plan of reorganization negotiated by the committee could withdraw that proxy.³⁵ But New Deal critics viewed this elaborate dance as a sham because individual security holders were likely to be too unsophisticated to make a meaningful choice in authorizing the formation of the committee or in evaluating the resulting plan of reorganization.³⁶ And once control had been given over to the committee, the investor had little say in the outcome of the reorganization. An investor who withdrew his securities from the committee would likely receive little or nothing in the reorganization and have to pay an assessment to the committee to boot.³⁷ In the words of one prominent critic, the process led to “the foisting of unfair plans upon masses of innocent investors, helplessly unorganized, or hopelessly uninformed.”³⁸

The SEC Report elaborated on why reorganization committees had so often failed to protect the interests of the security holders they represented. First, the report noted the lack of sophistication of many creditors in corporate reorganization cases. Thus, the committee system was ineffective when creditors were “uninformed and unskilled in the intricacies of finance.”³⁹ Second, the report posited that investors had little incentive to

32. In pressing their objections to the receivership system, reformers deployed case studies of receiverships and the apparent self-dealing by the professionals who controlled the reorganization process. *See, e.g.*, MAX LOWENTHAL, *THE INVESTOR PAYS* 120–30 (1933) (describing the conflicted relationships among managers, bankers, and lawyers involved in the receivership of the Chicago, Milwaukee, St. Paul & Pacific Railroad). The SEC elaborated on a variety of benefits that insiders gained from the process—what the agency’s report termed “the emoluments of control.” 1 SEC REPORT, *supra* note 25, at 4. These emoluments included fees paid out of the debtor’s estate.

33. *See* LOWENTHAL, *supra* note 32, at 187–95 (giving examples of the control exercised by reorganization professionals over protective committees).

34. The actual mechanism required the bondholder to deposit securities with the committee in accordance with a deposit agreement, which in turn authorized the committee to undertake various actions in the reorganization process. Paul Cravath, a leading reorganization lawyer of his day, provides one of the most detailed accounts of the formation of committees and the operation of deposit agreements. *See* Cravath, *supra* note 30, at 161–74.

35. *See id.* at 168. The dissenter nevertheless had to make a contribution toward the expenses incurred by the committee.

36. *See* Alfred B. Teton, *Reorganization Revised*, 48 *YALE L.J.* 573, 573 (1939).

37. 8 SEC REPORT, *supra* note 25, at 310.

38. *See* Teton, *supra* note 36, at 573.

39. 2 SEC REPORT, *supra* note 25, at 1.

monitor the conduct of committees when an individual investor's "investment is so small that it becomes either impossible or improvident for him to expend the funds necessary to prosecute his claims or defend his position."⁴⁰ In essence, the report explained that many creditors in bankruptcy cases held negative value claims that they had little economic incentive to pursue.⁴¹

These criticisms of the committee system of group organization in reorganization cases were not new. Indeed, the principal author of the SEC Report, William O. Douglas, had written a *Harvard Law Review* piece that outlined similar concerns three years earlier.⁴² Douglas's article, which focused on railroad reorganization cases, described the committee system as valuable but prone to abuse without reform.⁴³ Because of the low stakes held by a typical claimant, insiders could foist themselves on the group and gain control of the committee system for their own benefit. He proposed curbing the power of insiders—such as the debtor's managers and bankers—in order to give committees of small security holders a real voice in the reorganization process.⁴⁴

Douglas explored various methods of ensuring a more vigorous and democratic committee system. He made a favorable reference to a proposal by Professor Roger Foster that would have treated the process of committee formation much like the formation of a government in a democratic republic.⁴⁵ Claimants would elect from a slate of nominees in an open process their representatives to exercise control during the negotiation of a plan of reorganization.⁴⁶ An agency could serve as a check against self-dealing during the process.

In Douglas's view, then, the committee system would benefit from a leader to champion the interests of small stakeholders and check the power

40. *Id.*

41. William O. Douglas, the principal architect of the SEC Report, had noted in an earlier law review article that the perceived dysfunction of protective committees could be attributed in large part to the fact that many creditors held negative value claims in reorganization cases. See William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565, 567 (1934) ("In the first place, it took no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less.").

42. *See id.*

43. *See id.*

44. *See id.* at 567–68.

45. *See id.* at 586–87. Foster's proposal was emphatic if vague:

Let machinery be provided for bondholder election of representatives by plurality or majority vote, or by cumulative voting, with open or closed primaries, with requirement that candidates disclose, or free themselves from, inconsistent interests; place limits upon campaign expenditures, et cetera. Then give the representatives thus chosen the power to bind their whole class by the bargain they will make.

Roger S. Foster, Book Review, 43 YALE L.J. 352, 357 (1933).

46. *See* Douglas, *supra* note 41, at 586–89.

of insiders.⁴⁷ He distrusted the motives of private lawyers but was otherwise agnostic about the ideal form of this champion.⁴⁸ Douglas suggested that a private group, “permanently organized for respectable and competent patrol duty,” might come forward to serve that role.⁴⁹ He also suggested that a government agency could step in as watchdog, although he labeled that an “extreme step” less favorable than increased committee democracy.⁵⁰

2. Agency Supervision and the Demise of Group Representation

Despite these proposals, the eventual reforms enacted by Congress did not invigorate committees, install checks and balances against insider control, or harness the powers of representative democracy. Instead, the Chandler Act largely sidetracked committees in favor of what Douglas had once called the “extreme step” of agency supervision.⁵¹ Rather than resolution of a firm’s financial distress through an elaborate dance of group negotiation, the Chandler Act substituted a system of agency-supervised (although still court-centered) reorganization. Chapter X of the Chandler Act was the statute’s showpiece. That provision, designed for the resolution of large firms with publicly held securities, recast the reorganization process. The statute denied formal recognition to committees representing creditors during bankruptcy proceedings.⁵² Indeed, the statute limited the ability of ad hoc committees to solicit claimants in support of a plan of reorganization.⁵³ At the same time, bankruptcy rules adopted at the instance of the SEC required extensive disclosures by ad hoc committees.⁵⁴ In place of the incumbent management of the debtor acting together with protective committees, Chapter X cases

47. As his article explained, the lack of adequate leadership dampened any chance of mobilization by small stakeholders. *See id.* at 567 (“[T]he usual result was that this widely diffused and disorganized minority never mobilized, because of their inertia, lack of adequate leadership, or otherwise.”).

48. Douglas complained of reorganizations “effectuated by an incompetent and piratical group of the legal profession who as often as not did the security-holders even more disservice than would the old management or financial group.” *See id.* at 567.

49. *Id.* at 568. Douglas gave the Shareholders’ Protection Association, an English organization, as an example upon which a suitable private watchdog group could be modeled.

50. *Id.* at 584.

51. For a discussion of the approach to corporate reorganization taken by the Chandler Act, see DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 119–23 (2001).

52. Although committees had no formal role under Chapter X, the statute contemplated that committees might still be formed in some cases and receive compensation from the debtor’s estate. *See* Chandler Act § 242, 52 Stat. 840, 900 (1938) (repealed 1978); *see also* Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors’ Committees*, 43 *UCLA L. REV.* 1547, 1558 (1996).

53. Chandler Act §§ 175–176, 52 Stat. at 891.

54. Rule 10-211 in Chapter X cases required “detailed” disclosures to ensure greater control of “the personnel and activities of those acting in a representative capacity”—a provision intended to close off the reemergence of protective committees in disguise. 13A LAWRENCE P. KING ET AL., *COLLIER ON BANKRUPTCY* ¶ 10-211.03 (14th ed. 1977).

were to be controlled by a neutral and independent trustee, acting with the expert assistance of the SEC.⁵⁵ The trustee had the sole authority to formulate a plan of reorganization, although he could accept the input of creditors or other stakeholders in the case.⁵⁶

While a Chapter X bankruptcy remained a case brought before a court, the statute gave the SEC a favored role in the process. The agency could examine the financial condition of the debtor and opine on any proposed plan of reorganization—in fact, a plan could not be considered by the court until the SEC filed its report assessing it.⁵⁷ And no plan of reorganization could be sent to creditors for their approval unless the proposed plan was accompanied by the SEC's view of its merits.⁵⁸ Chapter X's basic premises were twofold: first, individual claimants could not effectively organize themselves into committees that served a meaningful function in reorganization cases; and second, the process of reorganizing a distressed firm was not a matter of group bargaining but a matter of careful study by neutral experts knowledgeable in the solutions to corporate and financial maladies.

How did it come to pass that proposals for beefing up the role of committees turned into legislation that hobbled them? The short answer is that the SEC Report had been received as a dossier on the futility of a robust committee system. The lessons of the report were that widely scattered small investors had little incentive to monitor the development of a large firm's reorganization, and that their indifference left the committee system open to inevitable commandeering by insiders.⁵⁹ Rather than taking seriously the opportunity for greater representative democracy in the selection of committees, or for the creation of a watchdog with the limited role of monitoring the formation of committees, Congress took a more aggressive approach. It removed the problems of committees by removing the committees altogether.

B. From Bankruptcy Reform to Class Action Reform

Kalven and Rosenfield embraced the SEC Report's insights and abstracted from them more general claims about group litigation. In their article, they compared a creditor in bankruptcy to an employee with a wage and hour claim, a shareholder with a small securities fraud claim, a taxpayer

55. Chandler Act § 156, 52 Stat. at 888.

56. *Id.* § 167, 52 Stat. at 890.

57. *Id.* § 173, 52 Stat. at 891.

58. *Id.* § 175, 52 Stat. at 891.

59. The statute treated small business bankruptcies differently. In a separate provision, Chapter XI, the Chandler Act provided for the creation of creditors' committees in cases seeking an "arrangement" of the debtor's financial affairs. Chapter XI was designed for the reorganization of firms with trade creditors but without publicly held securities. See SKEEL, *supra* note 51, at 162–63. The drafters of the Chandler Act apparently assumed that, unlike small investors such as bondholders, trade creditors had the savvy and the economic incentives to play a meaningful role in the debtor's reorganization. See SEC v. Am. Trailer Rentals Co., 379 U.S. 594, 613–14 (1965).

challenging an illegal assessment, and a businessman with a modest antitrust claim. They argued that each aggrieved claimant, "like the investor in the reorganization, finds himself inadvertently holding a small stake in a large controversy."⁶⁰ The SEC's description of the isolated and helpless claimant, they asserted, "applies equally well" to these situations.⁶¹

So it is not surprising that the authors also embraced the SEC Report's skepticism of group representation through committees. As they forthrightly acknowledged, "the committee is in considerable disrepute at the moment" because "the tremendous volume of experience with reorganization committees during the depression years was disillusioning."⁶² They summed up the prevailing wisdom about the use of committees in group resolution: "In brief, in the one type of case in which the committee has been used extensively, it has been tried and found wanting."⁶³

Because committees had been so completely discredited at the time of their writing, Kalven and Rosenfield understandably looked elsewhere for a model of group litigation. The model they developed called for essentially no participation by members of the group.⁶⁴ Instead, a single, self-nominated representative would prosecute the case on behalf of the group. In keeping with the era, Kalven and Rosenfield turned away from tinkering with democracy and reframed the institutional design question of group representation as solely about the choice of expert representative in litigation. The choice they presented was between a public agency and a private lawyer.⁶⁵ In light of the lessons they drew from the SEC Report, one might have expected them to favor the agency representative over the private lawyer. Indeed, they referred approvingly to the SEC's role in Chapter X cases as an example of the superiority of an agency to a private lawyer in some circumstance.⁶⁶ They noted that the "reorganization bar, like the reorganization committee, was not altogether satisfactory in discharging the semi-public responsibility thrust upon it by the reorganization process."⁶⁷ Nevertheless, Kalven and Rosenfield recognized that the private lawyer had a substantial monetary incentive to pursue litigation that an agency might not pursue.⁶⁸ Although they praised the

60. Kalven & Rosenfield, *supra* note 13, at 684.

61. *Id.*

62. *Id.* at 689.

63. *Id.*

64. They distinguished the class action from a committee structure by the role played by claimants during the litigation. *See id.* at 691 ("The chief difference between this method and the committee method is simply that instead of mobilizing the plaintiffs prior to trial, their participation in the case is deferred until a decision is reached.")

65. *Id.* at 715.

66. Kalven and Rosenfield cited the "activity of the SEC in reorganizations under Chapter X of the Chandler Act [a]s further evidence" of the "distrust of the competency of private litigation to determine adequately questions of public importance." *Id.* at 719 & n.101.

67. *Id.* at 719.

68. *See id.* at 717-18.

trend of “genuinely excellent” legal staffs at agencies,⁶⁹ they harbored some doubts about the limitations of public enforcement of rights due to the inevitable limitation of resources experienced by agencies and the lack of “a true civil servant attitude in America.”⁷⁰ The answer, they suggested, was not to rest exclusively on either public agencies or private lawyers but to draw from both for the enforcement of rights.⁷¹

The Contemporary Function of the Class Suit had a profound influence on the version of Rule 23 promulgated in 1966. The reframing of the categories of class actions and the creation of an opt-out class can be traced to their criticisms of the 1938 version of the Rule.⁷² They also clarified the basic justification of class actions reflected in the 1966 Rule: that the device could serve to protect rights that might otherwise be unenforced due to negative value claims and the limited resources of public agencies.⁷³ At the same time, the move away from committee representation was ensured by their assessment of the failings of the pre–New Deal bankruptcy process.

II. RETHINKING GROUP REPRESENTATION IN BANKRUPTCY

Ironically, the modern bankruptcy process has largely undone the New Deal era reforms on which Kalven and Rosenfield drew. With the 1978 Bankruptcy Code⁷⁴ (and, in particular, the provisions of Chapter 11 of the Code that govern the reorganization of firms), Congress turned away from the basic design of bankruptcy adopted in the 1930s. Today, a business reorganization in bankruptcy looks like a pre–New Deal reorganization in significant respects. A trustee is not required in most Chapter 11 cases, and therefore the incumbent management of the debtor remains in possession of the business during the case.⁷⁵ Creditors, and sometimes equity holders, are represented by a system of officially recognized committees.⁷⁶ These committees play a role in monitoring the debtor and negotiating the formulation of a plan of reorganization. The SEC no longer hovers above as a pervasive supervisor.⁷⁷

69. *Id.* at 718.

70. *Id.* at 720–21. Their principal fear was the continued existence of patronage appointments in government agencies. *See id.* at 720.

71. *Id.* at 721.

72. *See* Kaplan, *supra* note 2, at 380 n.89, 385 n.114 (citing Kalven and Rosenfield, *supra* note 13, favorably in discussing the inadequacy of the previous version of the Rule).

73. *See* Nagareda, *supra* note 17, at 603.

74. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.).

75. The debtor in possession has (with limited exceptions) the powers and obligations of a trustee. 11 U.S.C. § 1107(a) (2006).

76. *See id.* § 1102(a).

77. The U.S. Trustee program, which is housed within the Department of Justice, serves a much less intrusive monitoring function in Chapter 11 cases. *See* 28 U.S.C. § 586 (2006) (setting forth the duties of the U.S. Trustee). In large business reorganization cases, the agency’s most prominent role is often that of watchdog over the compensation of professionals. *Id.* § 586(a)(3)(A).

A. Agency Supervision and Its Discontents

The story of why those reforms were abandoned after forty years is instructive.⁷⁸ By 1978, Chapter X was seen as a failure. It was too slow and inhospitable for its intended job of reorganizing large firms. Those firms that could get away with doing so sought to squeeze themselves into a separate part of the Chandler Act originally designed for small businesses. Under that competing provision, incumbent managers were allowed to remain in possession of the business and creditors’ committees played an active role in negotiating the debtor’s fate.⁷⁹ In part this slow undermining of Chapter X resulted from politically imposed constraints—the SEC lacked the resources to perform its assigned tasks in bankruptcy cases because of restrictive budgets.⁸⁰

But the abandonment of the New Deal model of bankruptcy reorganization can also be seen as a reassessment of the role of individual claimants in bankruptcy. Recall that the Chandler Act reforms, informed by the SEC Report, viewed the pre–New Deal system of creditor representation as a sham.⁸¹ Those reforms were premised on the perception that widely dispersed claimants were unlikely to play a meaningful role in the process, and so committees invited usurpation by conflicted insiders. Better, then, to discard the committees and impose powerful experts to supervise the reorganization in order to protect small investors. That assumption became less persuasive over time in the decades after the Chandler Act’s enactment.

While the old protective committees may have opened the process to excessive insider control, the committees also played another crucial function. They served as facilitators of group resolution in business reorganizations. For a variety of reasons—both historical and practical—the American process of business reorganization in bankruptcy remains court centered. We speak of bankruptcy “cases” that are filed in court and presided over by judges. But the bankruptcy process at its core is a process of negotiation.⁸² Formal adjudication plays a limited role in even the most complex business reorganization.⁸³ Instead, bankruptcy involves a complicated, multipolar process of group resolution. A debtor seeking to reshape its capital structure will need to take into account the positions of multiple parties in interest, each potentially a source of cooperation or contestation.

78. See SKEEL, *supra* note 51, at 160–83; see also David A. Skeel, Jr., *Welcome Back, SEC?*, 18 AM. BANKR. INST. L. REV. 573, 574–76 (2010).

79. This alternative, simplified form of business bankruptcy was contained in Chapter XI of the Chandler Act. See *supra* note 59.

80. See SKEEL, *supra* note 51, at 170–71 (explaining the budgetary constraints imposed on the SEC beginning in the Eisenhower administration).

81. See *supra* notes 33–38 and accompanying text.

82. Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 92 (2004).

83. *Id.*

Chapter X, on the other hand, made effective resolution more difficult because it was not a process designed to facilitate negotiation. At bottom, the drafters of the Chandler Act viewed business reorganization as a matter of agency expertise and not group negotiation.⁸⁴ The reality of resolving a firm's financial distress, however, showed that assumption to be unsound—or at least incomplete.

Even among those claimants in a bankruptcy who might be considered small and scattered, the creation of a representative committee could further their interests for at least two reasons. First, some groups might contain a mixture of claimants with different incentives to pursue their claims. A group of unsecured creditors in a large bankruptcy case might comprise some creditors with insignificant claims as well as creditors with substantial claims. For example, a company's unsecured creditors might include bondholders with very large claims as well as creditors with small contract claims. Treating all of those creditors as helpless or indifferent would overlook the obvious benefits that could be realized by harnessing the energy of those willing and able to represent the group as a way of indirectly serving their own interests. If selected as representatives of other creditors, they might benefit the larger group while pursuing their own ends. Second, groups of creditors vary widely in their relative levels of sophistication. A properly designed system of group representation could draw on the savvy of some creditors in a way that would serve the interests of a larger group of unsophisticated creditors. In other words, the very heterogeneity of creditors in bankruptcy could be harnessed to protect the interests of the group.

B. Returning Group Representation to Business Reorganization Cases

The current Chapter 11 process attempts to achieve what William O. Douglas had suggested before he wrote the SEC Report—a more vigorous and independent committee to represent creditors. Under the Code, the U.S. Trustee, an administrative agency, appoints a committee of unsecured creditors comprising holders of the largest claims against the debtor.⁸⁵ The U.S. Trustee acts as a neutral entity responsible for selecting the members of the committee (and also for deciding whether additional representative

84. The conception of the bankruptcy process embodied in the Chandler Act is reflected in the comments of Jerome Frank after the statute's enactment. In response to complaints about the intrusive role of the SEC in bankruptcy cases, Frank rejected the proposition that reorganizations are a matter of private litigation. Instead, he insisted that a "reorganization is something more than a brawl, and that it is an administrative problem in the solution of which the public, as well as the litigants, has an interest." Jerome Frank, *Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act*, 18 N.Y.U. L. REV. 317, 321–22 (1941).

85. 11 U.S.C. § 1102(a)(1), (b)(1) (2006). The office of the U.S. Trustee sends questionnaires to the largest creditors disclosed on the debtor's schedule of creditors submitted when the debtor files a Chapter 11 petition. The questionnaire asks whether creditors would like to serve on the committee of unsecured creditors. See Roberta A. DeAngelis & Nan Roberts Eitel, *Committee Formation and Reformation: Considerations and Best Practices*, AM. BANKR. INST. J., Oct. 2011, at 20, 20.

committees are warranted). The office typically selects creditors based on the size and nature of their claims.⁸⁶ In turn, the members of the committee are fiduciaries for the larger group of creditors they represent.⁸⁷ Thus, the committee is expected to take a significant role in monitoring the debtor and in negotiating the resolution of the case.⁸⁸ The committee therefore gains access to confidential and proprietary information about the debtor’s affairs.⁸⁹ It can investigate claims against the debtor’s managers or third parties⁹⁰ and seek permission to pursue those claims if the debtor refuses to do so.⁹¹

The modern creditors’ committee sometimes acts as a mini-legislative body expressing the voice of the larger group of creditors. Because courts tend to place great weight on the views of the committee, its decision to take a position in favor of, or against, a particular development in the case is significant.⁹² A unanimous vote of a committee sends a very different signal from a closely divided vote.⁹³

This is not to say that the role of committees in bankruptcy cases is all sweetness and light. Because official committees are granted both significant information about the debtor’s case and a significant voice in its outcome, a member of the committee may seek to commandeer it for purely

86. See Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors’ Committees in Business Reorganizations*, 64 VAND. L. REV. 747, 763 (2011) (discussing the selection and composition of creditors’ committees).

87. See *In re Firstplus Fin., Inc.*, 254 B.R. 888, 894 (Bankr. N.D. Tex. 2000). There is, of course, disagreement about whether and to what extent the fiduciary model of the creditors’ committee is appropriate. See Bussel, *supra* note 52, at 1562–70 (comparing fiduciary and quasi-legislative models of creditors’ committees).

88. See H.R. Rep. No. 95-595, at 401 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6357 (explaining that committees “will be the primary negotiating bodies for the formulation of the plan of reorganization” and “will also provide supervision of the debtor in possession . . . and will protect their constituents’ interests”).

89. See Harner & Marincic, *supra* note 86, at 763–64.

90. 11 U.S.C. § 1103(c)(2) (providing that the committee may “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan”). The three basic functions of a creditors’ committee are to monitor the debtor’s operations, investigate potential claims against insiders, and negotiate the plan. *In re Cumberland Farms, Inc.*, 154 B.R. 9, 12 (Bankr. D. Mass. 1993).

91. See Official Comm. of Unsecured Creds. of Cybergeneics Corp. *ex rel.* Cybergeneics Corp. v. Chinery, 330 F.3d 548, 580 (3d Cir. 2003) (en banc) (concluding that a creditors’ committee has standing to bring a fraudulent conveyance claim that the debtor in possession declined to pursue).

92. See Harner & Marincic, *supra* note 86, at 764.

93. To give a prominent example, the Bankruptcy Court for the Southern District of New York granted a contested motion to transfer venue in the Patriot Coal bankruptcy when the committee voted 4–3 to oppose the motion. *In re Patriot Coal Corp.*, 482 B.R. 718, 724 n.5, 755 (Bankr. S.D.N.Y. 2012). When a similar motion was denied in the Enron bankruptcy, the committee had voted unanimously to oppose it. *In re Enron Corp.*, 274 B.R. 327, 345 (Bankr. S.D.N.Y. 2002) (“[T]he Court finds it relevant to weigh the position of the Committee in its statutory role as a fiduciary to and representative body of the unsecured creditors.”).

self-interested reasons.⁹⁴ More fundamentally, the ancient concerns about committees that are formed more for the benefit of reorganization professionals than of represented claimants still linger.⁹⁵ The issue of committee control, in other words, has not been resolved in all cases. Relatedly, the rise of claims trading in bankruptcy has produced the phenomenon of committees that play a significant role in bankruptcy cases despite a lack of formal recognition. It is not uncommon for sophisticated hedge funds to buy up tranches of smaller claims and then seek to have their voices heard in the case under the guise of an “ad hoc” committee of claimants.⁹⁶

But turning from the world of bankruptcy to the world of aggregate litigation suggests that bankruptcy is much richer, relatively speaking, in its appreciation of the variety of choices in group representation. The class action remains molded by the conceptual framework of Kalven and Rosenfield, and that framework gives short shrift to group representation outside the single lawyer acting on behalf of the group without further input. In a world that has moved beyond aggregation through the class action, however, that conceptual gap presents an opportunity for different approaches to representation.

III. THE HELPLESS GROUP IN AGGREGATE LITIGATION

What, then, of group representation in aggregate litigation more generally? The possibilities of more flexible arrangements in the class action may be limited. But the new world of nonclass aggregation presents, perhaps, greater room for enhanced claimant representation.

A. *The Problem of Group Representation in the Class Action*

The problem of claimant representation in the class action stems first from the emphasis on negative value claims as ideally suited for class resolution. The idealization of the negative value claim—Kalven and Rosenfield’s contribution—rests on the notion that class members are rationally indifferent to the prosecution of their claims. Indeed, Rule 23(b)(3) requires a court considering the certification of a damages class to weigh the class members’ interest in individually controlling their

94. See Harner & Marincic, *supra* note 86, at 763–67 (observing that a “self-interested committee can skew the court’s and outside parties’ perspectives of the Chapter 11 case and foster a resolution that might not maximize value” and giving examples).

95. In a recent case, the Bankruptcy Court for the District of Delaware disqualified counsel from representing a creditors’ committee based on allegations that the attorneys had manipulated the process of committee formation in order to assure their retention as committee counsel. *In re Universal Bldg. Prods.*, 486 B.R. 650 (Bankr. D. Del. 2010).

96. The principal question presented by these ad hoc committees is whether they should disclose their members’ economic interests. See *In re N.W. Airlines Corp.*, 363 B.R. 701, 701 (Bankr. S.D.N.Y. 2007). Whether these committees should have fiduciary duties in bankruptcy cases is another contested question. See generally David L. Perechocky, *Should Ad Hoc Committees Have Fiduciary Duties?: Judicial Regulation of the Bankruptcy Market*, 86 AM. BANKR. L.J. 527 (2012).

claims⁹⁷—a factor that favors the certification of negative value claims. When class members’ claims appear to be more valuable, however, certification is disfavored on the view that separate actions would be preferable.⁹⁸ Indeed, in *Amchem Products, Inc. v. Windsor* the Supreme Court acknowledged that “[w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’”⁹⁹

Although that reasoning flows from Kalven and Rosenfield’s emphasis on rights enforcement as the true function of the class action, it greatly diminishes the possibility of group representation in the class action. It presents as a necessary result of the decision to aggregate that claimants will exercise no role in the case. Or, to put the logic somewhat differently, it holds that only the helpless group deserves the benefits of aggregation. But it is odd to say that the possibility of *some* enforcement of rights without aggregation negates the benefits of aggregation. To be sure, the group with negative value claims may receive the most benefits from aggregation, but that does not mean that a group with more valuable claims deserves none of those benefits.¹⁰⁰ In a typical bankruptcy, the group of unsecured creditors may include, say, individuals with potentially valuable claims. That possibility would not be invoked to dismiss the need for a committee of unsecured creditors to represent the group. Of course, in bankruptcy, the need for aggregation in the first instance is taken as a given. The proper form of representation is a separate question of institutional design. The class action, on the other hand, collapses those analytically distinct questions into a single inquiry.

The development of a more stringent commonality threshold for class certification presents a second barrier to group representation in the class action. The Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*,¹⁰¹ arguably diminishes the variance or “spread” among class members with respect to their individual characteristics. If class members must be uniform in more dimensions, it is harder to justify the need for some form of group representation. Combined with the preference for negative value

97. FED. R. CIV. P. 23(b)(3)(A) (providing that “the class members’ interests in individually controlling the prosecution or defense of separate actions” is a factor in determining whether to certify the class).

98. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

99. *Id.* (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

100. Justice Breyer’s dissenting opinion in *Ortiz v. Fibreboard Corp.* made this point by noting the saved transactions costs in a class action that would benefit class members, even though their asbestos personal injury claims were not negative value claims. 527 U.S. 815, 882–83 (1999) (Breyer, J., dissenting) (observing that the resolution of claims under the proposed class action carried transaction costs of only 15 percent, while piecemeal litigation imposed transaction costs of 61 percent).

101. 131 S. Ct. 2541 (2011).

claims, the tightening of commonality makes the potential benefits of group representation in the class action context less plausible.

*B. The Possibility of Group Representation in
Nonclass Aggregate Litigation*

Freed from the conceptual and doctrinal constraints of the class action, however, aggregate litigation presents the possibility of greater group representation in litigation. Indeed, the very reasons for procedural aggregation's move beyond the formal boundaries of the class action provide justifications for exploring greater group representation. There is already a developing literature exploring some of the forms that group representation might take.¹⁰² But it is worth considering *why* group representation may provide greater benefits outside the class action. Three features of the new world of nonclass aggregations in particular—the size of claims, the variance in claimants, and the realities of settlement—invite group representation.

The increased judicial scrutiny of class certification has caused the turn toward nonclass aggregation. The difficulty of bringing a mass tort class action after the Supreme Court's *Amchem* and *Ortiz* decisions, for example, left lawyers involved in that category of cases to find some other form of procedural aggregation.¹⁰³ In recent years, class action lawyers have explored the construction of aggregate litigation through the use of coordinated proceedings under the Multidistrict Litigation (MDL) statute followed by a global settlement.¹⁰⁴ Once the MDL process brings cases presenting a common question of fact together for pretrial proceedings in one forum, the judge presiding over the cases guides the litigation toward settlement—a form of aggregation sometimes labeled the “quasi-class action.”¹⁰⁵ Certification of a class action is not required, because each plaintiff whose claim is centralized in the MDL court has a separate action and is separately represented by counsel.¹⁰⁶ Negotiations among plaintiffs' lawyers and their adversaries will then lead to a master settlement agreement to govern the resolution of each plaintiff's claim. Two of the most prominent examples of this form of nonclass aggregation followed the

102. See, e.g., Burch, *Litigating Together*, *supra* note 15.

103. See *id.* at 94 (“The upshot of the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, and of Congress passing the Class Action Fairness Act (CAFA), is that few mass-tort cases will proceed as certified class actions.” (citations omitted)).

104. 28 U.S.C. § 1407(a) (2006) (permitting the transfer of cases that involve one or more common questions of fact to a single judicial district for pretrial proceedings).

105. The judge may encourage the resolution of the litigation by a series of maneuvers, including selecting and trying “bellwether” cases to test the strength of claims or defenses and by choosing a steering committee of plaintiffs' counsel to take the lead in the litigation. Finally, the judge may seek to adjust the compensation of counsel for plaintiffs, even though there is no express power to do so as in a class action. See generally Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105 (2010).

106. To be sure, a single law firm may represent a large inventory of individual plaintiffs.

Vioxx and *Zyprexa* mass tort litigations.¹⁰⁷ In both litigations, the presence of individual questions relating to each claimant’s harm, combined with the high potential value of their claims, defeated certification of a standard class action.

1. Positive Value Claims

The features of nonclass aggregation that present stumbling blocks to class certification, however, also make the possibility of group representation more attractive. First, consider the presence of positive value claims. The likelihood that some claimants hold valuable claims that could be pursued separately weighs heavily against certification of a mass tort.¹⁰⁸

But the presence of claimants with high dollar claims raises the likelihood that a group of claimant representatives will have a heightened interest in the litigation. Much as a creditors’ committee in a Chapter 11 bankruptcy case may comprise those creditors with particularly valuable claims against the debtor, a claimant committee in a mass tort litigation might seek out a similar composition. The role such a committee could play is wide ranging: it could act as a voice of the larger group of claimants or simply as a locus for greater cooperation and communication among claimants.¹⁰⁹

2. Nonuniformity

Second, consider the lack of uniformity across claimants in nonclass aggregate litigation. In the class action context, greater variance among claimants decreases the likelihood that the group will satisfy the level of cohesion required for certification under Rule 23. In the *Vioxx* litigation, for example, class certification was doomed by the presence of individual harm and causation differences across the group alleging injury from the drug.¹¹⁰

A somewhat variegated group of claimants, however, may nevertheless make use of group representation. Again, recall that in a Chapter 11 case, the official committee of unsecured creditors may reflect a variety of creditor characteristics. The creditors’ committee of an industrial corporation, for example, might comprise bondholders, major vendors, toxic tort claimants, and labor representatives. That variety enhances the usefulness of the committee, because the committee’s deliberations may

107. See *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608–10 (E.D. La. 2008) (describing the background of the litigation); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490–91 (E.D.N.Y. 2006) (same).

108. See *supra* notes 97–99 and accompanying text.

109. For a detailed account of some of these possibilities, see Burch, *Litigating Together*, *supra* note 15.

110. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458–63 (E.D. La. 2006) (denying class certification).

help to test whether potential fissures among various claimants are actually significant.¹¹¹

3. Settlement

Finally, the reality of settlement in nonclass aggregate litigation provides another opening for group representation. The end goal of recent MDL mass tort litigation has been a master settlement reached after negotiation between plaintiffs' lawyers and their adversaries.¹¹² Procedural rules should recognize the realities of litigation practice, and that should mean an appreciation for the negotiation of a global resolution in nonclass aggregate litigation.¹¹³ The negotiation of a global resolution is a key role of the committee structure in business reorganizations.¹¹⁴ It is not hard to imagine a similar role for a claimant committee in nonclass aggregate litigation. A limited participation right of group representatives at the settlement stage could serve to ease the formulation of a settlement scheme acceptable to the broadest cross section of claimants.¹¹⁵

CONCLUSION

While the modern class action was conceived as the protector of helpless groups, the emerging form of nonclass aggregate litigation does not need to follow that conceptual path. Concern about group helplessness in aggregate proceedings may confuse and confound rather than enlighten. Indeed, the history of business reorganization law in the twentieth century is a story of the mistaken overemphasis on the helplessness of claimants and the eventual correction of that mistake. The possibilities of group representation should not be overlooked on the assumption that the group is simply unable or unwilling to protect itself. Rather, a realistic assessment of the composition of groups in nonclass aggregation suggests that some form of group representation, like that in business reorganizations, is viable. Particularly when the group includes claimants with high value claims, the group is variegated in its characteristics, and settlement is the end goal of litigation, group representation may provide a benefit to claimants as a whole.

111. See *supra* note 93 and accompanying text (discussing the weight given to a committee's position when the committee is unanimous or divided).

112. See *supra* note 105 and accompanying text.

113. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 578 (2011).

114. See *supra* note 88 and accompanying text.

115. See Bone, *supra* note 113, at 614–24.