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## Class Conflicts

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# CLASS CONFLICTS

Morris A. Ratner\*

*Abstract:* The approach of the twentieth anniversary of the Supreme Court’s landmark decision in *Amchem Products, Inc. v. Windsor* provides the opportunity to reflect on the collapse of the framework it announced for managing intra-class conflicts. That framework, reinforced two years later in *Ortiz v. Fibreboard Corp.*, was bold, in that it broadly defined actionable conflicts to include divergent interests with regard to settlement allocation; market-based, in that it sought to regulate such conflicts by harnessing competing subclass counsel’s financial incentives; and committed to intrinsic process values, insofar as, to assure structural fairness, the Court was willing to upend a settlement that would have solved the asbestos litigation crisis. Since the 1990s, the lower federal courts have chipped away at the foundation of that conflicts management regime by limiting *Amchem* and *Ortiz* to their facts, narrowly defining the kinds of conflicts that warrant subclassing, and turning to alternative assurances of fairness that do not involve fostering competition among subclass counsel. A new model of managing class conflicts is emerging from the trenches of federal trial courts. It is modest, insofar as it has a high tolerance for allocation conflicts; regulatory, rather than market or incentive-based, in that it relies on judicial officers to police conflicts; and utilitarian, because settlement outcomes provide convincing evidence of structurally fair procedures. In short, the new model is fundamentally the mirror image of the conflicts management framework the Court created at end of the last century. This Article provides an institutional account of this transformation, examining how changes in the way mass tort and other large-scale wrongs are litigated make it inconvenient to adhere to the Supreme Court’s twentieth century conflicts management blueprint. There is a lesson here: a jurisprudential edifice built without regard to the practical realities of resolving large-scale litigation cannot stand.

INTRODUCTION .....	787
I. THE SUPREME COURT’S LATE-TWENTIETH CENTURY BLUEPRINT FOR MANAGING CLASS CONFLICTS.....	791
A. The Ill-Defined Pre-Amchem Regime .....	791

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B.	<i>Amchem</i> 's Blueprint for Identifying and Managing Class Conflicts .....	796
II.	A TWENTY-FIRST CENTURY REVOLT .....	803
A.	Exceptions that Mask the Trend .....	804
B.	Two Case Studies .....	808
1.	The BP Oil Spill Litigation.....	809
a.	Two BP Settlement Classes with One Set of Counsel.....	813
i.	Economic Loss/Property Damage Settlement .....	813
ii.	Medical Benefits (Personal Injury) Settlement .....	816
b.	Competing Punitive Damage Classes with One Set of Counsel .....	819
2.	The NFL Concussion Injury Litigation .....	821
C.	Lower Court Attack Vectors .....	825
1.	Limiting <i>Amchem</i> and <i>Ortiz</i> to a Narrow Reading of Their Facts .....	825
2.	Narrowly Defining "Fundamental" Conflicts to Exclude the Most Common Allocation Conflicts.....	827
3.	Invoking the Specter of "Balkanization" and "Holdouts" .....	828
a.	Balkanization .....	829
b.	Holdouts .....	833
4.	The Mystique of Uncapped Settlement Funds.....	834
5.	Alternative Structural Assurances of Fairness.....	836
6.	Proof in the Pudding—A Utilitarian Wedge .....	837
7.	Deference to Trial Court Judges .....	840
D.	The New Conflicts Management Regime .....	841
III.	AN INSTITUTIONAL ACCOUNT: THE MDL MODEL FOR MANAGING MASS TORTS AND THE INCONVENIENCE OF SUBCLASSING .....	842
A.	The MDL Model: New Formal and Informal Institutional Arrangements for Managing Mass Torts .....	843
1.	Formal: Early Concentration of Mass Torts in Federal Courts and Limits on Litigation Classes.....	843
a.	CAFA and 28 U.S.C. § 1407 .....	843
b.	Limits on Mass Tort Litigation Classes; The Persistence of Settlement Classes .....	845
2.	Informal: Trial Judges Organize Plaintiffs' Counsel and Tightly Control Pretrial Activity.....	847
a.	Common Benefit Counsel Selection Criteria .....	849
b.	Judicial Control over Pleading, Discovery, Trial, and Settlement Discussions.....	852
B.	The Faded Threat of Reverse Auctions .....	854

C. Institutional Dissonance: Why <i>Amchem</i> 's Conflicts Management Blueprint Is Unappealing to Lower Federal Courts .....	857
1. Judicial Confidence .....	857
2. The Settlement Endgame .....	858
3. Timing Is Everything .....	859
CONCLUSION .....	860

## INTRODUCTION

At the close of the twentieth century, the Supreme Court overturned two of the largest mass tort<sup>1</sup> settlements in U.S. history on the ground that intra-class conflicts of interest rendered representation inadequate. The trial courts in *Amchem Products, Inc. v. Windsor*<sup>2</sup> and *Ortiz v. Fibreboard Corp.*<sup>3</sup> had approved class action settlements of asbestos claims where in each case the members of the settlement class had divergent interests with regard to settlement design and specifically with regard to allocation of settlement amounts among class members.

The Court held that such conflicts could not be overcome merely by showing that a settlement was good, or, in the uninspiring language of Rule 23, “adequate.”<sup>4</sup> Instead, adequate representation had to be baked into the organization of plaintiffs and class counsel to justify non-party preclusion of absent class members.<sup>5</sup> In *Amchem* and *Ortiz*, that meant that the settlement classes had to be divided into subclasses, each with their own representative plaintiffs and, importantly, their own lawyers whose attorneys’ fees depended on the subclass members’ fortunes and who could thus be trusted to loyally advance their interests when

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1. As used herein, the term “mass tort” refers broadly to mass production injuries. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1 at 343 (2004) [hereinafter MANUAL] (mass tort litigation “emerges when an event or series of related events injure a large number of people or damage their property” (internal quotation omitted)); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. LEGIS. 393, 393 n.1 (2000) (defining mass torts “as encompassing any (negligently or strictly) tortious systematic risk-taking by business that exposes some population of individuals to injury in person or property or both”). Because they often involve claims of varying strength, including differences in type of injury, proof of causation, and applicable law, mass tort class actions raise particularly vexing conflicts of interest problems. See generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS AND OTHER MULTIPARTY DEVICES* 53–54 (1995).

2. 521 U.S. 591 (1997).

3. 527 U.S. 815 (1999).

4. FED. R. CIV. P. 23.

5. *Amchem Prods., Inc.*, 521 U.S. at 591; *Ortiz*, 527 U.S. at 815.

negotiating settlement terms.<sup>6</sup> Failure to do so rendered class certification illegitimate and justified overturning the class settlements in those cases, leaving the federal trial courts saddled with the asbestos litigation crisis without any viable tools for resolving it outside of bankruptcy proceedings.<sup>7</sup>

Though the Supreme Court has not squarely returned to the conflicts management questions it answered in *Amchem* and *Ortiz*, the lower federal courts have spent the better part of the past two decades chipping away at their foundations, limiting them to their facts, assuming away and narrowly defining the kinds of conflicts of interest that warrant subclassing, and turning to alternative structural assurances of fairness that do not involve fostering competition among class counsel.<sup>8</sup> In their place, lower federal courts have erected a mirror image of the *Amchem* conflicts management regime, one that is modest in ambition, prefers regulatory to market approaches to managing conflicts, and privileges utilitarianism over the intrinsic value of procedural fairness.<sup>9</sup>

From the beginning, *Amchem* and *Ortiz* generated critical academic commentary.<sup>10</sup> Courts have largely sought to distinguish or reinterpret

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6. FED. R. CIV. P. 23(c)(5) states that “[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule.” See generally ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.23 at 337 (2016) [hereinafter ANNOTATED MANUAL] (“Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel.”); 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:58 at 346–47 (5th ed. 2011) (“Conflicts of interest between the class representative and some members of the class often may be resolved through the creation of subclasses.”); Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351 (2006) (reviewing subclasses and theories of their proper role).

7. See generally Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1906–10 (2002) (describing asbestos litigation filings post-*Amchem* and *Ortiz*); Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1931 (2002) (noting that for many defendants bankruptcy became the only logical response after *Amchem* and *Ortiz*).

8. See *infra* section II.C.

9. For a typology of market, regulatory, and other approaches to managing class actions, see generally William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1453–67 (2006). For purposes of this Article, the terms “procedural fairness” and “structural fairness” are used interchangeably, though the former is arguably broader than the latter.

10. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351 (1999) (criticizing the “retreat to rules formalism” in *Amchem* and *Ortiz*); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 330 (2003) (“Interest alignment within the class certainly should remain a part of due process analysis. But it is only a part, and not the most important one at that . . . . [T]he law might better ground the legitimacy of class representation in the structural constraints that operate upon representatives in governing arrangements where consent is already attenuated—the administrative state being the prime example.”); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1469 (1998) (“We first criticize the

them rather than undertake a direct attack.<sup>11</sup> We are thus left to read between the lines of the lower courts' decisions both to notice and to do a forensic analysis of *Amchem's* death by a thousand cuts. This Article takes up that challenge, providing an institutional account by looking at the ways in which a profound transformation over the past two decades in the arrangements for managing mass torts via the multi-district litigation model ("MDL model")<sup>12</sup> has boosted federal courts' confidence in their ability to directly regulate conflicts, while making subclassing with separate counsel especially inconvenient. In so doing, the Article ties together three strands in the class action and mass tort literature: commentary prematurely<sup>13</sup> proclaiming the death of class actions and the emergence of the new MDL model for managing mass tort and other complex litigation;<sup>14</sup> a rich and burgeoning literature

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unreality of the *Amchem* Court's 'no trade-offs' approach that would apparently preclude counsel from making any settlement allocation decisions, or handling other conflicts, in the class action context.").

11. See *infra* section II.C.

12. This new model is described more fully in Part III *infra*. See generally Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205 (2008); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method for Managing Multi-District Litigation: Problems and a Proposal*, 63 VAND. L. REV. 105, 110 (2010) ("The four practices just described—judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfer, and fee cuts—jointly constitute the emerging 'quasi class action' approach to MDL management."); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 KAN. L. REV. 775 (2010).

13. See Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 404 (2014) ("[N]otwithstanding the advent of nonclass aggregate litigation, Rule 23 class litigation remains a vital feature of the litigation landscape."). But see Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1600 (2016) ("A few courts have been willing to certify personal injury class actions for settlement purposes. Examples include the National Football League concussion litigation and the *Deepwater Horizon* case. For the most part, however, personal injury mass torts continue to be adjudicated outside of the class action arena. I believe that this trend will continue in the next decade.").

14. See, e.g., Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 88 (2011) ("The mass-tort class action as we know it is virtually extinct."); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1778 (1997) ("[I]t is apparent that few, if any, mass tort classes (especially those involving exposure-only victims), could meet the majority's interpretation of Rule 23(b)(3)'s predominance test or Rule 23(a)(4)'s adequacy of representation test. . . ."); Noah Smith-Drelich, *Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 6 (2014) ("[C]lass actions are no longer viable in the mass tort context . . ."). See also Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 309 (1996) ("In short, although the prospect of Supreme Court review does raise some hope for clarification, recent decisions cast doubt upon the suggestion that Rule 23, in its current form, will enable the legal system either to afford justice in a timely manner between plaintiffs and defendants or to ease the burden upon the courts of doing so.").

regarding “new” mass tort conflicts that arise in the MDL setting;<sup>15</sup> and the traditional class action conflicts literature.<sup>16</sup> The link among these literatures is the vital but underappreciated role that class actions still play in the new MDL model as a form of legal closure.<sup>17</sup>

The rest of this Article proceeds as follows: Part I briefly describes the regime for identifying and managing class conflicts that the Supreme Court erected in *Amchem* and *Ortiz*. Part II uses recent class settlements of sprawling mass torts in the BP oil spill and NFL concussion injury litigations to show how far we have strayed from *Amchem* and maps the attack vectors lower courts have pursued toward that end. Part III describes the new institutional arrangements for managing mass torts that explain *Amchem*'s decline and the emergence of a competing and newly ascendant conflicts management model.<sup>18</sup> The purpose of this

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15. See generally Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (reviewing conflicts that result from the interplay of repeat players and systemic pressures); L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157 (2004) (describing collusion in non-class aggregate settlements); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 279 (2011) (reviewing ethical challenges posed by the non-class settlement of Vioxx litigation); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordinating Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000) (reviewing ethical challenges created by informal aggregation); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013) (discussing ethical issues in non-class aggregate litigation).

16. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373–84 (1995) (surveying forms of collusion in class actions); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145–55 (2001) (surveying forms of class action abuse); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1179–1212 (1995) (sketching ethics of mass tort settlement with emphasis on class settlements); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 583–97 (2003) (inquiring into the proper standard for dealing with class conflicts); Nancy J. Moore, “Who Should Regulate Class Action Lawyers?”, 2003 U. ILL. L. REV. 1477, 1482–1503 (2003) (surveying ethics issues in class actions, focusing on conflicts; proposing adoption of an entity theory of the class and use of Rule 23 case law to evolve regulatory mechanisms mindful of the ethics rules).

17. Legal “closure” or “peace” results from a class judgment because the judgment precludes continued litigation of claims governed by the class settlement’s release as to all persons who do not opt out of the settlement class. See generally Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141 (2003) (describing how designers of class settlements attempt to achieve closure).

18. In adopting an institutional evolutionary vantage point, the Article follows a trail blazed in the mass tort setting by, among others, Professor Schuck, who used the same lens to explain developments in an earlier (pre-*Amchem*) era. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 944 (1995) (“The evolutionist emphasis draws attention to, and treats in a more consistent fashion, three distinct but related features of mass torts litigation: (1) incremental systems-building, (2) common-law process, and (3) selection by judges and other policymakers among competing institutional designs.”); see also Donald Elliott,

Article is not to judge this new regime, but to announce and explain its arrival.

## I. THE SUPREME COURT'S LATE-TWENTIETH CENTURY BLUEPRINT FOR MANAGING CLASS CONFLICTS

### A. *The Ill-Defined Pre-Amchem Regime*

In the 1940 decision *Hansberry v. Lee*,<sup>19</sup> the Supreme Court noted the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.”<sup>20</sup> The Court recognized an exception, i.e., “the judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”<sup>21</sup> But, the Court held, the Due Process Clause requires adequate representation as a condition of such non-party preclusion.<sup>22</sup> In *Hansberry*, the Illinois state courts had found a prior state trial court judgment binding not only on the named plaintiff who had successfully enforced a racially restrictive property covenant, but also on a class of property owners, some of whom wished to enforce the covenant and others of whom opposed it.<sup>23</sup> In other words, the class included persons with diametrically opposed interests who were potentially directly adverse, as evidenced by the fact that the class judgment was being used and challenged collaterally in a subsequent suit brought by class members who supported the covenant against those who did not.<sup>24</sup> Under those circumstances, the Court held, representation was inadequate.

When the modern version of Rule 23 of the federal rules took shape in 1966, it included a requirement of adequate representation applicable

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*Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 306–07 (1986) (laying out an evolutionary theory of procedure, tracing it to Oliver Wendell Holmes, Jr., and his precursors).

19. 311 U.S. 32 (1940).

20. *Id.* at 40.

21. *Id.* at 41.

22. *Id.* at 42–43 (“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented.”).

23. *Id.* at 44 (“Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class.”).

24. *Id.* at 44–45.



to all class actions, but did not identify which conflicts less complete or direct than those at issue in *Hansberry* were disabling.<sup>25</sup> In the ensuing years, the Court has never fully mapped such lesser conflicts.<sup>26</sup> Nevertheless, ethics doctrine provides a helpful analytical framework.<sup>27</sup> Conflicts are inevitable if clients are directly adverse, but can also arise when the duties a lawyer owes to one person present a significant risk of material limitation of the lawyer's representation of another.<sup>28</sup> In formal aggregation, we are especially concerned with a subset of the universe of potential material limitation conflicts, i.e., those that are structural in that they threaten to "skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves."<sup>29</sup>

Intra-class material limitation conflicts that have the possibility of skewing outcomes are generally of two types—investment and allocation.<sup>30</sup> Investment conflicts typically arise when subgroups of class

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

26. This is largely the result of the way in which disputes bubble up to the Supreme Court. The Court is called upon in each instance to determine whether the facts of a specific case render class counsel impermissibly conflicted, but does not act legislatively to address all possible categories of conflicts unrelated to the facts at hand. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (assessing adequacy of representation by reference to the class approved in that case); see also Geoffrey C. Hazard, Jr., *The Supreme Court as Legislature*, 64 CORNELL L. REV. 1, 12 (1978) ("I do not wish to be misunderstood as saying that the Court should make legal pronouncements in broader categorical terms rather than narrower ones. I only say that the appropriate breadth of its pronouncements about law is determined neither by considerations of 'rationality' nor by the 'nature' of the judicial process.").

27. Ethics law does not supply the rule of decision for purposes of determining whether subclasses are necessary. See generally RUBENSTEIN, *supra* note 6, § 3:58 at 346.

28. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 25 (AM. BAR ASS'N 2015). Comment 25 excludes absent class members from the purview of Rule 1.7(a)(1), regarding direct conflicts, but does not make such an exclusion for Rule 1.7(a)(2) material limitation conflicts. *Id.* ("When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.").

29. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B) (AM. LAW INST. 2009); see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1684 (2008) (conflicts that matter are "those that give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class-settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the relevant claims").

30. Other scholars have offered competing typologies of conflicts in aggregate litigation. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 385–93 (2000) (noting four "structural" conflicts in mass tort class actions, including allocation, settlement motivations, risk preferences,

members have inconsistent theories of liability or priorities with regard to case development. Allocation conflicts typically arise at the time of settlement, when the funds available to resolve a matter have to be distributed among persons who have competing claims to it. The fund from which competing claimants are paid can be limited because the defendant's resources are limited; or because the parties have agreed to resolve a group of claims or issues for an aggregate amount to be allocated among participating claimants; or because the parties negotiate multiple claims or issues sequentially or simultaneously (from the "bottom up"), with the understanding that the claims or issues are interdependent, in that agreement on all of them is necessary to resolve any of them, which is what typically happens when parties negotiate a payment grid to support a settlement claims program.<sup>31</sup> Tradeoffs can be explicit ("I will accept 'x' on issue 'A' but only if you pay 'y' on issue 'B'"), or can occur implicitly, as part of the ebb and flow of negotiations, in which parties are expected to prioritize and fight harder on some issues than others.<sup>32</sup> Logically, the more issues or categories of claims the parties need to resolve, the more opportunities they have for tradeoffs.

Resolving competing claims to a fund may entail a conflict even if plaintiffs' counsel are genuinely motivated only by a desire to link payouts to relative claim values. However, when negotiating settlements, common benefit counsel are invariably concerned with more than just relative claim value. Because defendants condition class settlements on buy-in through "tip-over" provisions (pursuant to which opt-outs over "x" percent of the class give the defendant a basis to cancel the settlement), class counsel naturally feel pressure to spread settlement

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and control); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186–92 (1982) (providing an early taxonomy of class conflicts).

31. See Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 306–10 (2015) (evaluating existing definitions of aggregate settlements and offering a new normative framework); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1813–14 (2005).

32. See Shaheen Fatima, Michael Woolridge & Nicholas R. Jennings, *Optimal Negotiation of Multiple Issues in Incomplete Information Settings*, in PROCEEDINGS OF THE THIRD INTERNATIONAL CONFERENCE ON AUTONOMOUS AGENTS AND MULTIAGENT SYSTEMS VOL. 3, at 1 (2004) <https://eprints.soton.ac.uk/259552/1/aamas04shaheen.pdf> [<https://perma.cc/LRD8-99SJ>] ("Generally speaking, there are two ways of negotiating multiple issues. One approach is to discuss all the issues together as a *package deal*. The other approach is to settle each issue independently of all the other issues." (emphasis in original)). See generally Peyman Faratin, Carles Sierra & Nicholas R. Jennings, *Using Similarity Criteria to Make Negotiation Tradeoffs*, in PROCEEDINGS, FOURTH INTERNATIONAL CONFERENCE ON MULTIAGENT SYSTEMS (2000) <https://eprints.soton.ac.uk/253738/1/icmas00.pdf> [<https://perma.cc/J6AH-RLB8>].

payments to inspire maximum participation. Depending on the case, this could mean transferring payments that would have been made to high-value claimants to relatively low-value claimants,<sup>33</sup> or the opposite dynamic in cases where low-value claims are too small to economically litigate individually.<sup>34</sup>

In the first few decades of the modern era, from 1966 to the early 1990s, the adequacy of representation requirement of Rule 23(a)(4) did little to regulate such conflicts, and more generally posed a relatively low bar to certification, requiring only that: representative plaintiffs be members of the class,<sup>35</sup> they not have interests “antagonistic” to those of the class, and they retain competent counsel.<sup>36</sup> The requirement of “membership” in the class, as applied, tended to bleed into Rule 23(a)(3)’s typicality requirement, i.e., that the named plaintiff “possess the same interest and suffer the same injury”<sup>37</sup> as the class members. That inquiry, in turn, focused on the class representative’s status or the relief sought.<sup>38</sup> The further requirement that class representatives not have interests “antagonistic” to those of the class sounds like it created a space for a nuanced assessment of conflicts of interest, but, as applied in the pre-*Amchem* era, was read along the lines contemplated by the Court

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33. See Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301, 309–10 (2004) (citing prospect theory to explain why individuals with low dollar claims may be relatively less risk-preferring, so that funds have to be transferred to them from relatively risk-averse high-value claimants in order to induce them to settle). The think tank RAND documented a similar dynamic in asbestos litigation, where counsel with contractual aggregates packaged low and high dollar claims together, transferring amounts from the top to the bottom of the claim value pyramid in such clusters. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 23 (2005).

34. See, e.g., *In re Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242 (2d Cir. 2011) (objectors successfully argued that named class representatives with stronger claims negotiated a settlement through counsel that potentially transferred value from the mass of relatively low-value claims to the higher claims); *infra* notes 80–88 and accompanying text.

35. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157–58 (1982) (plaintiff with promotion claim may not maintain a Rule 23 action on behalf of a class of person with hiring claims).

36. See, e.g., *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 622 (C.D. Cal. 1985) (citing Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975)) (“[C]ourts generally decline to consider conflicts at the outset, unless the conflict is apparent and at the very heart of the suit.”); *Hedges Enters., Inc. v. Cont’l Grp., Inc.*, 81 F.R.D. 461, 466 (E.D. Pa. 1979) (quoting *Sley v. Jam. Water & Util., Inc.*, 77 F.R.D. 391, 394 (E.D. Pa. 1977)) (“[T]he mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification. . . . The atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy.” (alteration added)).

37. *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

38. See, e.g., *Trotter v. Klinciar*, 748 F.2d 1177, 1183 n.7 (7th Cir. 1984) (plaintiff whose equitable relief claims had been mooted was inadequate to represent a class of persons seeking primarily equitable relief).

in *Hansberry*, i.e., as asking whether the representative plaintiff shared the class members' "objectives."<sup>39</sup> When assessing counsel's competency pre-*Amchem*, lower federal courts did not rigorously review to see if the class was sufficiently cohesive for counsel to be loyal to it and instead focused on counsel's experience, knowledge, and resources. Counsel's competency was rarely subject to successful challenge by defendants opposing class certification.<sup>40</sup> In the settlement context, class counsel's adequacy could be assessed by reference to the settlement terms; if the terms themselves were deemed to be fair, reasonable, and adequate, the trial court could "fairly assume that they were negotiated by competent and adequate counsel."<sup>41</sup>

But this same period witnessed two key innovations with regard to Rule 23 that eventually placed pressure on what had been, up until that time, a relatively relaxed approach to assessing adequacy. First, courts increasingly certified classes outside the traditional areas contemplated by the Rule's drafters, e.g., civil rights and other cases seeking injunctive relief and low-dollar or "negative value" damages suits.<sup>42</sup> Courts certified classes even in mass torts involving personal injuries, where the cases at least in theory could be pursued on an individual basis.<sup>43</sup> Second, courts became increasingly open to a variation of the "issue" class in which a class is certified for the limited purpose of evaluating and entering judgment upon a settlement.<sup>44</sup> In such circumstances, the defendant typically agrees to certification of a

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39. See, e.g., *Gomez v. Ill. State Bd. of Ed.*, 117 F.R.D. 394, 402 (N.D. Ill. 1987) (citing *Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940)).

40. See, e.g., *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 161 (D. Kan. 1996) ("In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to vigorously prosecute the action on behalf of the class."); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 681 (N.D. Cal. 1986) ("Defendants do not dispute the competency of plaintiffs' counsel, and this Court finds that plaintiffs' counsel have ample experience and expertise in bringing securities fraud class action suits.")

41. See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (D. Ohio 1992) (citing and quoting *In re Corrugated Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981)).

42. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617–18 (1997).

43. See Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 859 (1995) (noting that the fact of large-scale class settlements of asbestos and silicone gel implant claims "makes it evident that the class action has landed like a 600-pound gorilla in the arena of tort reform, where there has been increasing interest in replacing tort litigation with scheduled benefits like those provided in these class action settlements"); Judith Resnik, *From "Cases" to "Litigation"*, 54 L. & CONTEMP. PROB. 5, 17–21 (1991) (reviewing the increasing willingness of courts to certify mass tort class actions in the years after the 1966 revisions to Rule 23).

44. *Amchem Prods., Inc.*, 521 U.S. at 618 ("Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device.")

settlement class as part of a settlement agreement resolving the class members' claims, but without waiving its right to object to certification of a litigation class in the event the settlement is not approved or otherwise does not become final.<sup>45</sup>

It was in that spirit of adventuresomeness<sup>46</sup> and innovation that lower federal courts looked to Rule 23 as a solution to the largest mass tort in history. By the early 1990s, the federal system faced an asbestos litigation crisis. The Chief Justice wrote in a 1991 Report:

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.<sup>47</sup>

In *Amchem*, the trial court approved a voluntary, Rule 23(b)(3) damages settlement class seen by the proponents as providing a global resolution to the crisis in the form of a negotiated claims program—a grid that specified payment ranges for qualifying injuries.<sup>48</sup> The parties in *Ortiz* tried a different approach, certification of a mandatory settlement class under Rule 23(b)(2) to equitably allocate available funds.<sup>49</sup>

### B. *Amchem's Blueprint for Identifying and Managing Class Conflicts*

Though the settlements in *Amchem* and *Ortiz* raised distinct issues, partly because they involved different types of settlement classes,<sup>50</sup> they

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45. Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. U. L. REV. 951, 957–58 (2014).

46. *Id.* at 617–19. See generally JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 20–24 (1998) (reviewing the history of mass tort settlement class actions); David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 652 (2013) (noting period in the 1990s when courts saw class actions as the “cure-all” for mass torts).

47. *Amchem Prods., Inc.*, 521 U.S. at 599 (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991)).

48. *Id.* at 603 (describing the settlement as “an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements”).

49. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (1999).

50. In *Amchem*, the Court confronted the proper standard for assessing settlement classes and the application of Rule 23(b)(3)'s requirement that common issues predominate. *Amchem Prods., Inc.*, 521 U.S. at 591. In *Ortiz*, the Court confronted the definition of a 23(b)(2) “limited fund.” *Ortiz*, 527 U.S. at 827.

prompted a majority of Justices in each case to articulate and reinforce a common vision of the requirement of adequate representation as it pertained to the intra-class conflicts of interest. In both decisions, the Court applied the idea of a fundamental conflict broadly to include allocation conflicts stemming from varying claim strength or value, adopted a market or incentive-based approach to managing such conflicts by aligning counsel's and subclass members' interests, and privileged intrinsic process values over utilitarian concerns with fair outcomes.

First, the Court defined conflicts broadly to include divergent preferences regarding allocation of settlement proceeds.<sup>51</sup> For example, in both cases, the interests of persons who had already experienced asbestos-related injuries in receiving immediate compensation tugged against the interests of exposure-only claimants in ensuring the existence of adequate funding to pay for later-manifesting injuries.<sup>52</sup> Similarly, though less appreciated, persons with claims of sufficiently varying value, such as persons whose claims were and were not covered by defendant's insurance policy in *Ortiz*, could not be adequately represented by the same plaintiffs and counsel.<sup>53</sup> Second, the Court identified subclassing with separate counsel as a preferred solution for such conflicts.<sup>54</sup> Because the district court in each case failed to take steps "at the outset" to provisionally certify subclasses with separate counsel for such "easily identifiable categories of claimants," there was no "structural assurance" of adequate representation during the negotiations that led to the settlements.<sup>55</sup> Third, the Court rejected what it perceived as efforts to substitute an evaluation of a settlement's fairness for an evaluation of conflicts of interest and their proper management.<sup>56</sup> The Court demonstrated a "stubborn"<sup>57</sup> commitment to

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51. *See Coffee, supra* note 30, at 393–94 (reading *Amchem* to require that "allocations have to be bargained out among subclasses").

52. *Ortiz*, 527 U.S. at 856; *Amchem Prods., Inc.*, 521 U.S. at 627.

53. *Ortiz*, 527 U.S. at 857 ("Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants.").

54. *Id.* at 856 ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.").

55. *Id.* at 831–32, 857.

56. *Amchem Prods., Inc.*, 521 U.S. at 622 ("Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper.").

57. Elizabeth Chamblee Burch, *Procedural Adequacy*, 88 TEX. L. REV. 55, 55 (2010) ("There's something admirably stubborn about the Supreme Court's *Amchem* opinion. Despite being presented with a paradigm of efficiency—a global settlement for present and future claims in the

the intrinsic value of procedural fairness when it overturned the asbestos settlements in each case.

Viewed only in the context of the asbestos litigation crisis that gave rise to them, *Amchem* and *Ortiz* make little sense. Why would the Court fuss about imperfect alignment of interests in a system that appeared to be deeply broken on so many other dimensions?<sup>58</sup> The decisions come into sharper focus when viewed in the broader context of late twentieth century institutional arrangements for managing mass torts, and the theory of class conflicts and their management that appealed to the sensibilities of that era. That context explains why the Court adopted a market approach to conflict management that emphasized the intrinsic value of structural fairness.

At the end of the twentieth century, federal institutional arrangements for managing mass tort and other geographically dispersed wrongs were largely ineffective. Due largely to jurisdictional constraints, federal courts were relatively small and weak fish in a sea of federal and state court judges. Mass torts were often grounded in state law, and federal courts' diversity jurisdiction could easily be undermined by destroying complete diversity with the addition of plaintiffs who were citizens of defendant's state of incorporation, or by selecting plaintiffs who did not individually meet the minimum amount in controversy necessary for the federal courts to have diversity jurisdiction. This left much mass tort litigation pending on a class basis in state courts,<sup>59</sup> where the judges were perceived to be less sophisticated and to have a sometimes-cavalier attitude toward class certification, e.g., by certifying litigation classes on

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elephantine asbestos litigation—the Court held that class attorneys could adequately represent only a class with sufficient cohesion.”); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 373 (1997) (quoting *Amchem Prods., Inc.*, 521 U.S. at 628) (“The Third Circuit and the Supreme Court have interceded to spare the ‘unselfconscious and amorphous legions’ of asbestos victims and their families the indignity to their legal due process rights that might have accompanied the prospect for monetary compensation in their lifetimes offered by the \$1 billion-plus settlement.”).

58. See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (“In the case of *Amchem*, the perfect was the enemy of the good: the multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies.”).

59. See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 145–49 (2002) (describing the “anomaly” of pre-CAFA complete diversity and minimum amount in controversy requirements of 28 U.S.C. § 1332 that kept many nationwide class actions out of federal court).

the pleadings, without proof that the criteria for certification had been met.<sup>60</sup>

The belief in class action lawyers' ability to choose plaintiffs and forum shop, including via the identification of "outlier" state court judges willing to aggressively use Rule 23,<sup>61</sup> gave lawyers the appearance of control.<sup>62</sup> But the same mechanism that gave plaintiffs' attorneys the appearance of strength functioned as their Achilles heel: because their role as class counsel was contingent upon a court certifying the class and rendering a class judgment, and because other camps of plaintiffs' counsel could easily file in a competing jurisdiction, settle with the defendant, and scoop the case, plaintiffs' counsel experienced an intense and existential form of role-insecurity. Their investment in class litigation could at any moment be wiped out by an interloper, leading to what leading commentators saw as the most glaring ethical lapse of the era, the reverse auction.<sup>63</sup> Reverse auctions occurred when defendants pitted competing camps of plaintiffs' counsel against each other, awarding the role of settlement class counsel to the lowest bidder.<sup>64</sup>

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60. See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1597 (2008) (noting that CAFA was driven in part by mistrust of state court judges). *But see* PUBLIC CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING 2 (2005), <https://www.citizen.org/documents/OutlierReport.pdf> [<https://perma.cc/BUS4-8ZA6>] ("[T]his report shows that empirical evidence is extremely thin with respect to state court jurisdictions that are 'judicial hellholes' for class actions.").

61. Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 700–01 (2013) (describing the standard narrative of class practice in state courts as a "caricature").

62. See, e.g., *In re* Baan Co. Sec. Litig., 186 F.R.D. 214, 229 (D.D.C. 1999) (noting that one key aim of the Private Securities Litigation Reform Act (1995) was to shift control over litigation from class counsel to lead institutional investors).

63. See, e.g., Coffee, *supra* note 16, at 1370–73 (explaining the reverse auction scenario); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 811–13 (1997) (same); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998) (same); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000) ("[D]ueling class actions enhance the pressure to settle and increase the likelihood of inadequate settlements.").

64. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282–83 (7th Cir. 2002) (defining and explaining the "reverse auction" problem); *In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 788 (3d Cir. 1995) ("[B]ecause the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with defendants by underselling the plaintiffs' claims relative to other attorneys."); BARBARA J. ROTHSTEIN & THOMAS E. WILLING, *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 14 (2005) ("'Reverse Auction' is the label for a defendant's collusive selection of the weakest attorney among a number of plaintiff attorneys who have filed lawsuits dealing with the same subject matter; in other words, a reverse auction is the 'sale' of a settlement to the lowest bidder among counsel for competing or overlapping classes.").



This role-insecurity was seen as worsening two types of lawyer-client conflicts, the incentive plaintiffs' lawyers acting for aggregates have to settle prematurely and also to trade class benefits for control and/or fees. Entrepreneurial, profit-maximizing plaintiffs' counsel are naturally willing to invest less in plaintiffs' claims than plaintiffs would prefer. The lawyers' recovery (the fee) is only a percentage of plaintiffs' recovery, such that the lawyers have the incentive to invest only as long as additional dollars of investment exceed the lawyers' opportunity costs; whereas plaintiffs would like that higher level of investment that maximizes their expected recovery. Moreover, the lawyers have more at stake, and are thus more risk-averse, because they typically advance their time and costs. For these reasons, lawyers and clients' case investment preferences systematically skew.<sup>65</sup> The underinvestment/premature settlement problem just described is distinct from the sellout problem, where lawyers, given the opportunity, might take actions to increase their fees at clients' expense, e.g., by negotiating a settlement that involves reduced payments to clients but enhanced fees or other benefits for the lawyers. Both problems exist in all contingent fee settings.<sup>66</sup> Add to that the difficulty relatively disenfranchised or absent clients have monitoring lawyers acting on their behalf, and such lawyers have both the incentive and the ability to peg investment at lower amounts than clients prefer, and to increase their fees at clients' expense.<sup>67</sup> These ever-present ethical challenges are exacerbated when counsel experience role-insecurity. The lawyers' expected fee is reduced by the possibility of being scooped by competing proposed class counsel, further depressing investment; and the status of settlement class counsel is for sale, paid by winning lawyers by trading away client recoveries.

Under those circumstances, a picture of class actions as both lawyer-driven and deeply flawed emerged. One of its chief elaborators was

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65. See generally John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 *LAW & CONTEMP. PROBS.* 5, 41–49 (1985); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 *WAKE FOREST L. REV.* 733, 751 (1997) (describing threat of underinvestment by counsel).

66. See, e.g., Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 *CORNELL L. REV.* 529, 537–46 (1978) (building on the Schwartz & Mitchell economic analysis of attorney investment incentives under contingent fee contracts); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 *STAN. L. REV.* 1125, 1133–36 (1970) (elaborating economic analysis that predicts systematic underinvestment by contingent fee lawyers).

67. This is the traditional and prevailing account of the entrepreneurial lawyer. For a critique, see generally Morris A. Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 *REV. LITIG.* 757 (2012).

Professor John C. Coffee, Jr., whose work the Supreme Court cited in both *Amchem* and *Ortiz*.<sup>68</sup> Coffee saw the entrepreneurial (profit-maximizing) plaintiffs' attorney, not the class representative, as the driving force behind class actions, mapped the divergence between the interests of lawyer and class members, and recognized class members' inability and unwillingness to effectively monitor class counsel given their asymmetric stakes.<sup>69</sup> Professor Coffee couched all of this in an agency cost framework,<sup>70</sup> identifying as a goal the management of agency costs.<sup>71</sup> This, he explained, could be achieved by aligning the interests of profit-maximizing agents and their principals to minimize the loss in welfare experienced by the principal (the class) as a result of the agent's (class counsel's) disloyalty.<sup>72</sup> This agency cost lens quickly captured the imagination of scholars and courts and now serves as the traditional, though not exclusive,<sup>73</sup> conceptual framework for thinking

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68. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997). It is important to note that while the Court was clearly influenced by Professor Coffee's writings, Professor Coffee himself was critical of the framework the Court announced in *Amchem* and *Ortiz*. See, e.g., Coffee, *supra* note 30, at 373–74 (noting that the approach taken in *Amchem* and *Ortiz* “risks two inconsistent dangers: (1) it may do too little, and (2) it may do too much,” the former danger stemming from the continuing viability of settlement classes, and the latter from the fact that “an expansive reading of *Amchem* and *Ortiz* threatens the viability of the class action across a broad range of litigation contexts”). It is thus not at all surprising that Professor Coffee later testified in support of settlements, described below, that this Article presents as inconsistent with the *Amchem* regime. See *infra* note 218.

69. See *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1057 n.13 (S.D. Tex. 2012) (quoting RUBENSTEIN, *supra* note 6, § 3.52) (“[I]n small claims cases [class representatives] have so little at stake that it would be irrational for them to take more than a tangential interest, while in all cases, including larger claim cases, class representatives generally lack the legal acumen to make key decisions about complex class action litigation, much less to monitor savvy class counsel.”).

70. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 684–90 (1986) (“Agency costs” are the sum of monitoring expenditures by the principal, bonding expenditures by the agent, and the loss in welfare experienced by the principal due to the “divergence between the agent's decisions and those decisions which would maximize the welfare of the principal”); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12–27 (1991) (defining agency cost theory and applying it to class and derivative claims).

71. Coffee, *supra* note 70, at 726 (“[T]he basic goal of reform should be to reduce the agency costs incident to this attorney-client relationship.”).

72. *Id.*

73. Though the agency cost frame is most consistent with traditional class conflicts doctrine, commentators have proposed other intriguing lenses for thinking about conflicts and adequacy of representation. See, e.g., Myria Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006)

about class conflicts, and was certainly the dominant conceptual lens when the Supreme Court decided *Amchem* and *Ortiz*.

Thus, at the time it decided *Amchem* and *Ortiz*, the Supreme Court faced a landscape in which federal courts seemed poorly situated to regulate the quality of multijurisdictional class actions, class counsel's self-seeking stood out as the central problem, and agency cost theory provided the conceptual framework for providing a conflicts-management solution. Building on that foundation, the Court was naturally drawn to find some way to strengthen the adequacy of representation inquiry using a market or incentive-based frame, one that looked to the manipulation of counsel's incentives.<sup>74</sup> The Court accomplished its goal by stating what read like a clear approach to class conflicts: denial of class certification in the absence of subclassing with separate counsel whose fees turned on the subclass's fortunes.

But conflicts law is by nature far less categorical. Different doctrines regulating lawyer conflicts can be brought to bear in any particular circumstance.<sup>75</sup> All conflicts analysis is, at root, a form of risk-assessment,<sup>76</sup> i.e., a consideration of the risk that an agent or fiduciary

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(calling the agency cost problem in small claims class action a "mirage" because the focus in such cases should be on optimal deterrence rather than on optimal compensation); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1139 (2009) (drawing on moral philosophy and economics to assess adequacy by reference to whether "representation makes class members no worse off than they would have been if they had engaged in individual litigation"). Similarly, as discussed in section II.C.5 below, lower federal courts have searched for alternatives to incentive-based or "economic" models of conflicts management.

74. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.")

75. Compare *Amchem Prods., Inc.*, 521 U.S. at 625 (using Rule 23(a)(4)'s adequacy of representation requirement to analyze conflicts that might justify denial of certification or subclassing), with *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) (on a motion to disqualify class counsel, analyzing alleged conflict through the lens of ethics doctrine adapted to the class setting).

76. Risk assessment is the foundation of conflicts analysis in a range of settings, including under the relevant ethics rules. See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 71–72 (1996) ("Although various purposes have been ascribed to them, the 'conflict rules' are best understood as rules of 'risk avoidance.' They address situations in which there is a risk that a lawyer will not adequately carry out obligations to a present or a former client because competing obligations to another present or former client or because of the lawyer's own competing interests." (internal citation omitted)). Risk assessment also anchors court consideration of motions to disqualify opposing counsel. See, e.g., *United States v. Turner*, 594 F.3d 946, 954–55 (7th Cir. 2010) (finding the risk of conflict insufficiently severe to justify a trial court order disqualifying counsel). Similarly, risk assessment is the foundation of conflicts analysis under Rule

will be disloyal as a result of competing duties to members of the aggregate or the fiduciary's own interests. Implicit in all conflicts doctrine is an understanding that the risk need not be reduced to zero. Instead, conflicts should be managed *to a point* that depends on the costs and benefits. *Amchem* and *Ortiz* adopted that same approach by noting that conflicts had to be sufficiently fundamental to require subclassing with separate counsel.<sup>77</sup> The Court did not precisely define which conflicts were “fundamental,”<sup>78</sup> and did not identify subclassing as the *exclusive* method for managing conflicts. Thus, as the next Section describes, the Court's seemingly muscular blueprint for managing class conflicts—i.e., an expansive definition of actionable conflicts, subclassing with separate counsel as the preferred response, and a commitment to intrinsic fairness values—contained the seeds of its own undoing.

## II. A TWENTY-FIRST CENTURY REVOLT

A person reading *Amchem* and *Ortiz* in the late 1990s would have been hard-pressed to predict how they have been applied to a changing complex litigation landscape. Especially, though not exclusively, in the very mass tort practice setting that gave rise to those decisions, the Court's decisions are experiencing death by a thousand cuts. With few exceptions providing a veil of vitality, discussed below, the lower federal courts have steadily limited *Amchem* and *Ortiz* to a crimped read of their facts; narrowly defined the kinds of fundamental conflicts that warrant subclassing; accepted alternative structural assurances of fairness to avoid subclassing when they could not distinguish *Amchem* and *Ortiz* on their facts; and looked to the substantive adequacy of the

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23. See, e.g., *Mendoza v. United States*, 623 F.2d 1338, 1344 (9th Cir. 1980) (framing the risk assessment for purposes of determining whether representation is adequate as follows: “[r]epresentative suits carry with them an accepted structural risk that conflicts may arise between groups of class members. It may be unavoidable that some class members will always be happier with a given result than others, but potential injustice arises as the distribution of benefits and burdens in a class remedy becomes increasingly unequal”); *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 160 (N.D. Cal. 2015) (assessing adequacy of representation in a class action in terms of the risk that a conflict would materialize).

77. *Amchem Prods., Inc.*, 521 U.S. at 636 (cautioning that trial courts should consider the costs of subclassing when exercising discretion to create subclasses).

78. Professor Miller's 2003 comment is apt today: “[g]iven the widespread recognition of the problems conflicts of interest in class action litigation, one might suppose that decisionmakers would have developed a workable and well-understood doctrine for assessing these problems. Surprisingly, however, the courts have not articulated coherent principles to guide their analysis.” Miller, *supra* note 16, at 582.

settlement as proof of procedural fairness, bringing a utilitarian Trojan horse into the adequacy of representation analysis.<sup>79</sup>

A. *Exceptions that Mask the Trend*

Three veils give *Amchem* and *Ortiz* the appearance of vitality. First, the Second Circuit has recently been the flag bearer of an atypically strict reading of those decisions. In *Literary Works*,<sup>80</sup> plaintiffs' counsel in consolidated proceedings represented a single class of freelance authors who sold works to hardcopy print publishers that were later published online settled the claims of copyright infringement with regard to the online publications.<sup>81</sup> The settlement divided the works at issue into three categories, A–C. Category A and B works were registered and thus the copyright claims were relatively more valuable. Category C works were not registered and could only be litigated for damages if they were registered, in which case, they would share the same value as Category B claims.<sup>82</sup> More than ninety-nine percent of the claims were category C claims, though many of the Category A and B claimholders also had Category C claims. The same counsel represented all three categories of claims, and negotiated a settlement that, not surprisingly, was disproportionately generous with respect to the more valuable A and B claims.<sup>83</sup> The trial court rejected objectors' claims of conflicts between on the one hand, the Category A and B claims and on the other the Category C claims.<sup>84</sup> The Second Circuit reversed, noting that allocation conflicts based on varying claim value could rise to the level of a fundamental conflict requiring subclassing,<sup>85</sup> and that subclassing with separate counsel was the preferred mechanism for assuring structural fairness in this case.<sup>86</sup>

The Second Circuit explained why having a neutral participate in allocation decisions cannot substitute for the market-based approach it found *Amchem* and *Ortiz* to require:

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79. See *infra* notes 256–77 and accompanying text.

80. *In re Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242 (2d Cir. 2011).

81. *Id.* at 245.

82. *Id.* at 246.

83. *Id.*

84. *Id.* at 247.

85. *Id.* at 249–52.

86. *Id.* at 253.

The Supreme Court counseled in *Ortiz* that subclasses may be necessary when categories of claims have different settlement values. The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case? It is for this reason that the participation of impartial mediators and institutional plaintiffs does not compensate for the absence of independent representation. Although the mediators safeguarded the negotiation process, and the institutional plaintiffs watched out for the interests of the class as a whole, no one advanced the strongest arguments in favor of Category C's recovery.<sup>87</sup>

The circuit court therefore required separate counsel for the Category C claims and sent the case back so that the properly represented parties could renegotiate the settlement.<sup>88</sup> They did, resulting in submission to the trial court of a revised settlement that was far more generous to Category C claimants, without reducing settlement payouts for Category A or B claims.<sup>89</sup>

More recently, in *Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*,<sup>90</sup> the Second Circuit doubled down on this relatively aggressive read of *Amchem* and *Ortiz*, overturning the largest cash antitrust settlement in U.S. history on the ground that representation was inadequate.<sup>91</sup> In that case, the same lawyers represented a Rule 23(b)(3) opt-out settlement class of persons who accepted Visa or MasterCard prior to November 28, 2012, and, also, a separate mandatory Rule 23(b)(2) settlement class of persons who accepted Visa or MasterCard after that date.<sup>92</sup> The court found that the interests of the two settlement classes conflicted, in that persons in the (b)(3) class were focused on maximizing the payment of cash, whereas persons in the (b)(2) class were focused on obtaining relatively more generous injunctive relief.<sup>93</sup> The court found that the injunctive relief class, which received only temporary relief, but released its claims in perpetuity, lost

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87. *Id.*

88. *Id.* at 257–58.

89. *In re Literary Works in Elec. Databases Copyright Litig.*, MDL No. 1379, 2014 U.S. Dist. LEXIS 50143 (S.D.N.Y. Jan. 22, 2014) (preliminary approval order).

90. 827 F.3d 223 (2d Cir. 2016).

91. *Id.* at 234 (quoting *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 229 (E.D.N.Y. 2013)) (“The (up to) \$7.25 billion in relief for the (b)(3) class was the ‘largest-ever cash settlement in an antitrust class action.’”).

92. The date was significant because the court preliminarily approved the proposed settlement on November 27, 2012. *Id.* at 229.

93. *Id.* at 233–34.

that tug-of-war,<sup>94</sup> one grounded in the opportunity counsel had to trade claims for one group to grease the wheels of settlement for another.<sup>95</sup> The court went out of its way to “emphatically”<sup>96</sup> reinforce the argument made in *Literary Works* that active involvement of a neutral in settlement discussions was not an adequate alternative assurance of fairness.<sup>97</sup>

The Second Circuit is an outlier.<sup>98</sup> No other circuit court has adopted such a strong and straightforward read of *Amchem*'s requirement of subclassing to address intra-class conflicts regarding allocation. Not all decisions emanating from that circuit hew as forcefully to the *Amchem* framework. For example, in *Charron v. Wiener*,<sup>99</sup> a 2013 decision, the Second Circuit read *Literary Works* as applying with special force when settlement class certification precedes certification of a litigation class,<sup>100</sup> and only where claims were both released and “disfavored”<sup>101</sup> under the settlement's terms, putting a utilitarian gloss on the decision that could profoundly limit its impact, as explained below. In *City of Livonia Employees' Retirement System v. Wyeth*,<sup>102</sup> the trial court found *Literary Works* inapplicable even when a class of (low dollar) claims was disfavored as long as the settlement term was characterized as a

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94. *Id.* at 234 (“The trouble with unitary representation here is exacerbated because the members of the worse-off (b)(2) class could not opt out.”).

95. *Id.* (“The class counsel and class representatives who negotiated and entered into the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief.”).

96. *Id.*

97. *Id.*

98. See, e.g., Supplemental Declaration of John C. Coffee, Jr. ¶ 22, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 13, 2012), ECF No. 7726-4 [hereinafter Coffee Supplemental Declaration] (describing *Literary Works* as “the decision that has taken the strongest, most activist stance requiring subclasses”).

99. 731 F.3d 241 (2d Cir. 2013).

100. *Id.* at 250 (“As a preliminary matter, we note that unlike the situation in *Amchem*, *Ortiz*, and *In re Literary Works*, the settlement here was not being approved at the same time that the class was being certified. Where settlement and certification proceed simultaneously, courts must give heightened attention to the requirements of Rule 23(a).”; see also *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.2d 223, 234 (2d Cir. 2016) (distinguishing *Charron* on the ground that *Charron* it did not involve a settlement approved at the same time as class certification).

101. *Charron*, 731 F.3d at 252 (“This case therefore does not present the situation the Supreme Court faced in *Amchem*, *Ortiz*, and *In re Literary Works*, where the defendants were released from liability on certain claims that the settlements disfavored.”).

102. No. 07 Civ. 10329 (RJS), 2013 U.S. Dist. LEXIS 113658 (S.D.N.Y. Aug. 27, 2013).

“distribution threshold,”<sup>103</sup> i.e., a minimum value of claim below which no payment would be made. And in *Laumann v. NHL*,<sup>104</sup> the trial court limited *Literary Works* to (b)(3) cases involving allocation of monetary funds.<sup>105</sup>

Second, the conflicts management regime articulated in *Amchem* and *Ortiz* has the veneer of robustness because intermediate appellate courts outside the Second Circuit still do reverse trial courts for failing to address conflicts via subclassing. But these decisions typically involve the types of direct and complete conflicts that were deemed impermissible before *Amchem* and *Ortiz*,<sup>106</sup> or are rendered in cases where the need for subclassing is proved by the presence of unfair settlement terms, precisely the kind of inquiry *Amchem* rejects.<sup>107</sup>

Finally, lower federal courts still regularly exercise *discretion* to certify subclasses. They often do so in order to make the litigation more manageable rather than to address adequacy concerns.<sup>108</sup> When

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103. *Id.* at \*9–10 (“*Literary Works* . . . does not displace the string of precedent favoring distribution thresholds.”).

104. 105 F. Supp. 3d 384 (S.D.N.Y. 2015).

105. *Id.* at 404 n.73.

106. These cases are often just variations on the facts of *Hansberry*. Examples include cases in which some class members actually benefit from the challenged conduct. *See, e.g.,* *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003) (class included both end user purchasers of drug and wholesalers, but wholesalers benefitted from the challenged conduct, prompting the court to note: “[t]o our knowledge, no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class”). In the same vein are cases in which a proposed class includes persons who do and do not have continuing business relationships that tether their interests to those of the defendant, such as classes that include both present and former franchisees. *See, e.g.,* *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338–39 (4th Cir. 1998) (overturning certification of a litigation class on the ground that representation was inadequate; noting the conflict between present and former franchisees regarding the remedy, given that present franchisees have a stake in the franchise’s continued health; and noting the even more pressing conflict on the facts of this case between two groups of plaintiffs over the measure of damages).

107. Examples include recent Third Circuit decisions that both sharply limit *Amchem* and *Ortiz* and, at the same time, reverse certification in cases where unfair settlement terms evidence counsel’s disloyalty. Two such cases—*Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012) and *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 346–48 (3d Cir. 2010)—are discussed *infra* in section II.C.

108. *See, e.g.,* *Klay v. Humana, Inc.*, 382 F.3d 1241, 1260–61 (11th Cir. 2004) (“Because we are reviewing the district court’s certifications under an abuse of discretion standard, we affirm. Nevertheless, it seems that the plaintiffs could comfortably be split into two Subclasses based on their reimbursement scheme” for purposes of making the litigation more manageable); *Perry v. Equity Residential Management, LLC*, 12–10779–RWZ, 2014 WL 4198850, at \*6–7, \*10 (D. Mass. Aug. 26, 2014) (certifying three litigation subclasses, and noting that in general subclasses “may help make the case more manageable,” and that “creation of subclasses may circumvent commonality problems,” but appointing the same lawyers counsel for all three subclasses).



adequacy of representation motivates the courts' exercise of discretion to subclass, it is often a motivation that disappears at the time of settlement. By way of example, in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*,<sup>109</sup> the Eleventh Circuit reversed the trial court's certification of a litigation class and remanded for discovery regarding a possible conflict of interest between class members who were injured and benefitted by the challenged conduct. The case settled on remand, and the trial court certified a single settlement class, finding that the fact of settlement mooted conflicts concerns.<sup>110</sup>

The strength of the regulatory regime announced by the Court in *Amchem* and *Ortiz* is best measured not by the extent to which lower courts feel they *may* subclass, but by the extent to which they feel they *must* do so to manage conflicts. The case studies presented by way of example in the following section illustrate the degree to which the foundation of the intra-class conflicts management regime of *Amchem* and *Ortiz* has been hollowed out.

### B. Two Case Studies

Two recent case studies highlight the bankruptcy of the *Amchem* framework for regulating intra-class conflicts of interest. In both, class members' divergent interests regarding the design and allocation of any eventual settlement were apparent at the outset of the litigation. Nevertheless, the trial and intermediate appellate courts either found an absence of conflicts, or found that any conflicts were insufficiently fundamental to warrant any subclassing or more than minimal subclassing. This subsection lays out the intra-class allocation conflicts. The following subsection identifies the arguments used by the courts in these and other cases to avoid or minimize subclassing with separate counsel, and, indeed, to upend and reframe the conflicts management regime outlined in *Amchem* and *Ortiz*.

The two case studies presented here cross jurisdictions and substantive law settings. Each settlement or cluster of settlements is, though imperfect, impressive on a number of dimensions. The BP class settlements discussed below set a new gold standard, both on the merits with more-than-full compensation of many categories of claims, and in terms of the settlement's design, with claims processes negotiated and disclosed in advance, making it one of the most transparent mass tort

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109. 350 F.3d 1181 (11th Cir. 2003).

110. *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-MDL-1317-SEITZ/KLEIN, 2005 U.S. Dist. LEXIS 43082, at \*26 (S.D. Fla. Apr. 19, 2005) (granting final approval).

settlements ever negotiated.<sup>111</sup> Similarly, the class settlement of the NFL concussion injury settlement was arguably generous given the weaknesses of plaintiffs' claims.<sup>112</sup> Settlements so dazzling make it easy to miss or overlook underlying intra-class conflicts.

### 1. *The BP Oil Spill Litigation*

The blowout, explosion, and fire aboard the Deepwater Horizon drilling rig on April 20, 2010, and the resulting oil spill and cleanup effort, together comprise one of the largest environmental mass torts in U.S. history.<sup>113</sup> The resulting oil spill contaminated the Gulf region, impacting natural resources (e.g., fish), property, and businesses and individuals whose economic interests intersected with the region.<sup>114</sup> The cleanup efforts involved the use of allegedly toxic oil dispersants, exposing cleanup workers to a range of short and long term illnesses.<sup>115</sup> These economic, property, and personal injuries gave rise to legal claims sounding in federal and state law.<sup>116</sup> Within four months of the blowout, the Judicial Panel issued an order transferring and consolidating all actions in the federal system alleging economic loss, property damage, or personal injury claims to Judge Barbier in the United States District Court for the Eastern District of Louisiana.<sup>117</sup>

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111. At one point, BP even unsuccessfully appealed the settlement when it became dissatisfied with the settlement administrator's and court's interpretations of it. *See In re Deepwater Horizon*, 739 F.3d 790, 799 (5th Cir. 2014) (rejecting BP's appeal).

112. *In re NFL Players' Concussion Injury Litig.*, 307 F.R.D. 351, 391–92 (E.D. Pa. 2015) (noting the risk that plaintiffs' claims could be knocked out on defendants' pending motion to dismiss on preemption grounds).

113. *In re Oil Spill by Oil Rig "Deepwater Horizon"*, 21 F. Supp. 3d 657, 667 (E.D. La. 2014) ("It was not long after the initial explosions that the first lawsuits were filed. Since that time, approximately 3,000 cases, with over 100,000 named claimants, have been filed in federal and state courts across the nation.").

114. LOU NADEAU ET. AL., U.S. DEP'T OF INTERIOR, BUREAU OF OCEAN ENERGY MGMT., ASSESSING THE IMPACTS OF THE DEEPWATER OIL SPILL ON TOURISM IN THE GULF OF MEXICO REGION 1 (2014).

115. Master Complaint in Accordance with PTO No. 11 [Case Management Order No. 1] Section III.B(3) ["B3 Bundle"] ¶¶ 9–12, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Dec. 15, 2010), ECF No. 881.

116. Plaintiffs pursued federal statutory, general maritime, and state law claims, though the trial court ultimately dismissed the state law claims. *See Order and Reasons [As to Motions to Dismiss the B1 Master Complaint]* at 18, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. August 26, 2011), ECF No. 3830.

117. Transfer Order, *In re Oil Spill*, No. 10-02179 (J.P.M.L. Aug. 10, 2010), ECF No. 1.

Faced with this “amorphous collection of claims”<sup>118</sup> and the challenge of managing them within the confines of a single MDL proceeding, Judge Barbier immediately established an MDL leadership structure. He appointed nineteen attorneys to serve as members of a plaintiffs’ steering committee (“PSC”),<sup>119</sup> tasked with coordination and implementation of discovery; coordination of selection, management, and presentation of common issue or bellwether trials; and the exploration and development of “all settlement options” pertaining to any claim.<sup>120</sup> The court recognized that the administratively consolidated proceedings involved sufficiently distinct issues to warrant separate “pleading bundles” to facilitate motions to dismiss, including a “B1” pleading bundle for economic loss and a “B3” pleading bundle for personal injury claims.<sup>121</sup>

The nature, strength, and value of these claims turned on a few key variables, including geography, type of profession, business or property, available remedies, and whether personal injury plaintiffs had yet manifested injuries. By way of example, claims that arose closer in time or physical space to the spill or to contaminants were arguably stronger than more temporally or physically remote claims.<sup>122</sup> Pursuant to the

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118. Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237, 237 (2011).

119. Judge Barbier appointed attorneys James P. Roy and Stephen J. Herman as interim liaison counsel for the MDL, pending appointment of an MDL plaintiffs’ leadership structure. See Pretrial Order No. 1 Setting Initial Conference at 13, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 20, 2010), ECF No. 2. The Court then formalized the appointment and made Roy and Herman *ex officio* members of the PSC. Pretrial Order No. 6 at 1, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 27, 2010), ECF No. 110. After soliciting written applications, the court appointed fifteen additional lawyers to the MDL PSC. See Pretrial Order No. 8 [Appointment of PSC and Plaintiffs’ Executive Committee] at 1–2, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Oct. 8, 2010), ECF No. 506. One year later, after reviewing “applications for appointment and re-appointment” to the PSC, the court added as PSC members two additional persons. See Pretrial Order No. 46 [Appointing Plaintiffs’ Co-Liaison Counsel, Plaintiffs’ Executive Committee, and Plaintiffs’ Steering Committee] at 1–2, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Oct. 5, 2011), ECF No. 4226. PSC membership has remained largely constant throughout the litigation. See Order [Re-Appointing Plaintiffs’ Steering and Executive Committee Members and Plaintiffs’ Co-Liaison Counsel], *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Oct. 4, 2016), ECF No. 21767 (listing nearly all of the originally appointed counsel).

120. See Pretrial Order No. 1 at 14–18, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 20, 2010), ECF No. 2; Pre-trial Order No. 8 at 3–4, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Oct. 8, 2010), ECF No. 506.

121. See *infra* note 335.

122. See, e.g., John C. P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD (Nov. 22, 2010), <https://dash.harvard.edu/bitstream/handle/1/4595438/Report%20on%20Economic%20Loss%20Liability%2011%2022%2010.pdf?sequence=1> [<https://perma.cc/KY6R-KNZM>] (analyzing the OPA and discussing the relationship between concepts of “distance” and proximate cause).

Court's decision in *Robins Dry Dock*,<sup>123</sup> punitive damages were available to most economic loss claimants only if they were commercial fishermen or suffered physical damages and resulting economic losses associated with the spill.<sup>124</sup> And persons who had already experienced physical injuries were differently situated from those who had merely been exposed or who had manifested minor injuries but were still susceptible to more serious and perhaps latent ones.

The same undifferentiated group of lawyers appointed to the PSC at the beginning of the MDL resolved large pieces of the litigation via a series of class settlement agreements that made distinctions among plaintiffs based on the key variables listed above. These distinctions were obvious at the start of the proceedings given the experiences BP and claimants had with the Gulf Coast Claims Facility (“GCCF”) that BP unilaterally established and that Ken Feinberg administered to pay early individual settlements.<sup>125</sup> The resulting class settlements have been praised,<sup>126</sup> partly because the payouts exceeding \$11 billion are impressive in the aggregate,<sup>127</sup> but, as explained below, the settlements were reached via a process that invited tradeoffs among differently situated categories of class members.

The settling parties and the court acknowledged the need for distinct classes with regard to BP on only two dimensions. First, building off its

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123. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

124. The trial court ultimately allowed certain punitive damages claims to be pursued (against Responsible Parties who satisfied the OPA presentment requirement and against non-Responsible Parties) to the same extent they could be pursued before enactment of the Oil Pollution Act, i.e., by “persons who suffered physical damage and resulting economic loss resulting from an oil spill,” or where there was “gross negligence,” but not for purely economic losses “unaccompanied by physical damage to a proprietary interest,” per *Robins Dry Dock*. Order and Reasons [As to Motions to Dismiss the B1 Master Complaint] at 19, 27, 38, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 26, 2011), ECF No. 3830 (citing *Robins Dry Dock*, 275 U.S. at 303).

125. See, e.g., BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: REPORT OF FINDINGS AND OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE 28–53 (2012), <https://www.justice.gov/iso/opa/resources/66520126611210351178.pdf> [<https://perma.cc/EW9M-XQ4H>] (describing claimants and claims procedures); Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 829–63 (2011) (describing genesis and structure of the GCCF).

126. See, e.g., Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 399–400 (2014) (praising the BP settlement).

127. See, e.g., Report by the Claims Administrator of the Deepwater Horizon Economic and Property Damages Settlement Agreement on the Status of Claims Review, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Feb. 14, 2017), ECF No. 22248 (summarizing payouts to class members); Status Report from the Deepwater Horizon Medical Benefits Settlement Claims Administrator, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Feb. 14, 2017), ECF No. 22245 (same); Order & Reasons [Aggregate Common Benefit Fee and Costs Award] at 13–15, *In re Oil Spill*, No. 2:10-md-02719 (E.D. La. Oct. 25, 2016), ECF No. 21849 (same).

order requiring distinct master complaint pleading, the court certified separate settlement classes resolving all economic loss/property damage claims and oil cleanup worker personal injury claims against BP, which, as part of the economic settlement, assigned its own claims against co-defendants Halliburton and Transocean to the BP economic loss settlement class.<sup>128</sup> Second, in the subsequent punitive damages class settlements with Halliburton and Transocean, the parties recognized the need to distinguish between “Old Class” (BP economic loss settlement class members with BP’s assigned claims against Halliburton and Transocean) and “New Class” (persons with direct punitive damage claims against Halliburton and Transocean).<sup>129</sup>

While each class had different named representative plaintiffs, the same lawyers have been appointed to represent all four of the aforementioned classes.<sup>130</sup> These are thus not subclasses in the sense imagined in *Amchem* and *Ortiz*, where subclass counsel’s desire to maximize the attorney’s fee prompts them to seek to maximize the subclass’s recovery, thereby creating a structural assurance of loyalty. That vision is reflected in the Federal Judicial Center’s *Manual for Complex Litigation*, which assumes that if subclass counsel are appointed after a settlement has been reached, the trial court should send the parties back to renegotiate the settlement terms, with separate counsel representing the subclasses and fighting for the right sized slices of the pie.<sup>131</sup> In a conflicts management regime informed by agency cost theory, subclassification without separate representation elevates form (subclassing) over function (managing conflicts) by leaving conflicted counsel responsible for mediating the very tensions that prompted subclassing.

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128. See *infra* section II.B.1.a.

129. See *infra* section II.B.1.b.

130. Preliminary Approval Order [As to the Proposed HESI and Transocean Punitive Damages and Assigned Claims Class Action Settlements] at 30–31, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Apr. 12, 2016), ECF No. 16183 [hereinafter PD Preliminary Approval Order] (appointing MDL Co-Liaison Counsel and Plaintiffs’ Steering Committee members as Class Counsel for the Punitive Damages Settlement Class). There is precedent for creating distinct classes without separate counsel. For example, in *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 149–51 (E.D.N.Y. 2000), the court created five settlement classes to resolve a range of Holocaust-era claims against Swiss banks and other entities, appointing the same counsel to each, in that instance in order to avoid what the court feared would be unseemly competition among subclasses and subgroups over a capped settlement fund. See *In re Holocaust Victim Assets Litig.*, 2007 U.S. Dist. LEXIS 18339, at \*7–8, \*44–45 (E.D.N.Y. Mar. 15, 2007) (describing the unique circumstances of the litigation that produced this arrangement).

131. See ANNOTATED MANUAL, *supra* note 6, at § 26.612, at 428.

a. *Two BP Settlement Classes with One Set of Counsel*

i. *Economic Loss/Property Damage Settlement*

While discovery and preparation for a trial on certain common issues were under way, the PSC and BP negotiated two separate class action settlements, one for economic and property losses and the other for personal injuries.<sup>132</sup> The trial court appointed different plaintiffs but the same lawyers to represent both settlement classes.<sup>133</sup>

The economic loss and property damage settlement agreement identifies fifteen named plaintiffs for a class that incorporates temporal and geographic limits<sup>134</sup> and requires claims to fall within specific damage categories.<sup>135</sup> For each of the eight broad damage categories, the settlement agreement establishes detailed claims matrices or “frameworks” distinguishing class members on multiple grounds.<sup>136</sup> Some of the matrices are actually clusters of grids. For example, the

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132. Order and Reasons [Granting Final Approval of the Economic and Property Damages Settlement Agreement] at 2–3, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Dec. 21, 2012), ECF No. 8138 [hereinafter Economic Final Approval Order].

133. After being informed that a settlement was imminent, Judge Barbier appointed the MDL liaison counsel, Messrs. Roy and Herman, as interim class counsel. Order Appointing Interim Class Counsel, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Mar. 5, 2012), ECF No. 5960. Shortly thereafter, Judge Barbier appointed Roy and Herman as “Lead Economic and Property Damages Class Counsel” and “Lead Medical Benefits Class Counsel.” The remaining seventeen lawyers appointed to the MDL PSC were appointed as additional settlement class counsel for both classes. Preliminary Approval Order [As to the Proposed Economic and Property Damage Class Action Settlement] at 33, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. May 2, 2012), ECF No. 6418 [hereinafter Economic Preliminary Approval Order] (appointing Roy and Herman as Lead Class Counsel and appointing the seventeen other PSC members as additional Class Counsel for the Settlement Class); Preliminary Approval Order [As to the Proposed Medical Benefits Class Action Settlement] at 22–23, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. May 2, 2012), ECF No. 6419 [hereinafter Personal Injury Preliminary Approval Order].

134. Economic Final Approval Order, *supra* note 132, at 7 (“The geographic bounds of the Settlement are Louisiana, Mississippi, Alabama, and certain coastal counties in eastern Texas and western Florida, as well as specified adjacent Gulf waters and bays. Generally, [t]o be a class member, an individual within the geographic area must have lived, worked, or owned or leased property in the area between April 20, 2010, and April [16], 2012, and businesses must have conducted activities in the area during that same time frame.”).

135. The settlement recognizes six categories of damage: (1) specified types of economic loss for businesses and individuals, (2) specified types of real property damage (coastal, wetlands, and real property sales damage), (3) Vessel of Opportunity Charter Payment, (4) Vessel Physical Damage, (5) Subsistence Damage, and (6) the Seafood Compensation Program. Economic Final Approval Order, *supra* note 132, at 7.

136. See Deepwater Horizon Economic and Property Damages Settlement Agreement as Amended on May 2, 2012, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. May 3, 2010), ECF No. 6430-1 [hereinafter Economic Settlement Agreement]. For an overview of the settlement, see Economic Final Approval Order, *supra* note 132, at 6–19.

economic loss category includes separate frameworks for individuals and businesses, and within the business category is further divided into general, multi-facility, failed start-up, and start-up frameworks. Each claims program framework is described in corresponding exhibits to the settlement.

The BP economic loss settlement was claims-made and uncapped, except for the Seafood Compensation Program, which was capped at \$2.3 billion.<sup>137</sup> The matrices made payment amounts contingent on the key variables identified above—time, geography, type of business or profession, and available remedies—in three ways. These variables dictated whether claimants needed to prove causation; the amount of the available “risk transfer premium” or “RTP,” a multiplier meant to account for, among other things, the risk of future losses as well as the possibility of recovering punitive damages; and the settlement awards. By manipulating these variables, the parties were able to estimate at the time they negotiated the settlement terms the likely payouts at the back end.<sup>138</sup>

Given the obviousness and range of variables used to discriminate among economic loss/property damage class members for settlement purposes, arguments could have been made in support of creating multiple subclasses. Indeed, objectors did make such arguments. The settling parties used geography as a proxy for claim strength when deciding eligibility, proof requirements, and compensation within each settlement matrix. An expert for one unusually sophisticated objector testified that the Economic Loss Zones were drawn arbitrarily such that similarly situated class members were treated differently.<sup>139</sup> Another group of objectors noted that Zone A and B members are entitled to relatively higher RTPs, and that, even though approximately eighty-five percent of the class members fell into Zones C and D, “[n]ot a single named class representative falls within Zones C or D.”<sup>140</sup> Other objectors covered by the Wetlands Real Property Claim matrix noted that none of the named plaintiffs with such claims resided outside Louisiana and

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137. See Economic Final Approval Order, *supra* note 132, at 7–8.

138. See Economic Settlement Agreement, *supra* note 136.

139. Economist and financial analyst Marc Vellrath submitted a declaration supporting objections by non-settling defendant Halliburton alleging conflicts within the economic loss “super-class.” Declaration of Marc Vellrath Regarding the Proposed Economic & Property Damages Settlement Agreement ¶¶ 3, 17, *In re Oil Spill*, No. 2:10-cv-07777 (E.D. La. Aug. 31, 2012), ECF No. 91-2 [hereinafter Vellrath Decl. re Economic Settlement].

140. Consolidated Objections of 795 Unnamed Class Members to Deepwater Horizon Settlement Agreement at 6–7, *In re Oil Spill*, No. 2:10-cv-07777 (E.D. La. Sept. 7, 2012), ECF No. 198.

objected to the decision to limit eligibility to make such claims to Louisiana property owners.<sup>141</sup>

Allocation tradeoffs were made not only by geographic zone but also by profession or industry. For example, for individuals, the risk transfer premium—a multiplier on grid awards—varied between zero and three depending on both zone and industry, resulting in what one objector characterized as arbitrary payment differences among claimants.<sup>142</sup> Similarly, within the Seafood Compensation Program, claimants with distinct positions in a particular industry had conflicting allocation interests. The SCP compensated boat owners, lessees, captains, and crew “roughly in proportion to their respective shares of or contribution to the total value created through a vessel-captain-and-crew’s seafood harvesting efforts.”<sup>143</sup> So when negotiating the grid to allocate compensation among them, each stakeholder would have wanted to see more weight given to his sub-group’s contribution to value.

Counsel would also have been tempted to make tradeoffs among class members based on their eligibility to recover punitive damages. Recognizing that, objectors asserted allocation conflicts between those class members whose claims supported punitive damages and those whose claims did not. For example, writing about the Coastal Real Property Damage subgroup, Sturdivant Objectors claimed:

Not a single class representative has a federal maritime claim—or corresponding claim for punitive damages—for damage to real property. As OPA-only claimants, the class representative real property owners are not typical of class members, like Objectors, who have federal maritime claims for damage to their real property, which is the only way to recover punitive damages.<sup>144</sup>

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141. Objections and Memorandum in Support of MRI, LLC and Dauphin Island Property Owners Association’s Objections to Proposed Settlement Agreement at 6, *In re Oil Spill*, No. 02:10-cv-07777 (E.D. La. Sept. 7, 2012), ECF No. 144 (overall discussion is at pages 5–14); *see also* Statement of Written Objections of Economic Class Member [Panther Ridge] at 2, 13–20, *In re Oil Spill*, No. 02:10-cv-07777 (E.D. La. Sept. 7, 2012), ECF No. 190.

142. *See* Vellrath Decl. re Economic Settlement, *supra* note 139, ¶¶ 175–77.

143. *Id.* ¶¶ 223–24.

144. Objections Regarding Proposed Economic and Property Damages Settlement Agreement [Sturdivant Objectors] at 3, 11–12, *In re Oil Spill*, No. 02:10-cv-07777 (E.D. La. Sept. 10, 2012), ECF No. 214 (“As the Court has already ruled, those class members who did not suffer physical damage to a proprietary interest (unless the claim falls into the commercial fisherman exception) have no federal maritime claim (Doc. 3830, p. 38). Based on information and belief, the large majority of class members will not have federal maritime claims and will have only OPA claims.”).



These objectors asserted that separate class representatives “and counsel” should have been appointed to represent class members with and without federal maritime claims, within the Coastal Real Property Damage subgroup, and more generally within the settlement class.<sup>145</sup> Despite the material differences between their entitlement to punitive damages, both subgroups (those with and without physical damages) get the same RTP under the settlement, which Sturdivan Objectors interpreted to mean that owners of physically damaged real property were not paid for their punitive damages claims.<sup>146</sup>

In rejecting all of these objections, the trial court and, on appeal, the Fifth Circuit, applied what is now a recognizable array of arguments for limiting the impact of *Amchem* and *Ortiz*, such that the courts found no conflicts that required subclassing.<sup>147</sup> Those arguments are laid out in section II.C., below. Before turning to them, it is helpful to lay out the additional pieces of the sprawling class settlements the BP oil spill litigation produced.

ii. *Medical Benefits (Personal Injury) Settlement*

The MDL PSC that represented the economic loss settlement class also negotiated the separate “medical benefits” (personal injury) settlement, though it assigned a subset of its members to take the lead in these discussions.<sup>148</sup> The personal injury settlement identifies eleven named representatives<sup>149</sup> of a class of persons who worked as “Clean-Up Workers” as defined in the Complaint (and settlement) or resided in defined geographic zones within particular time periods, and, if a Zone A resident, who developed a physical symptom or illness “that is associated with exposure to oil/or dispersants or decontaminants.”<sup>150</sup>

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145. *Id.* at 4.

146. *Id.* at 5, 32–33.

147. *See infra* section II.C.

148. Expert Report of Robert H. Klonoff Relating to the Proposed Medical Benefits Class Settlement ¶ 76, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. August 13, 2012), ECF No. 7111-4 (“The medical benefits settlement was negotiated separately from the economic and property damages settlement, and a different group of PSC attorneys led the negotiations.”).

149. Medical Class Action Complaint ¶ 5(a)–(k), *Plaisance v. BP Expl. & Prod., Inc.*, No. 2:12-cv-00968 (E.D. La. Apr. 16, 2012), ECF No. 1 [hereinafter *Personal Injury Class Complaint*].

150. *Id.* ¶ 84. More precisely, the Settlement Class is defined to include three categories of members: (1) individuals who worked as cleanup workers at any time between April 20, 2010 and April 16, 2012; (2) individuals who resided in Zone A (Gulf Coast beachfront areas) for some time on each of at least sixty days between April 20, 2010 and September 30, 2010 (“Zone A Resident”), and developed one or more Specified Physical Conditions between April 20, 2010 and September 30, 2010; and (3) individuals who resided in Zone B (Gulf Coast wetland areas) for some time on

In exchange for a class release,<sup>151</sup> the personal injury settlement provides four main benefits to the class: a claims program for Specified Physical Conditions, described below; a Back-End Litigation Option for Later-Manifested Physical Conditions;<sup>152</sup> a Periodic Medical Consultation Program; and a Gulf Region Health Outreach Program. The specified Physical Conditions claims program is a negotiated set of matrices for Specified Medical Conditions. Benefits vary based on, among other things: the reason for and source of exposure (e.g., as cleanup worker or resident); geographic region (e.g., beachfront and wetland “Zones”); whether the claimant was merely exposed or is presently injured, and, if presently injured, whether the claimant has experienced acute (short-term) or chronic (ongoing) medical conditions after exposure to oil or chemical dispersants; and the type of proof.<sup>153</sup> Eligible Specified Physical Conditions fall into a range of categories, including vision; respiratory; ear, nose, and throat; skin; neurophysiological/neurological/odor-related conditions; gastrointestinal or stomach conditions; and, for cleanup workers only, heat-related conditions. The Specified Physical Conditions Matrix is a 14-page chart that shows proof requirements and payment amounts by disease, worker/resident status, and geographic Zone.<sup>154</sup> The chart also identifies “enhancers” (e.g., overnight hospitalization) and states whether actual hospital expenses are a prerequisite for recovery.<sup>155</sup>

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each of at least sixty days between April 20, 2010, and December 31, 2010 (“Zone B Resident”). Economic Preliminary Approval Order, *supra* note 133, at 5.

151. Medical Benefits Class Action Settlement Agreement, as Amended on May 1, 2012 at 103–11, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. May 3, 2012), ECF No. 6427-1 [hereinafter Personal Injury Settlement Agreement].

152. Persons who develop a “Later-Manifested Physical Condition” are entitled to participate in a “Back-End Litigation Option,” including a limited right to sue BP for specified diseases manifesting after a particular date, subject to BP’s right to “mediate” the dispute, and without the ability to pursue punitive damages. Order and Reasons [Granting Final Approval of the Medical Benefits Class Action Settlement] at 16–17, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Jan. 11, 2013), ECF No. 8127 [hereinafter Personal Injury Final Approval Order]. Importantly, this is not a back-end *opt out* right, though it does serve a limitation on the scope of the release. The persons who experience Later-Manifested Physical Conditions are still class members, and are subject to various limitations, including limitations on elections of remedies, the issues to be litigated via discovery and at trial and proof, punitive damages, and venue. Personal Injury Settlement Agreement, *supra* note 151, at 57–58, 64, 66–69.

153. Personal Injury Final Approval Order, *supra* note 152, at 8.

154. Personal Injury Settlement Agreement, *supra* note 151, at Exhibit 8, ECF No. 6427-10. The Zones are demarcated in Exhibits 9–10 to the settlement. *See* Personal Injury Settlement Agreement, *supra* note 151, at Exhibits 9 and 10, ECF Nos. 6427-11 & 6427-12.

155. Personal Injury Final Approval Order, *supra* note 152, at Exhibit 8, ECF No. 6427-10.

Again, given the obviousness and range of variables used to discriminate among personal injury class members for settlement purposes, arguments were predictably made in support of creating multiple subclasses with separate counsel to ensure a degree of loyalty when making allocation choices. For example, the medical benefits class included both persons who were merely exposed to oil and dispersants as well as persons who manifested physical injuries. The court opted to forgo subclassing presently injured and exposure-only plaintiffs, citing the declaration of Professor Coffee, who testified that “there are no ‘future claimants’—persons exposed to a toxic substance who have not yet manifested any injury—who will receive any compensation for future injuries under the Medical Benefits Settlement Agreement.”<sup>156</sup>

That testimony rested on Professor Coffee’s understanding that, even though Zone B and Clean-Up Workers are by definition not required to have an acute or chronic condition specified on the Specified Physical Conditions Matrix, they are nevertheless “injured” *for purposes of general maritime law* because the complaints allege they “inhaled fumes or physically contacted oil or dispersants.”<sup>157</sup> Put differently, the BP trial court ignored the exposure-only versus presently-injured conflict in the personal injury settlement by assuming that, as a formal legal matter, all workers in a particular zone were not just exposed but also injured. Formal niceties aside, exposure-only plaintiffs arguably had an interest in negotiating a more liberal and generous Back End Litigation Option; whereas the presently-injured plaintiffs were interested in relatively greater compensation for their *manifested* injuries. *Amchem* is thus directly analogous. Even so, it is possible to distinguish the *degree* of conflict in *Amchem* and BP. The asbestos settlement did not have anything like the BP settlement’s Back End Litigation Option, and arguably undercompensated persons with later-manifesting injuries by failing to account for inflation when calculating payouts.<sup>158</sup> Then again, the BP settlement’s Back End Litigation Option included features that call its meaningfulness into question, e.g., the requirement that plaintiffs elect between worker’s compensation and a suit against BP, and limits on evidence (e.g., re BP’s gross negligence) and remedies (e.g., punitive damages).<sup>159</sup> Regardless of how well the settlement compensated exposure-only personal injury claimants, the structural assurance of

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156. Declaration of John C. Coffee, Jr. ¶ 52, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 10, 2012), ECF No. 7113-2 [hereinafter *Coffee Personal Injury Declaration*].

157. *Id.* ¶ 54.

158. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

159. *See supra* note 152.

separate counsel was missing. Separate counsel may have negotiated the same or better terms. We'll never know.

Instead of creating multiple subclasses with separate counsel along any of the fault lines pitting class members against each other for settlement purposes, Judge Barbier certified just two settlement classes against BP, and named the same lawyers to represent both. He granted final approval to both the economic and personal injury class action settlements with BP, dismissing objections regarding adequacy of representation and intra-class conflicts, and was affirmed by the Fifth Circuit on appeal.<sup>160</sup>

*b. Competing Punitive Damage Classes with One Set of Counsel*

In the economic settlement described above, BP assigned its claims against non-settling defendants to the settlement class. To resolve those and other claims, the MDL PSC negotiated two new class settlements, one with Halliburton, the provider of the cement used at the original BP drill site, in 2014,<sup>161</sup> and another with Transocean, the owners of the drilling rig, in 2015.<sup>162</sup> These nearly identical settlements resolved two categories of claims, those of the “Old Class” (the BP economic loss class described above), to end litigation regarding BP’s Assigned Claims, as well as those of a “New Class” of all persons with punitive damages claims against Halliburton and Transocean, only a subset of whom were members of the Old Class. The New Class was both narrower and broader than the Old Class. It was broader because it included “many claimants whose property suffered direct physical damage from the explosion and oil spill, but who were excluded from the Old Class. Among others, these include local governments . . . and

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160. The Fifth Circuit affirmed final approval and rejected appeals asserting conflicts of interest, repeating the trial court’s arguments. See *In re Deepwater Horizon*, 739 F.3d 790, 796 (5th Cir. 2014).

161. HESI Punitive Damages and Assigned Claims Settlement Agreement (Amended as of November 13, 2014), *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Nov. 13, 2014), ECF No. 13646-1 [hereinafter Halliburton Settlement Agreement]. The settlement benefit is primarily a limited cash payment of \$1.028 billion to resolve both the New Class punitive damage claims and the Old Class assigned claims. *Id.* at 18. Additionally, Halliburton agrees to pay a reasonable amount for common benefit attorney’s fees and costs, up to a maximum of \$99,950,000. *Id.* at 43.

162. Transocean’s Punitive Damages and Assigned Claims Settlement Agreement, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. May 29, 2015), ECF No. 14644-1 [hereinafter Transocean Settlement Agreement]. Transocean agreed to pay \$211,750,000 to resolve both the Assigned Claims (from BP) of the “Old Class” and the punitive damages claims of the “New Class” defined in the agreement. *Id.* at 17–18. In addition, Transocean agrees to pay common benefit attorneys’ fees and costs in the amount awarded by the court up to \$25 million. *Id.* at 43.

oil and gas interests.”<sup>163</sup> It was narrower because it included only that subset of Old Class members who could satisfy the “physical injury” threshold of the *Robins Dry Dock* rule<sup>164</sup> and thus were entitled to a punitive damages award.<sup>165</sup>

The same lawyers served as “Old Class” and “New Class” counsel.<sup>166</sup> The agreements they negotiated with Halliburton and Transocean expressly pitted Old and New Class members against each other, in that the capped settlement amounts had to be allocated between them. In lieu of seeking appointment of separate counsel for each class, the settlements relied on an alternative structural assurance of fairness—a court-appointed Allocation Neutral<sup>167</sup>—to deal with the obvious conflicts.<sup>168</sup> The Allocation Neutral proposed allocation of 72.8% of the settlements to the New Class and 27.2% to the Old Class, a recommendation the trial court adopted.<sup>169</sup>

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163. *Id.* at 19.

164. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

165. Transocean Settlement Agreement, *supra* note 162, at 18.

166. The “parties” to the agreements are listed as the PSC on behalf of the New Class defined in the agreement and the DHEPDS Class Counsel, for the BP economic loss settlement class. *See, e.g.*, Halliburton Settlement Agreement, *supra* note 161, at 4, 11. DHEPDS (i.e., BP economic loss settlement) Class Counsel and the PSC acting for New Class to negotiate the settlement are the same persons. They are listed by role rather than by name. To underscore the point, Roy and Herman signed both as PSC Co-Liaison Counsel for New Class and as DHEPDS Settlement Class Counsel for Old Class. *Id.* at 52. The Court gave credence to that formal way of separating counsel and their roles, e.g., in its order appointing Wilkinson as the Allocation Neutral, which identified the parties requesting appointment as “Plaintiffs Steering Committee (on behalf of the members of a putative New Class)” and “DHEPDS Class Counsel (on behalf of the DHEPDS Class),” as if those were distinct persons. *See* Order Appointing Magistrate Judge Joseph C. Wilkinson, Jr. as Allocation Neutral at 1, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Sept. 29, 2015), ECF No. 15398 [hereinafter Order Appointing Wilkinson]. The same format is used in the Transocean agreement to refer to the same lawyers serving in distinct roles. Transocean Settlement Agreement, *supra* note 162, at 1–3.

167. The trial court appointed Magistrate Judge Joseph C. Wilkinsin, Jr. to serve as Allocation Neutral. *See* Order Appointing Wilkinson, *supra* note 166.

168. Declaration of Robert H. Klonoff Relating to Class Certification and Fairness Issues in the Proposed Halliburton and Transocean Settlements ¶ 32, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 5, 2016), ECF No. 21423-1 (noting that Magistrate Judge Wilkinson established the allocation between the two classes and that “[n]either Co-Liaison/Co-Lead/Class Counsel, the PSC, nor any Class Counsel advocated for any particular allocation; it is my understanding that counsel were silent and neutral on the issue to avoid any perceived conflict”). The settling parties similarly attempted to address allocation conflicts within the Old and New Classes by delegating allocation decisions to neutrals. *Id.* ¶¶ 68–72; *see also* PD Preliminary Approval Order, *supra* note 130, at 9 (describing appointment of neutral to devise a distribution plan for New Class members).

169. PD Preliminary Approval Order, *supra* note 130, at 9; *In re Oil Spill*, 2015 U.S. Dist. LEXIS 165622, at \*16 (E.D. La. Dec. 10, 2015).

If *Literary Works*'s interpretation of *Amchem* and *Ortiz* had traction outside the Second Circuit, this would be a recipe for failure of the class settlement. Instead, Judge Barbier granted final approval of the punitive damage settlements.<sup>170</sup> His Order and Reasons addressed adequacy of representation in only a summary way, concluding that "[t]his case suffers from none of the problems identified in *Amchem*," in part because the class members were "protected by a specific, detailed, and objective framework that was developed and promulgated publicly by the Claims Administrator" and because "differences within the framework are rationally related to the relative strengths and merits of similarly situated claimants."<sup>171</sup>

## 2. *The NFL Concussion Injury Litigation*

Unlike the BP settlements, which involved zero subclassing with separate counsel, the NFL litigation is an example of minimalist and pro forma use of subclassing. It falls in that cluster of cases where courts subclass only with regard to futures or other similarly limited categories of claims, without guaranteeing truly separate and independent representation, either because of the timing of the subclassing or because subclass counsel are pulled from a pool of existing common benefit counsel whose fees are not truly tethered to the fortunes of any one subclass.

In July 2011, seventy-three former professional football players sued the NFL and a manufacturer of helmets, asserting as to the NFL that it "failed to take reasonable actions to protect them from the chronic risks of head injuries in football."<sup>172</sup> Thousands of additional claims were filed in over 300 lawsuits transferred and consolidated by the Judicial Panel to Judge Anita Brody in the Eastern District of Pennsylvania.<sup>173</sup> Judge Brody quickly appointed a leadership team of plaintiffs' counsel to handle pretrial activity, including settlement.<sup>174</sup>

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170. See Final Order and Judgment Granting Approval of HESI and Transocean Punitive Damages and Assigned Claims Settlement Agreements at 2–4, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Feb. 15, 2017), ECF No. 22253.

171. Order and Reasons [Granting Final Approval of the HESI and Transocean Punitive Damages and Assigned Claims Class Action Settlements] at 20–21, *In re Oil Spill*, No. 2:20-md-02179 (E.D. La. Feb. 15, 2017), ECF No. 22252 [hereinafter PD Final Approval Order and Reasons].

172. *In re NFL Players*, 821 F.3d 410, 421 (3d Cir. 2016).

173. Transfer Order at 2, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. Jan. 31, 2012), ECF No. 1.

174. Case Management Order No. 2, *In re Nat'l Football League Players' Concussion Injury Litig.*, Case No. 2:12-md-02323-AB (E.D. Pa. Apr. 26, 2012), ECF No. 64 (appointing counsel);

In July 2013, while the NFL's motion to dismiss was pending, Judge Brody ordered the parties to mediate and appointed a mediator.<sup>175</sup> Within a few months, the parties reached an agreement covering 20,000 retired players and providing a \$765 million fund to pay for medical examinations and to compensate injured players.<sup>176</sup> Concerned that the capped fund might be insufficient, Judge Brody denied the motion for preliminary approval.<sup>177</sup> She appointed a Special Master to help the parties make financial forecasts, and five months later the parties reached a revised settlement providing for uncapped settlement payments pursuant to a settlement grid.<sup>178</sup>

From the outset, it was obvious that any settlement would have to distinguish among class members based on a range of factors, including type of illness.<sup>179</sup> The final NFL settlement does so through its central feature, an uncapped Monetary Award Fund overseen by a claims administrator that provides compensation for Retired Players who submit proof of Qualifying Diagnoses.<sup>180</sup> The settlement recognizes only six such diagnoses, from varying levels of neurological impairment to Alzheimer's Disease, Parkinson's Disease, ALS, and death with chronic traumatic encephalopathy (CTE).<sup>181</sup> The settlement releases claims without compensation for many of the symptoms of CTE, such as

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Case Management Order No. 3, *In re Nat'l Football League Players' Concussion Injury Litig.*, Case No. 2:12-md-02323-AB (E.D. Pa. May 11, 2012), ECF No. 72 (appointing additional counsel).

175. *In re NFL Players*, 821 F.3d at 422; *Turner v. NFL*, 307 F.R.D. 351, 363 (E.D. Pa. 2015) (noting the appointment of retired United States District Court Judge Layn Phillips as mediator).

176. *In re NFL Players*, 821 F.3d at 422.

177. *In re NFL Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 715 (E.D. Pa. 2014); *Turner*, 307 F.R.D. at 364.

178. *In re NFL Players*, 821 F.3d at 423.

179. Other factors that were used to distinguish class members in the settlement, and that were evident as possible sources of allocation conflicts at the front end, included age, length of service in the NFL, and the date on which a player died. *See Turner*, 307 F.R.D. at 367 ("A Retired Player's Monetary Award is subject to a series of incremental offsets. The older a Retired Player is at the time he receives a Qualifying Diagnosis, the smaller his award will be."); ("[A]ny eligible Representative Claimant of a deceased Retired Player who died prior to January 1, 2006 will receive a Monetary Award only if he can show that his wrongful death or survival claim would not be barred by the statute of limitations . . ."). Objections made to the settlement on the merits with regard to these factors could have been pitched as adequacy of representation objections, but were instead mostly made and treated as objections regarding the adequacy of the settlement. *See, e.g., id.* at 407–08 (dismissing objections to the age offset).

180. *Id.* at 365. The other two key features of the settlement are a \$75 million Baseline Assessment Program that provides eligible players with free baseline assessment exams of their neurological functioning, and a \$10 million educational program. *Id.* at 365–66.

181. *Id.* at 367.

changes in mood, including depression.<sup>182</sup> Moreover, the settlement compensates CTE death claims only for persons who died prior to the final fairness hearing.<sup>183</sup> These distinctions represent tradeoffs made by counsel for the class when deciding how to structure settlement payments.

Though one can imagine subclassing on multiple dimensions,<sup>184</sup> the trial court certified only two subclasses, for claimants with and without a Qualifying Diagnosis. Counsel selected the representatives for each class: Shawn Wooden for other retired players with no Qualifying Diagnosis (i.e., no injury), whose primary interest was in a medical examination, and Kevin Turner for presently-injured retired players whose primary interest was in compensation.<sup>185</sup>

The trial court appointed separate counsel for each subclass to participate in the negotiations, but they were appointed only after negotiations by all counsel had begun.<sup>186</sup> The significance of the timing of the appointment of subclass counsel becomes clear when one reviews the timeline of negotiations: the formal mediation that led to the initial class settlement lasted twelve days,<sup>187</sup> and the time period between the

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182. *Id.* at 397.

183. *Id.* On this last score, the trial court found that the class members were all equally at risk of CTE and that the class representative for persons who had not yet manifested a qualifying injury was, or at least alleged himself to be, one such person. *Id.*

184. Public Citizen, a class action watchdog group, <http://www.citizen.org/Page.aspx?pid=369> [<https://perma.cc/BUS4-8ZA6>], put it succinctly:

The flaw in the class certification can be stated succinctly: A small group of attorneys, eventually designated as representing two named class representatives, devised a benefits plan and a grid for determining settlement benefits that (1) includes only five disease categories (plus death with CTE prior to settlement approval), (2) contains significant offsets to settlement benefits based on age at time of diagnosis and eligible years played in the NFL, and (3) excludes from payment a large percentage of the class who have concussion-related conditions that are alleged in the class complaint. The attorneys for the class did not, and could not, properly represent the wide range of circumstances of the class as a whole in this settlement.

Brief of Amicus Curiae of Public Citizen, Inc., in Support of Appellants Seeking Reversal at 2, *In re NFL Players Concussion Injury Litig.*, Case 15-2230 (3d Cir. Aug. 26, 2015), ECF No. 003112056130. Similar objections were made by objectors at the trial court level and on appeal. *See, e.g.*, Objection of Craig Heimburger and Dawn Heimburger at 8, *In re NFL Players' Concussion Injury Litig.*, Case No. 2:12-md-02323-AB (E.D. La. Oct. 14, 2014), ECF No. 6230 (“Two settlement classes are not enough for a fact-pattern this complex (and even if it were, the separate representation is questionable when each of the attorneys for each of the subclasses separately represented individual clients in the other subclass and did not ever disclose that conflict.”).

185. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 427–28 (3d Cir. 2016); *Turner*, 307 F.R.D. at 372.

186. *In re NFL Players*, 821 F.3d at 429 (“When class counsel and the NFL began mediation, there was only one proposed class of all retired players.”).

187. *Turner*, 307 F.R.D. at 363.



commencement of those negotiations and the reaching of a deal was only two months.<sup>188</sup> So appointment of subclass counsel in that window left little room for counsel whose loyalty had previously been to all plaintiffs as a whole to adjust to a new, more tailored role.

Moreover, subclass counsel were appointed from the group of common benefit counsel who had already been representing all plaintiffs in the MDL and were not only counsel for the subclasses, but were instead common benefit counsel for all MDL plaintiffs as well as class counsel for all class members who *also* happened to have special responsibility for advancing subclass members' interests.<sup>189</sup> They did not even have responsibility for negotiating a settlement of subclass members' claims or issues and instead just "played an active role" in the mediation process.<sup>190</sup> In the NFL concussion injury litigation, subclass counsel's fortunes do not clearly rise or fall with those of the class members; instead, as class counsel for all class members, their fees could arguably be determined based on the value of the settlement to class members as a whole.

Objectors unsuccessfully challenged the trial court's limited use of subclassing, and, as to the two subclasses it created, the timing of the appointment of subclass counsel and their selection from among existing MDL common benefit counsel.<sup>191</sup> Objectors relied on *Amchem* and *Ortiz*, on Rule 23(a)(4)'s adequacy of representation requirement, and on

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188. *Id.* at 364.

189. *In re NFL Players*, 821 F.3d at 429 ("[C]lass counsel designated lawyers from the Steering Committee to serve as subclass counsel."); *Turner*, 307 F.R.D. at 425 ("Pursuant to Federal Rule of Civil Procedure 23(g), the Court confirms the appointment of Christopher A. Seeger, Sol Weiss, Steven C. Marks, Gene Locks, Arnold Levin, and Dianne M. Nast as Class Counsel. In addition the Court confirms the appointment of Christopher A. Seeger and Sol Weiss as Co-Lead Class Counsel, and confirms the appointments of Arnold Levin and Dianne M. Nast as Subclass Counsel for Subclasses 1 and 2, respectively.").

190. See Declaration of Robert H. Klonoff Relating to the Proposed Class Settlement in the National Football League Players' Concussion Injury Litigation ¶ 31, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. La. Nov. 12, 2014), ECF No. 6423-9 [hereinafter Klonoff NFL Declaration] ("[A]lthough co-lead class counsel took the lead on negotiating the settlement, counsel for the two subclasses 'played an active role in the mediation process,'" citing Declaration of Co-Lead Class Counsel Christopher A. Seeger in Support of Final Approval of Settlement and Certification of Class and Subclasses ¶ 27, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. La. Nov. 12, 2014), ECF No. 6423-3); *id.* ¶ 43 ("Subclass Counsel each performed their own due diligence and independently assured themselves that the deal was fair and satisfied the needs of their respective Subclass members and Due Process.").

191. *In re NFL Players*, 821 F.3d at 429–30 (noting, too, that for the first time on appeal, objectors also challenged the adequacy of representation where Arnold Levin, counsel for the no-injury subclass, represented individual plaintiffs who potentially had already experienced qualifying injuries).

Rule 23(g), added by rule amendment in 2003 to separate out the criteria for appointing class counsel.<sup>192</sup> A faithful application of *Amchem* and *Ortiz* would have led to an outcome that differed on at least two dimensions. First, at a minimum, the separate subclasses would have had separate counsel.<sup>193</sup> Second, they would have been named at a point when subclass counsel could have assured that the settlement process was structurally fair, i.e., before settlement negotiations progressed.<sup>194</sup> Nevertheless, Judge Brody granted final approval to the settlement. The Third Circuit affirmed the settlement class certification and final approval order, and the Supreme Court denied petitions for writ of certiorari.<sup>195</sup>

### C. Lower Court Attack Vectors

How did we get from *Amchem* to the BP and NFL class settlements? The range and intensity of conflicts among persons with different circumstances and claim values suggest that had the BP and NFL settlement class certification orders been before the Supreme Court in the late 1990s, the Court would have required subclassing with separate counsel on multiple dimensions to provide the necessary structural assurance of fair representation by aligning the interests of subclass counsel and the class members, even if that meant upending the settlements in those cases and prolonging the agony of litigation. The trial and circuit courts in the BP and NFL matters avoided that outcome by following attack vectors defined by the lower federal courts since the late 1990s.

#### 1. Limiting *Amchem* and *Ortiz* to a Narrow Reading of Their Facts

*Amchem* and *Ortiz* involved conflicts among class members regarding settlement design. As noted, *one* conflict the Court highlighted was that between presently injured and exposure-only plaintiffs; but the Court also gave examples of how the presence within a class of diverse claims of varying strength and value can force counsel to make impermissible tradeoffs among class members. In *Amchem*, the Court gave the example of persons with loss of consortium claims, which were released but not

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192. *Turner*, 307 F.R.D. at 373 n.27.

193. *See supra* notes 54–55 and accompanying text.

194. *Id.*

195. *In re NFL Players*, 821 F.3d at 447–48. The Supreme Court denied two writ petitions on the same day. *See Gilchrist v. NFL*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 591 (2016); *Armstrong v. NFL*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 607 (2016).

compensated under the settlement.<sup>196</sup> In *Ortiz*, the key example was the claims of persons whose injuries occurred before and after 1959, the end-date of availability of an insurance policy that potentially covered and thus impacted the value of claims.<sup>197</sup> The settlement treated all claimants equally, without regard to date of injury, which troubled the Court.<sup>198</sup>

Nevertheless, a number of courts have suggested that *Amchem* and *Ortiz* apply less forcefully outside the setting of mass torts inflicting latent personal injuries that create futures problems, writing as if the other categories of conflicts the Court also deemed problematic did not exist.<sup>199</sup> This appears to be what the Third Circuit meant when, in *Community Bank*,<sup>200</sup> it recently held that *Amchem* and *Ortiz* have to be applied cautiously because of their “atypical circumstances.”<sup>201</sup> In the BP litigation, Judge Barbier’s lead argument in support of his finding of “no conflicts of interest among the class”<sup>202</sup> was that there was ostensibly no futures problem in BP, implying that *Amchem*’s holding was somehow uniquely relevant to that category of conflict. Implicitly,

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196. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

197. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999).

198. *Id.*

199. *See, e.g.*, *Hartless v. Clorox Co.*, 273 F.R.D. 630, 638 (S.D. Cal. 2011), *aff’d*, 473 Fed. App’x 716 (9th Cir. 2012) (“This case does not involve contested insurance funds or present and future claimants.”); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No: 3:08-MD-01998, 2009 U.S. Dist. LEXIS 119870, at \*22 (W.D. Ky. Dec. 22, 2009) (“[U]nlike an asbestos mass tort action where unknown plaintiffs may develop symptoms decades later, this action involves an objectively identifiable class.”); *In re Texas Prison Litig.*, 191 F.R.D. 164, 179 (W.D. Mo. 1999) (“The Court is aware that the U.S. Supreme Court has recently expressed concern about the use of class actions to resolve mass tort claims. The Supreme Court’s two overarching concerns have been whether the class is adequately represented and whether the class is sufficiently cohesive to warrant adjudication by representation . . . Unlike some of the recent mass tort class actions which have been rejected by the U.S. Supreme Court, this class action does not involve unpredictable damages that may arise in the future, or involve claimants that are yet unborn.”); *Farmers Ins. Exch. v. Leonard*, 125 S.W.3d 55, 67 (Tex. App. 2003) (“The problems which led to a conflict in the asbestos cases were unique to personal injury cases.”). Commentators, too, have emphasized the practical importance in *Amchem* of the disparate treatment of inventory clients and class members, all of whom had only unfiled claims, though the Court’s holding did not expressly turn on that distinction. *See, e.g.*, Alex Raskolnikov, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 YALE L.J. 2545, 2547–48 (1998).

200. *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380 (3d Cir. 2015).

201. *Id.* at 393 (quoting Prof’l Firefighters Ass’n of Omaha, *Local 385 v. Zalewski*, 678 F.3d 640, 646–47 (8th Cir. 2012)).

202. Economic Final Approval Order and Reasons, *supra* note 132, at 31; *see also* PD Final Approval Order and Reasons, *supra* note 171, at 20 (“This case suffers from none of the problems identified in *Amchem*, where the Court noted a potential intraclass conflict, in the context of a settlement with an overall cap, between individuals who had already been injured by asbestos and those who had only been exposed to it.”).

Judge Brody in the NFL case—supported by expert testimony from Professor Klonoff<sup>203</sup>—adopted a similar approach when picking out the futures problem as being somehow singularly worthy of attention.

Similarly, lower courts have read the intensity of the concern with conflicts in *Amchem* and *Ortiz* as flowing from the fact that litigation was commenced at the same time a class settlement was presented.<sup>204</sup> For example, in *Petrovic v. Amoco Oil Co.*,<sup>205</sup> the Eighth Circuit argued that *Amchem* and *Ortiz* “each involved a situation in which the parties agreed upon a class definition and a settlement before formally initiating litigation, and then presented the district court with the complaint, proposed class, and proposed settlement.”<sup>206</sup> This characterization of *Amchem* and *Ortiz* is technically true, but glosses over the fact that settlements in those cases followed years of non-class litigation.<sup>207</sup> Yet in rejecting objections to a class settlement focused on adequacy of representation, the Eighth Circuit in *Petrovic* found that “heightened” concern for conflicts was not warranted due to the length of time the case had been litigated before it was settled.<sup>208</sup>

## 2. *Narrowly Defining “Fundamental” Conflicts to Exclude the Most Common Allocation Conflicts*

Allocation conflicts necessitating subclassing included, in *Amchem*, conflicts among class members with categories of claims of varying settlement value,<sup>209</sup> and in *Ortiz*, claims of varying strength.<sup>210</sup> Nevertheless, the trial courts in the BP and NFL litigations found that differences in claim strength or value were not sufficiently “fundamental” to warrant subclassing.<sup>211</sup>

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203. See Klonoff NFL Declaration, *supra* note 190, ¶ 34. (describing the *Amchem* and *Ortiz* as if the only relevant conflicts were between exposure-only and presently-injured plaintiffs, i.e., the futures problem).

204. *Charron v. Wiener*, 731 F.3d 241, 250 (2d Cir. 2013) (discussed *supra* note 100 and accompanying text); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145–46 (8th Cir. 1999) (distinguishing *Amchem* and *Ortiz* because the settlement in the *Petrovic* case followed years of litigation).

205. 200 F.3d 1140 (8th Cir. 1999).

206. *Id.* at 1145–46.

207. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821–24 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600–02 (1997).

208. *Petrovic*, 200 F.3d at 1145.

209. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

210. *Ortiz*, 527 U.S. at 857.

211. Economic Final Approval Order, *supra* note 132, at 34 (finding no “fundamental” conflicts, and that “[i]t’s perfectly fair and reasonable, and indeed common and accepted, for settlement

Some lower federal courts have gone so far as to *categorically* define “fundamental” conflicts as excluding such allocation conflicts. The Third Circuit has been at the vanguard of this approach to limiting *Amchem* and *Ortiz*. In *In re Pet Food Products Liability Litigation*,<sup>212</sup> the Third Circuit rejected objections to adequacy of representation due to failure to subclass in a settlement of claims against manufacturers of adulterated dog food. The settlement distinguished among class members with varying claims and injuries and assigned different values to such claims in recognition of their relative strength. The court held that “differences in settlement value do not, without more, demonstrate conflicting or antagonistic interests within the class”<sup>213</sup> and that “alleged differences in the strength of the various claims asserted in this class action do not, by themselves, demonstrate conflicting or antagonistic interests within the class that would require subclasses.”<sup>214</sup> Other circuits have held similarly.<sup>215</sup>

### 3. *Invoking the Specter of “Balkanization” and “Holdouts”*

Lower federal courts have consistently used metaphors of geopolitical chaos and blackmail to justify avoiding or minimizing subclassing. These metaphors capture two categories of anxiety. First, the fear is that any amount of subclassing with separate counsel will cause conflicts that would otherwise have lain mostly dormant to bubble to surface through the adversarial process, creating a chain reaction of endless separate representation, a process courts and commentators label

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benefits to turn on strength of class members’ claims”); *Turner v. NFL*, 307 F.R.D. 351, 376 (E.D. Pa. 2015) (narrowly defining “fundamental” conflicts as existing “where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class”).

212. 629 F.3d 333 (3d Cir. 2010).

213. *Id.* at 346, 348 (citing *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 271 (3d Cir. 2009) (“[E]ven assuming objectors’ characterization of the Purchase Claims as ‘strong’ and Injury Claims as ‘weak’ carries some validity, objectors fail to articulate how differences in the relative strength of the different claims would lead to conflicts of interest in class representation . . . . It appears to us objectors’ focus on the relative strength of the claims, like their focus on the disparity of the allocation, is more appropriately addressed as a Rule 23(e) adequacy of allocation question, rather than a Rule 23(a) adequacy of representation question.”); *see also Petrovic*, 200 F.3d at 1146–48 (rejecting need for subclasses because almost every settlement involves claims of varying value); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at \*15 (N.D. Cal. Jan. 28, 2016) (“The mere fact that ‘relief varie[s] among the different groups of class members [does] not demonstrate . . . conflicting or antagonistic interests within the class’ or adequacy of representation issues.” (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 272)).

214. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 347 (3d Cir. 2010).

215. *See, e.g., Petrovic*, 200 F.3d at 1146 (finding conflicts regarding allocation based on varying claim strength and value to be insufficiently “stark” to require subclassing).

“Balkanization.” Second, the fear is that once such subclasses are formed, their distinct counsel will hold out for a greater share of settlement proceeds than is otherwise due to them, making settlement unlikely or possible only on unfair terms.

a. *Balkanization*

“Balkanization” is a metaphor for the descent into endless fragmentation. Applied to aggregate litigation, the fear is that segmentation could convert an otherwise cohesive group into “feuding enclaves”<sup>216</sup> and that segmentation builds on itself, so that splitting at one crack in the aggregate ineluctably causes the whole thing to crumble into countless pieces. As a metaphor, it is used across jurisdictions within the federal system as a shorthand for a more fulsome argument.<sup>217</sup> It is worth unpacking: central to the metaphor’s power is the notion that there is no logical stopping point between any segmentation of representation of the aggregate and complete chaos. It assumes that all splits in the aggregate are equal, such that if any one warrants segmentation, they all must.

Relying on procedural experts’ invocation of the specter of Balkanization,<sup>218</sup> Judge Barbier in BP invoked the Balkanization metaphor when finding that “if subclasses were entertained, there would be no principled basis for limiting the number of subclasses.”<sup>219</sup> Similarly, in the NFL concussion personal injury litigation, Judge Brody

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216. Coffee, *supra* note 30, at 374–75.

217. See, e.g., Williams v. Rohm & Haas Pension Plan, 685 F.3d 629, 635 (7th Cir. 2011) (“[O]ther class members argued that separate subclasses should be created to account for potentially different outcomes based on the statute of limitations. ‘[I]f subclassing is required for each material legal or economic difference that distinguishes class members, the Balkanization of the class action is threatened.’” (quoting Coffee, *supra* note 30)); Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 629 (6th Cir. 2007) (citing threat of “Balkanization” as a justification for supporting the trial court’s refusal to subclass); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005) (quoting Coffee, *supra* note 30).

218. See Declaration of John C. Coffee, Jr. ¶¶ 29, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 10, 2012), ECF No. 7110-3 [hereinafter Coffee Economic Declaration]; Supplemental Declaration of John C. Coffee, Jr., *supra* note 98, ¶ 19, ECF No. 7726-4 (asserting that objectors’ logic “could require an endless number of subclasses”); Declaration of Samuel Issacharoff ¶ 11, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Aug. 13, 2012) (“[T]he settlement process itself would unravel if discussions were held among a growing number of subgroups, which would then likely beget further subgroups by the same logic.”); Supplemental Declaration of Geoffrey P. Miller ¶ 19, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Oct. 22, 2012) (“Virtually every class action involves class members who are somewhat differently situated in a myriad of discrete ways. If sub-classing and separate representation were required for all such interests, class action litigation would be all but impossible.”).

219. Economic Final Approval Order, *supra* note 132, at 35–36.

rejected arguments regarding the need for separate counsel for each subclass by arguing that “[i]f subclassing is required for each material legal or economic difference that distinguishes class members, the Balkanization of the class is threatened.”<sup>220</sup> Judge Brody’s fears were also supported by expert testimony, in that case from Professor Klonoff, who wrote:

If the subclassing process includes the many alleged injuries caused by concussions outlined by the Brain Injury experts, and if each of those injury categories is then subdivided based on age, length of eligible service, and dollar values, the required number of subclasses could easily exceed 50. Neither *Amchem* nor any other case requires the creation of never-ending numbers of subclasses.<sup>221</sup>

To evaluate the correctness of the application of the Balkanization metaphor in these particular cases, we first have to ask, in general, whether there is any logical stopping point in *any* case between, at one extreme, recognizing no conflict as sufficient to warrant segmentation of an administrative or class aggregate, and, at the other, seeing every conflict as requiring segmentation. To answer, it helps to match the theory and doctrine of class conflicts sketched in section I.A., above, to the practical aspects of settling a mass tort. As noted, conflicts law assesses the risks of disloyalty in light of the costs of deeming a conflict impermissible.<sup>222</sup>

The logic of settlement lends itself to the balancing tests applied in the case law, demonstrating the capacity of counsel and trial courts to identify the fissures that warrant subclassing. Settling parties naturally map the underlying litigation onto grids, which are used by lawyers and MDL judges when tackling pleading, motion practice, discovery, and settlement. Grids take shape long before they are embedded in settlements. In BP, the broad outlines of the grids later used to settle the proceedings were evident at least as of the filing of master pleadings.<sup>223</sup> Similarly, the parties in the NFL concussion injury litigation quickly coalesced around a settlement grid structured on predictable variables

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220. *Turner v. NFL*, 307 F.R.D. 351, 379 (E.D. Pa. 2015) (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d at 202 (quoting *Coffee*, *supra* note 30, at 398)).

221. Klonoff NFL Declaration, *supra* note 190, ¶¶ 39, 43 (“Again, once one goes down the road of subclassing beyond the two existing subclasses (presently diagnosed with a Qualifying Diagnosis and not presently diagnosed), it is hard to argue against additional subclasses based on player size, position played, and other categories urged by objectors.”).

222. See *supra* notes 76–78 and accompanying text.

223. See *supra* note 125; *infra* note 245 and accompanying text.

such as length of play, age, and type of disease.<sup>224</sup> Other mass torts have resolved on similar lines.<sup>225</sup>

Putting together theory, doctrine, and practice yields a clear framework for preventing Balkanization. Trial courts may assess the fault lines within the aggregate that present the greatest risk, at greatest cost to affected subgroups, of giving rise to investment or allocation conflicts, and can create a limited number of subclasses along those lines. The “right” number of subclasses will depend on the facts of each case. The point is that the choice is not between zero and an infinite number, as the Balkanization metaphor suggests. Instead, subclasses can be delineated in a contained way using the kinds of balancing tests applied to grid frameworks that naturally arise in mass torts. We have already seen one example described above—*Literary Works*.

The “other” BP MDL involving financial misconduct claims provides additional support. That litigation is an example of segmentation of an administrative aggregate prior to any certification determination, which the rules enable, e.g., via Rule 23(g), which permits appointment of “interim” class counsel.<sup>226</sup> MDL No. 2179, to which the economic loss, property and personal injury claims were transferred, and which is the subject of the mass tort case study described in Part II, above, was one of *two* BP MDLs created after the spill. The second—MDL No. 2185—is the proceeding to which the Judicial Panel sent all securities fraud, derivative, and ERISA litigation against BP prosecuted in the wake of the spill.<sup>227</sup> That MDL was assigned to Judge Keith P. Ellison in the Southern District of Texas.<sup>228</sup> Unlike Judge Barbier, who concentrated

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224. See *supra* note 179 and accompanying text.

225. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 223 (2007) (“Like workers’ compensation laws in the early twentieth century, peace arrangements for mass torts use grids to match medical conditions with compensation payouts in a systematic manner.”).

226. FED. R. CIV. P. 23(g)(3).

227. Transfer Order at 2–3, *In re* BP P.L.C. Sec. Litig., No. 4:10-md-02185 (S.D. Tex. Aug. 10, 2010), ECF No. 1 (explaining why MDL No. 2185 would be separate from MDL No. 2179, the Panel noted that the “true factual focuses of these two dockets are vastly different. Plaintiffs in MDL No. 2179 will likely focus on the incident itself, the respective fault, if any, of the three or four primary actors, and the incident’s economic and other after effects. In the securities actions, discovery will likely focus on BP alone, its safety record over at least the past five years, and, in particular, the alleged duty of BP officials to recognize and disclose the likelihood that a calamity such as this might occur. Thus, the typical benefits of common discovery would likely be few”); Order, *In re* BP Sec., Derivative & Emp’t Ret. Income Sec. Act (ERISA) Litig., No. 4:10-md-02185 (S.D. Tex. Oct. 13, 2010), ECF No. 58 (denying Transfer in MDL No. 2189, Transferring the Subject Actions to MDL No. 2185, and adding ERISA cases to MDL No. 2185).

228. Transfer Order at 2–3, *In re* BP P.L.C. Sec. Litig., No. 4:10-md-02185 (S.D. Tex. Aug. 10, 2010), ECF No. 1.



responsibility for economic loss, property damage, and personal injury claims in one undifferentiated group of plaintiffs' attorneys, Judge Ellison split MDL No. 2185 into three consolidated proceedings within the MDL, each with its own distinct set of common benefit counsel, for securities, derivative, and ERISA claims, respectively.<sup>229</sup> Judge Ellison divided MDL No. 2185 that way even though it meant that there would be some overlap in the discovery and other pretrial activity in those cases.

Within the securities fraud consolidated proceedings in MDL No. 2185, Judge Ellison also appointed counsel for a subclass in the early stages of the suit, choosing a single fracture in that case, which he saw as sufficiently significant to warrant segmentation. As of the time of his order appointing class counsel, there were seven class actions proposing classes of "purchasers of American Depository Receipts ('ADRs') and ordinary shares of BP during various time periods between 2005 and 2010."<sup>230</sup> The subclass was created to account for the differences in the time periods on which the lead and subclass lead plaintiffs focused.<sup>231</sup>

Armed with an understanding regarding how courts may selectively segment aggregates to manage conflicts in general, we can now critically examine Judge Barbier's and Judge Brody's suggestions that they were unable to do so in the BP oil spill and NFL concussion injury litigations in particular. Judge Barbier's own case management orders suggest that he did in fact acknowledge discreet fault lines within the MDL aggregate as worthy of particular distinction and segmentation. He divided the proceedings between, on the one hand, economic loss and property claims and, on the other, personal injury claims, both by assigning separate pleading bundles to them at the outset and by certifying separate settlement classes for them at the back end, with separate

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229. Amended Order, *In re* BP P.L.C. Sec. Litig., No. 4:10-md-02185 (S.D. Tex. Dec. 6, 2010), ECF No. 74 (recognizing separate consolidated proceedings within the MDL).

230. Memorandum and Order at 2, *In re* BP, P.L.C. Sec. Litig., No. 4:10-md-02185 (S.D. Tex. Dec. 28, 2010), ECF No. 79 (consolidating the securities fraud cases and appointing lead plaintiffs and their counsel for the class and subclass).

231. *Id.* at 11–12 ("While it is by no means certain that such conflicts [between the lead and Ludlow plaintiffs over the time periods on which they focused] would prevent New York & Ohio from adequately representing the class, the Court finds it particularly important at this early stage of the case to avoid prejudicing the claims of absent class members through the appointment of a lead plaintiff who cannot fully and fairly represent them. Because New York & Ohio's losses are concentrated outside the Ludlow Period, and because that concentration leads New York & Ohio to present different legal theories than other plaintiffs, they have not made a preliminary showing of typicality and adequacy. Therefore, New York & Ohio are not entitled to a presumption that they are the most adequate lead plaintiffs.").

representative plaintiffs.<sup>232</sup> Similarly, in the NFL litigation, Judge Brody was able to contain subclassing to two groups, those with and without Qualifying Diagnoses, without causing conflicts to multiply endlessly, and could have similarly drawn the line at a higher number without losing control.<sup>233</sup>

The distortion at the heart of the Balkanization metaphor is that fragmentation is somehow something that happens to a litigation, as if the judge is powerless to control it. Trial courts in the BP oil spill and NFL concussion injury litigations adopted this position. But in fact, *Literary Works* and the “other” BP litigations reveal that the opposite is true.<sup>234</sup> Trial court judges can assess the costs and benefits of carving classes at obvious joints to create a level of competition that harnesses some of the energy of competition without igniting a chain reaction of endless fragmentation.

*b. Holdouts*

A related source of resistance to subclassing with separate counsel is the fear that counsel whose fees are tied to subgroup outcomes will engage in extortion to increase their subgroup’s share and thus their expected attorney’s fees.<sup>235</sup> To put the fear in some context, it should be noted that all settlement is a form of extortion. The plaintiff threatens continued litigation and a possible judgment if the defendant refuses to settle on terms the plaintiff finds acceptable. Extortion is a two-way street, in that defendant can threaten high litigation costs and the possibility of extinguishing that claim if plaintiff fails to agree to what the defendant offers. In that light, extortion by subclasses is just another way of describing negotiation of their interests.

The real fear is of opportunistic holdouts, i.e., those who are offered a “reasonable” amount for a claim, but hold out for more, not seeking just full claim value but instead seeking to capture a disproportionate share of any settlement pie in exchange for discontinuing their obstruction of a global peace. Logically, the more an aggregate is segmented, the more persons there are who have the power to hold any settlement hostage.

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232. See *supra* section II.B.1.a.

233. See *supra* section II.B.1.b.

234. See *supra* notes 80–89, 227–32 and accompanying text.

235. See generally Coffee, *supra* note 30, at 435–36 (“[T]he more subclasses that are required, the greater the danger that one subclass will hold out.”); John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 655 (1987) (“[I]f any subclass can prevent the settlement’s overall approval, the prospect for extortion is high.”).

There is truth to the holdout argument to this extent: settling parties would naturally prefer to have the counsel appointed to represent each subset of the aggregate on board before concluding a global settlement. However, counsel for subgroups do not have an actual veto power over the settlement of those claims in either the class or the non-class setting. If Rule 23 is used as the vehicle for providing closure in a global settlement, a subset of counsel may bring a proposed class settlement to the court, even over the objection of dissenting plaintiffs or counsel.<sup>236</sup> Objections by counsel appointed to do common benefit work and to serve as interim class counsel for a subgroup may cause *friction* at the time of a global settlement. But such objections by themselves cannot prevent a global settlement. The power to hold out is thus limited.

#### 4. *The Mystique of Uncapped Settlement Funds*

Trial courts in the BP<sup>237</sup> and NFL<sup>238</sup> litigations argued that because the funds were (mostly) uncapped, there were no conflicts of interest. Supported by reports and affidavits from legal scholars,<sup>239</sup> Judge Barbier found that the uncapped nature of the funds (other than the Seafood Compensation Program, which was capped) meant that settling parties did not need to, and thus did not, make tradeoffs among claimants.<sup>240</sup> The assumption was that if BP was willing to pay all claims pursuant to the negotiated matrices, then there was no tension among class members, because each would get whatever he deserved. Similarly, Judge Brody held that the uncapped, inflation-adjusted nature of the fund in the NFL

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236. See, e.g., *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157 (3d Cir. 1984) (subset of plaintiffs' counsel unsuccessfully represented objecting plaintiffs). See generally MANUAL, *supra* note 1, at § 21.642.

237. Economic Final Approval Order, *supra* note 132, at 31 ("There are no conflicts of interest among the class.")

238. *In re* NFL Players, 821 F.3d 410, 432 (3d Cir. 2016).

239. Professors John C. Coffee, Jr., Samuel Issacharoff, Robert Klonoff, and Geoffrey Miller submitted reports or affidavits in support of the BP settlements. Coffee, Issacharoff and Klonoff opined that the uncapped nature of the settlement funds for programs other than seafood, and the high ceiling on the SCP fund, meant that there were no conflicts among settlement class members. See, e.g., Coffee Economic Declaration, *supra* note 218, ¶¶ 8, 23–24; Declaration of Samuel Issacharoff ¶ 14, *In re* Oil Spill, No. 2:10-md-02179 (E.D. La. Aug. 13, 2012), ECF No. 7101-6; Expert Report of Robert H. Klonoff Relating to the Proposed Economic and Property Damages Class Settlement ¶¶ 31, 36, *In re* Oil Spill, No. 2:10-md-02179 (E.D. La. Aug. 13, 2012), ECF No. 7101-5 (claimants were "not competing for limited dollars").

240. Economic Final Approval Order, *supra* note 132, at 31–32 ("[M]ost importantly, this Settlement does not involve a limited fund. . . . [T]he claims frameworks offering generally uncapped compensation ensure that a benefit paid to one member of the class will in no way reduce or interfere with a benefit obtained by another member.")

settlement was a “structural” protection that lessened concerns regarding conflicts.<sup>241</sup>

One can see why the distinction between capped and uncapped, claims-made settlements is illusory by looking at the BP litigation. BP viewed its liability in the aggregate, as a total estimated dollar figure. When negotiating the settlement matrices, BP undoubtedly had some target figure in mind as the price it was willing to pay to secure legal closure. It could have simply negotiated a settlement for that figure, placing the risk on plaintiffs that the amount was too low to satisfy all claims. Indeed, BP took exactly that approach when negotiating the Seafood Compensation Program.<sup>242</sup> As to other claim categories, BP elected to take an alternative path, reaching the same figure it was willing to pay for legal peace, but instead by negotiating grids with fixed eligibility, proof requirements, and awards, adjusting those variables to reach an estimated global target payout.<sup>243</sup> That approach placed the risk on BP that claims and claims payments would exceed its estimated total liability. BP was likely willing to take the risk in this case because it had access to substantial claims data from two sources, the GCCF it established pursuant to its obligations to pay economic loss and property damage claims,<sup>244</sup> and, with regard to the personal injury claims discussed in the next section, from a Medical Encounters Database maintained in real time to track worker complaints during the cleanup process.<sup>245</sup>

Because, as noted, the BP Seafood Compensation Program was a capped fund, the matrices that constitute it even more obviously represent negotiated allocations among competing claimants. Judge Barbier held that the amount of the \$2.3 billion SCP fund was sufficiently high that tradeoffs among class members did not need to be made within it,<sup>246</sup> a variation of the uncapped fund argument addressed above. Even if there was a windfall in the fund, however, its allocation among persons with competing claims to it would categorically put those persons in tension with each other.

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241. *In re NFL Players*, 821 F.3d at 432; *Turner v. NFL*, 307 F.R.D. 351, 376–77 (E.D. Pa. 2015).

242. See Economic Final Approval Order, *supra* note 132, at 7–8.

243. See *supra* note 136.

244. See *supra* note 125.

245. Coffee Personal Injury Declaration, *supra* note 156, ¶¶ 42–51 (describing Medical Encounters Database).

246. Economic Final Approval Order, *supra* note 132, at 32–33.

### 5. *Alternative Structural Assurances of Fairness*

Courts often point to the participation of court-appointed neutrals in settlement negotiations as an alternative structural assurance of fairness that obviates the need for subclassing, though typically without addressing concern regarding information asymmetries between counsel and neutrals that led the Second Circuit to reject that equation in *Literary Works*.<sup>247</sup> Judge Barbier made a similar argument in the BP case, asserting that no conflicts existed in part because “Magistrate Judge Shushan’s involvement further ensured structural integrity during the negotiations.”<sup>248</sup> In the NFL concussion injury litigation, after denying the parties’ motion for preliminary approval of a settlement that resulted from court-supervised mediation, the trial court directed the parties to share expert actuarial information with Special Master Perry Golkin, an expert in finance. Special Master Golkin also supervised discussion designed to address the trial court’s concern that the initial capped settlement amount might be insufficient. The court found that the presence of a mediator and special master in the negotiation process provided assurance of fairness.<sup>249</sup>

In BP, Judge Barbier found another way around a strict read of *Amchem* by attempting to equate as alternative structural assurances of fairness on the one hand, *Amchem*’s attorney-fee-based approach to interest alignment and, on the other, the representativeness and inclusiveness of the steering committee.<sup>250</sup> Appointing a representative and inclusive steering committee is a best practice. The MANUAL proposes diversity within the steering committee.<sup>251</sup> Professor Burch proposes “encouraging input and dissent”<sup>252</sup> from non-repeat players and non-lead lawyers and appointment of steering committees that reflect the diversity among the members of the aggregate.<sup>253</sup> These suggestions are

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247. *See* *Juris v. Inamed Corp.*, 685 F.3d 1294, 1324 n.25 (11th Cir. 2012) (“We are not the first court to suggest that *Amchem* and *Ortiz* impose a requirement of adequate structural assurances, as opposed to a per se requirement of formally designated subclasses.”); 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 7.31, at 160 (5th ed. 2013) (citing *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004)).

248. Economic Final Approval Order, *supra* note 132, at 33.

249. *Turner v. NFL*, 307 F.R.D. 351, 377 (E.D. Pa. 2015) (“Moreover, the presence of Mediator Judge Phillips and Special Master Golkin helped guarantee that the Parties did not compromise some Class Members’ claims in order to benefit other Class Members.”).

250. *See infra* notes 251–55 and accompanying text.

251. *See* MANUAL, *supra* note 1, § 10.224 (“[W]here diverse interests exist among the parties, the court may designate a committee of counsel representing different interests.”).

252. Burch, *supra* note 15, at 77, 120–21.

253. *Id.* at 122–23.

helpful with respect to creating conditions under which concerns of disparate interests within the aggregate might be voiced and squarely fit Professor Burch's interest in cognition.<sup>254</sup> But they do not fit a model of conflict management rooted in economic theory, which requires that counsel's financial interests align with those of distinct sub-groups of plaintiffs. Nevertheless Judge Barbier asserted the BP steering committee's representativeness and inclusiveness as a response to adequacy objections regarding class counsel's incentives. He noted: "[t]he PSC was consulted and participated throughout the settlement process. Whenever a particular category of claims was discussed during negotiations, lawyers who had clients with such claims took an active role in advising the negotiators."<sup>255</sup> That consultative approach left the negotiators, though more fully informed, still conflicted, e.g., regarding allocation with regard to competing claims.

#### 6. *Proof in the Pudding—A Utilitarian Wedge*

The Supreme Court was adamant that the lower courts resist the urge to conflate the 23(a)(4) adequacy and 23(e) settlement fairness inquiries.<sup>256</sup> Courts today have found a new way to link the two inquiries. First, if courts believe that compensation amounts are reasonable under the circumstances, they discount the possibility that there were tradeoffs among class members. For example, in his order granting final approval to the BP economic loss class settlement, Judge Barbier noted that there were no conflicts in part because "[t]he differences within the [settlement] frameworks developed through arms-length negotiation, are rationally related to the strengths and merits of similarly situated claims."<sup>257</sup> Similarly, in the NFL litigation, the appellate court found that "the terms of the settlement reflect that the interests of current and future claimants were represented in the negotiations," because the terms were fair to both groups.<sup>258</sup> Other lower

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254. *Id.* at 121 ("[L]everaging outsiders' expertise is a more viable means of achieving cognitive diversity."). See also Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1156–60 (2011) (reviewing and applying the cognitive diversity literature to the selection of lead plaintiffs in securities fraud class actions under the PSLRA).

255. Economic Final Approval Order, *supra* note 132, at 32.

256. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997).

257. Economic Final Approval Order, *supra* note 132, at 31.

258. *In re NFL Players*, 821 F.3d 410, 432–33 (3d Cir. 2016).

federal courts have adopted similar approaches.<sup>259</sup> Assessing common practices, the Sixth Circuit observed:

[C]ourts customarily demand evidence of improper incentives for the class representatives or class counsel—such as a promise of excessive attorney fees in return for a low-cost, expedited settlement—before abandoning the presumption that the class representatives and counsel handled their responsibilities with the independent vigor that the adversarial process demands.<sup>260</sup>

Second, lower courts have suggested that if settlement terms are structured in an unfair way so as to disadvantage subsets of class members without justification, *then* a fundamental conflict may be found to exist. For example, in *Dewey v. Volkswagen*,<sup>261</sup> the Third Circuit confronted a settlement of a product defect case involving various models of Volkswagen and Audi vehicles with sunroofs that were allegedly defectively designed and thus prone to leaking without special maintenance. The settlement provided various kinds of relief, including most importantly an \$8 million fund,<sup>262</sup> which prompted objectors to allege two different types of conflicts of interest. The Third Circuit's disparate treatment of them demonstrates the utilitarian creep that has shaped application of *Amchem* and *Ortiz* in the years since they were decided.

First, objectors in *Dewey* argued that the settlement implicated the futures problem that so prominently figured in *Amchem* because the named plaintiffs, who had all already suffered sunroof leaks, represented a class that also included persons who had not.<sup>263</sup> Objectors alleged that persons who already suffered leaks had an interest in ensuring generous immediate compensation, and were relatively less interested in assuring compensation for failure to inform the class, or in assuring compensation for “future protections,”<sup>264</sup> such as inspections and funding for payment of future damage claims. The Third Circuit acknowledged that “[t]his

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259. For example, in *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000), the Ninth Circuit affirmed a trial court's finding that representation was adequate even though class counsel representing two classes of purchasers chose a damages measure for settlement purposes that favored one of them, finding that disfavored class members were unlikely to be successful on the merits on the other. *Id.* at 462–63. The court held: “[w]ere we to decertify the current class it is possible that no one will recover anything from Mego.” *Id.* at 463.

260. *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 628 (6th Cir. 2007).

261. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 173 (3d Cir. 2012).

262. *Id.* at 175.

263. *Id.* at 185.

264. *Id.* at 186.

case bears some resemblance to *Amchem* and raises some of the same concerns.”<sup>265</sup> Nevertheless, the court found that a mere misalignment of allocation preferences alone was not sufficiently fundamental to raise conflict concerns,<sup>266</sup> especially where, as in *Dewey*, persons who had already experienced leaks were capable of experiencing future leaks, *and* where the settlement’s terms were “structured to ensure that even past claimants had an incentive to protect the rights of all members of the class to make future claims” by actually providing for payment of such claims.<sup>267</sup>

*Dewey* objectors were more successful with regard to the second conflict they alleged, i.e., that between persons in a “reimbursement group” who had priority under the settlement and all other class members relegated to a “residual group” capable of making claims only if any portion of the \$8 million fund remained.<sup>268</sup> The boundaries of the residual group were determined by reference to the claims rate on a vehicle model.<sup>269</sup> But the claims rate that distinguished those in the two groups was arbitrary, in that there was no justification for treating the two groups differently but for the class representatives’ desire to maximize the funds available to persons in the residual group.<sup>270</sup> The Third Circuit found this conflict to be sufficiently fundamental to trigger adequacy of representation concerns.<sup>271</sup> Why was this conflict different from the futures issue? The court found the degree of misalignment of interest here to be starker than with regard to the differential preferences of persons who had already experienced an injury and those who had not, because the reimbursement and residual plaintiffs’ preferences were relatively more oppositional.<sup>272</sup> More to the point, the court found that the “*structure of the settlement agreement itself*,”<sup>273</sup> which treated the groups differently for no apparent reason, was proof that the conflict was fundamental. That is, an unfair settlement *term* proved the existence of a

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265. *Id.* at 185.

266. *Id.* at 186 (“[E]ven if the representative plaintiffs did value protections for future claimants less than other members of the class, we do not believe that, again on this record, their differing valuations would create a fundamental conflict sufficient to undermine their ability to adequately represent the class.”).

267. *Id.*

268. *Id.* at 187.

269. *Id.*

270. *Id.* at 187–88.

271. *Id.* at 187.

272. *Id.* at 188 (“The problem is that the interests of the representative plaintiffs and the interests of the residual group aligned in opposing directions.”).

273. *Id.* at 187 (emphasis added).



structural conflict. That is why the court posed as a solution either amendment of the settlement to eliminate the arbitrary distinction made between “reimbursement” and “residual” claimants *or* subclassing.<sup>274</sup>

*Dewey* illustrates an intermediate appellate court not only giving *Amchem* a narrow read on the required degree of misalignment of interest, but flipping *Amchem* on its head<sup>275</sup> by relying on an analysis of the fairness of the settlement’s terms to determine whether conflicts of interest are sufficiently fundamental to call the adequacy of representation into question. This reliance on the fairness of settlement terms to demonstrate the inadequacy of representation is evident even in the Second Circuit. In *Payment Card Interchange*, discussed above, the court went out of its way to demonstrate the relative stinginess of the relief accorded to (b)(2) settlement class members relative to (b)(3) settlement class members<sup>276</sup> and to criticize the unfairly broad scope of the release made by (b)(2) members.<sup>277</sup>

## 7. Deference to Trial Court Judges

A last element of the attack on *Amchem* and *Ortiz* concerns the level of deference to the trial court judge deciding whether to subclass. Dissenting in *Amchem*, Justice Breyer wrote: “[w]hat constitutes adequate representation is a question of fact that depends on the circumstances of each case.”<sup>278</sup> Dissenting in *Ortiz*, Justice Breyer again

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274. *Id.* at 189; *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 307 (3d Cir. 2005) (looking to disparate and unfair settlement terms as a basis to find representation inadequate, in that case, because the class representatives did not have TILA or HOEPA claims and the settlement failed to provide any recovery for such claims).

275. In *Amchem*, the Court acknowledged objections to the relatively sweeter deal received by class counsel’s inventory clients whose claims were settled outside the class action. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 606 (1997). But the intra-class conflict of interest on which the Court based its decision did not involve those non-class members. As to the core conflict between presently injured class members and those whose injuries had not yet manifested, the Court noted the existence of settlement terms that limited their recovery. *Id.* at 627 (“[N]o adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.”). But the Court did not deem these provisions to be unfair. Instead, the Court found it notable that these terms “reflect essential allocation decisions designed to confine compensation and limit defendants’ liability.” *Id.* at 595.

276. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 239 (“This bargain is particularly unreasonable for merchants that begin accepting Visa or MasterCard after July 20, 2021.”).

277. *Id.* (“Merchants that cannot surcharge (by reason of state law or rules of American Express) and those that begin operating after July 20, 2021 suffer an unreasonable tradeoff between relief and release that demonstrates their representation did not comply with due process.”).

278. *Amchem Prods., Inc.*, 521 U.S. at 637 (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1765, at 271 (3d ed. 2007)).

emphasized the need to defer to trial courts' assessments regarding the costs and benefits of subclassing, arguing that the trial court's fact findings regarding the relative insignificance of the alleged allocation conflicts should not be overturned.<sup>279</sup> The majority in each case obviously disagreed—not with the abuse of discretion standard, but with its application in each case. But intermediate appellate courts today borrow liberally from Breyer's playbook. In *In re Insurance Brokerage Antitrust Litigation*,<sup>280</sup> in a decision declining to disturb the trial court's exercise of discretion not to require subclasses, the Third Circuit held: “[b]ecause ‘the decision whether to certify a subclass requires a balancing of costs and benefits that can best be performed by a district judge,’ we accord substantial deference to district courts with respect to their resolution of this issue.”<sup>281</sup> Similarly, in both the BP and NFL cases, the intermediate appellate courts found the courts' subclassing choices to be well within the trial court judges' exercise of discretion.<sup>282</sup>

#### D. *The New Conflicts Management Regime*

The new conflicts management regime emerging from the trenches of lower federal courts is revealed in the two case studies sketched in the preceding sections. It is modest, rather than bold, in that, with few exceptions, it applies to a relatively limited universe of conflicts. It is regulatory, rather than market based, to the extent courts now rely on the judge's ability to manage conflicts by supervising counsel directly or via neutrals. And it elevates utilitarian concerns over the intrinsic value of fair process to the extent it looks to the fairness of settlement outcomes to judge whether representation was adequate. In short, the conflicts management regime is the mirror image of the one built by the Supreme Court in *Amchem* and *Ortiz*.

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279. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 878–81 (1999).

280. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 271 (3d Cir. 2009).

281. *Id.* (quoting *In re Candant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005)); *see also* *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) (“No doubt, the district courts could have drawn additional class lines, but they did not abuse their discretion in choosing not to do so.”).

282. *See In re NFL Players*, 821 F.3d 410, 429 (3d Cir. 2016); *In re Deepwater Horizon*, 739 F.3d 790, 814 (5th Cir. 2014).

### III. AN INSTITUTIONAL ACCOUNT: THE MDL MODEL FOR MANAGING MASS TORTS AND THE INCONVENIENCE OF SUBCLASSING

The preceding Part addressed *how* we got from *Amchem* to BP and the NFL class settlements. This Part explores *why* lower federal courts have effectively flipped the regulatory regime, providing an institutional account.<sup>283</sup> As noted, at the time *Amchem* and *Ortiz* were decided, federal courts were jurisdictionally challenged with regard to mass tort class actions, and relatedly, the reverse auction was the most glaring ethical challenge of the day. Congress and courts responded with new formal and informal institutional arrangements for managing mass tort and other geographically dispersed class actions that together constitute the new “MDL model,”<sup>284</sup> the general features of which are described below and were visible in both the BP and NFL case studies. This new model has had the effect of concentrating multijurisdictional class actions in federal courts; deferring class certification to later stages of proceedings, in mass torts mostly for settlement purposes; nudging federal courts to innovate new informal case management techniques that give them more control over case outcomes; substantially muting the reverse auction problem that concerned courts at the time *Amchem* and *Ortiz* were decided; and making settlement the only realistic endgame.

The new MDL model for managing litigation of mass torts and other geographically dispersed harms was born of mistrust of class counsel,<sup>285</sup> but, for the reasons provided below, has had the effect of inspiring lower federal courts to trust them all the more at the time of settlement.<sup>286</sup> The

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283. A competing account might involve the tension among different conceptual frames for addressing the “governance” problem posed by class actions. For a survey of “models of class action governance,” see Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 92–115 (2003) (surveying “market,” “democracy-based,” and “judicial-administrative” solutions to the class action governance problem). The virtue of an institutional account is that it explains why one conceptual framework would be more appealing to courts than another.

284. See *supra* note 12.

285. Erichson, *supra* note 60, at 1594–96.

286. Professor Marcus predicted that at least some plaintiffs and their counsel might actually end up looking favorably upon the jurisdictional regime CAFA wrought. See Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1769 (2008) (“By the 1980s and 1990s, consternation about the 1966 expansion of class actions shifted markedly as defendants learned how to use class actions to accomplish the goals they wanted to achieve. So also, a quarter century from now, many may look back at CAFA as enabling legislation that furthered the goal of consumer class actions rather than the interests of the business establishment that pressed for its passage.”).

*Amchem* framework for regulating class conflicts now feels both less necessary and far less convenient, insofar as it fosters competition among subclass counsel in a system characterized by substantial court control aimed at facilitating cooperation among counsel and eventual global settlement.

A. *The MDL Model: New Formal and Informal Institutional Arrangements for Managing Mass Torts*

1. *Formal: Early Concentration of Mass Torts in Federal Courts and Limits on Litigation Classes*

a. *CAFA and 28 U.S.C. § 1407*

Parallel class proceedings in federal and state courts and concerns regarding outlier state court jurisdictions handling cases of national significance prompted calls for an exclusive forum model.<sup>287</sup> In 2005, Congress responded with the Class Action Fairness Act (CAFA), which modified the diversity statute in two ways that facilitate the concentration of mass tort litigation in federal court. First, in an effort to provide for federal court consideration of interstate cases of national importance, even if they involved state law claims,<sup>288</sup> CAFA federalized much class action litigation. It did so by permitting aggregation of claims to meet the minimum amount in controversy requirement for cases involving more than \$5 million and, in such cases, allowing removal to federal court on minimal rather than complete diversity.<sup>289</sup> CAFA has successfully shifted much class practice to federal court,<sup>290</sup>

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287. See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 517 (1996) (“[T]he move toward an exclusive [federal] forum model for large-scale cases is necessary and desirable.” (bracketed text added)); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1416 (2006) (portraying CAFA as “a bulwark against improper or opportunistic state-court oversight of the national market”).

288. 28 U.S.C. § 1332 (2012).

289. “Minimal” diversity requires that any plaintiff and any defendant be citizens of different states. *Id.* § 1332(d)(2)(A).

290. Erichson, *supra* note 60, at 1607–14 (documenting the post-CAFA shift in class practice from state to federal court); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1750–62 (2008) (noting a marked increase post-CAFA in the number of state-law cases filed in the first instance in federal court and in the number of diversity removals of class actions).

even if it leaves some multistate class actions in state court due to the home state and local controversy exceptions.<sup>291</sup>

Second, CAFA expanded federal jurisdiction with regard to “mass actions.”<sup>292</sup> A mass action includes any civil action other than a class action in which “monetary relief claims of 100 or more persons are proposed to be tried jointly<sup>293</sup> on the ground that the plaintiffs’ claims involve common questions of law or fact.”<sup>294</sup> Though the statutory regime does not federalize all mass tort claims,<sup>295</sup> it has the effect of federalizing nearly all attempts to pursue such claims through trial en masse, whether via consolidated proceedings or class actions.

Functionally, CAFA intersects with the MDL statute, 28 U.S.C. § 1407, to not only federalize, but to also centralize mass tort litigation before a single trial court judge selected by the Judicial Panel on Multidistrict Litigation. The expansion of federal court subject matter jurisdiction coincides with what Professor Marcus characterizes as a “maximalist”<sup>296</sup> use of the transfer and coordination statute. Because Section 1407 requires only “minimal commonality,”<sup>297</sup> the Panel’s aggressive use of it results in the now-routine creation of sprawling super-aggregates that include not only large numbers of persons, but persons with varied claims and injuries. That maximalist approach, evident long before Congress enacted CAFA, has dramatically

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291. The “local controversy” exception to CAFA applies when two-thirds of the plaintiffs and at least one defendant against whom “significant relief” is sought are citizens of the forum state, and certain other conditions are met. *See* 28 U.S.C. § 1332(d)(4)(A) (2012). The “home state” exception applies if two-thirds or more of the proposed class members and the primary defendants are citizens of the forum state. *See id.* § 1332(d)(4)(B).

292. *Id.* § 1332(d).

293. The intermediate appellate courts have split regarding the meaning of the phrase “proposed to be tried.” *Compare In re Abbot Labs., Inc.*, 698 F.3d 568, 572–73 (7th Cir. 2012) (joint trial proposal can be “implicit”), *with Gutowski v. McKesson Corp.*, No. C 12-6056 CW, 2013 U.S. Dist. LEXIS 26333, at \*7 (N.D. Cal. Feb. 25, 2013) (casting doubt on the approach taken by the Seventh Circuit in *Abbot* and citing *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir. 2009) for the proposition that CAFA’s mass action provisions should be read strictly and narrowly).

294. 28 U.S.C. § 1332(d)(11)(B)(i). CAFA’s effect on non-class mass torts is limited. For example, it does not include purely local matters or cases consolidated only for pretrial purposes. *Id.* § 1332(d)(11)(B)(ii).

295. Mark S. Werner, *The Viability and Strategic Significance of Class Action Alternatives Under CAFA’s Mass Action Provisions*, 103 GEO. L.J. 465, 467 (2015) (noting that because the objective of mass tort litigation is normally settlement, not a joint trial, the omission of mass actions consolidated for pretrial purposes creates a potentially large loophole).

296. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2266 (2008) (“[T]he operation of § 1407 has tended in a maximalist direction.”).

297. Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 667, 688 (2013).

intensified since that time, in terms of the number of MDL petitions granted each year and the size and scale of the largest of the MDLs.<sup>298</sup> This is especially true with regard to mass torts, which dominate the MDL docket in terms of the number of transferred cases, and particularly dominate the large-scale MDL docket.<sup>299</sup> Whereas in 2002, MDL cases made up 16 percent of the federal caseload, they now make up 36 percent of the civil caseload, a number that grows to 45.6 percent of federal civil cases pending as of June 2014 if prisoner and social security cases are removed from the mix<sup>300</sup>—and the vast majority of those are concentrated in a small number of giant MDL mass tort proceedings.<sup>301</sup>

*b. Limits on Mass Tort Litigation Classes; The Persistence of Settlement Classes*

Starting in the mid-1990s, courts and rule-makers placed new limits on the certification of litigation classes, especially with regard to mass torts.<sup>302</sup> Two changes in particular are relevant to this analysis. First, rule-makers and courts effectively pushed back the certification determination to later stages of the procedural timeline by amending

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298. See, e.g., John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230 (2008) (noting substantial growth post-CAFA in the number of MDL petitions and the total number of ongoing MDL dockets); Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 42 (2015) (“In the last ten years, the concentration of the large MDL cases—virtually all of the which are mass-tort cases—has risen exponentially.”); *Standards and Best Practices for Large and Mass Tort MDLs*, DUKE LAW CENTER FOR JUDICIAL STUDIES (Mar. 3, 2016), [https://law.duke.edu/sites/default/files/centers/judicialstudies/standards\\_and\\_best\\_practices\\_for\\_large\\_and\\_mass-tort\\_mdls.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf) [https://perma.cc/2YJM-A2YD] [hereinafter DUKE STANDARDS AND BEST PRACTICES] (“Not only is the overall number of actions in MDLs growing, these actions are becoming more concentrated in a small number of mass-tort MDLs, primarily products liability and particularly pharmaceutical and health-care cases. Of the MDLs pending in June 2014, nearly 88% of them were consolidated in only 18 MDLs—16 product liability and 2 other mass torts.”).

299. See Metzloff, *supra* note 298, at 43 (“The reality with respect to mass-tort claims is radically different. The MDL process has come to be dominated by large mass-tort dockets typically involving thousands of underlying actions. Indeed, over 95 percent of the total actions currently consolidated through the MDL process are mass-tort cases. This represents a significant evolution in the utilization of the MDL process that initially took a restrictive approach to the mass-tort context.”).

300. DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at x–xi.

301. See *supra* note 298.

302. See generally JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* 95 (2015) (“Mass tort class actions quickly blossomed at the end of the 1980s and flourished until they were curtailed by the Supreme Court in the 1990s.”); Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. CIN. L. REV. 315, 331 (2011) (“Since the 1990s, the Federal Rules of Civil Procedure have been amended to make class certification more difficult.”).

Rule 23(c)(1)<sup>303</sup> and by requiring the class certification determination to be based on a rigorous analysis of evidence, even if that evidence overlaps with the merits.<sup>304</sup> Second, courts made it harder to certify litigation classes in mass torts, which frequently involve individual issues of causation and injury and varying state laws, by raising the bar on commonality under both 23(a)(2) and 23(b)(3).<sup>305</sup>

Though the class action's death has been heralded in general and with regard to mass torts in particular,<sup>306</sup> and though a significant theme in recent commentary is of a switch from class to administrative aggregation,<sup>307</sup> mass tort *settlement* classes, the door to which *Amchem* left open,<sup>308</sup> are still routinely even if less frequently<sup>309</sup> embraced.<sup>310</sup>

303. Prior Rule 23 read that certification should be considered as "soon as practicable." Pursuant to a 2003 amendment, Rule 23(c)(1)(A) now states that certification should be considered "[a]t an early practicable time." FED. R. CIV. P. 23.

304. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–52 (2011).

305. *See, e.g., id.* at 349–50 (to satisfy 23(a)(2)'s commonality requirement, plaintiffs must show that a common contention is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997) (differences in exposure, causation, and state law undermined plaintiffs' efforts to show predominance of common issues of fact or law).

306. *See supra* note 13.

307. *See, e.g., Linda S. Mullenix, Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 551 (2013) ("For those actors for whom the class action presents frustrating barriers to resolving massive litigation on favorable terms, there has been a decided shift away from the class action towards the creative invention of class-avoidance mechanisms."); Sherman, *The MDL Model*, *supra* note 12, at 2223 (describing the MDL "model" as an "alternative" to class actions); Willging & Lee III, *supra* note 12, at 777 ("This Article examines the extent to which available empirical research supports the impressions of scholars that a shift has occurred from using class action procedures to using multidistrict-litigation procedures to manage and resolve tort litigation in the federal courts.").

308. *Amchem Prods., Inc.*, 521 U.S. at 619 ("[S]ettlement is relevant to a class certification."); *see also* Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1507 (2013) ("The recent renaissance in settlement classes allows defendants to obtain global peace when they agree to a settlement price, but they can resist collective resolution in all other cases so that litigation is extremely costly for plaintiffs to pursue.").

309. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 819 (2010) (finding almost no mass tort settlements in federal court in the period 2006–07); Willging & Lee III, *supra* note 12, at 341 (noticing fewer mass tort class actions in federal courts, overall, compared to the 1990s).

310. *See, e.g., In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. 2:07-MD-1873, 2012 U.S. Dist. LEXIS 146680 (E.D. La. Sept. 27, 2012) (resolving product liability claims in an MDL via settlement on a class basis); *Klein v. O'Neal*, 705 F. Supp. 2d 632 (N.D. Tex. 2010) (certifying settlement class in personal injury drug case); *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221 (S.D. W. Va. 2005) (certifying settlement class involving allegedly defective drug that caused personal injuries); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359 (N.D. Ohio 2001) (certifying settlement of medical device products liability settlement class); *Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine)) Prods. Liab. Litig.*,

When these class settlements take place within liberally constituted administrative aggregates, as happened in the BP and NFL case studies, the result is settlement classes that can be as sprawling as the asbestos class the Supreme Court found objectionable in *Amchem*.

2. *Informal: Trial Judges Organize Plaintiffs' Counsel and Tightly Control Pretrial Activity*

The formal moves just described enabled informal arrangements that have resulted in an unprecedented level of judicial control that MDL judges now enjoy over mass tort proceedings. Not only have judges selectively imported class action management procedures into multidistrict litigation proceedings relating to the appointment and payment of counsel,<sup>311</sup> but they have also innovated new ways to control every other phase, including pleading, discovery, settlement negotiation, and bellwether trials.

One of the first items of business for the MDL judge after transfer and coordination is the conferral of an exclusive right to manage “common benefit work”<sup>312</sup> on a subset of plaintiffs’ counsel (“common benefit counsel”).<sup>313</sup> In large mass torts, this involves two steps: the appointment and organization of common benefit counsel<sup>314</sup> and the enumeration of their spheres of responsibility and authority, and entry of case

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No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at \*24 (E.D. Pa. Aug. 28, 2000) (certifying settlement class in personal injury drug case in consolidated proceeding involving 176 cases and 8 million people). *See generally* Sullivan v. DB Invs., 667 F.3d 273, 334 (3d Cir. 2011) (Scirica, J., concurring) (“Despite initial uncertainty the opinions might pose formidable obstacles for settling massive, complex cases, this has not, for the most part, proved to be the case. Nonetheless, class settlement in mass tort cases (especially personal injury claims) remains problematic, leading some practitioners to avoid the class action device—most prominently in the recent \$4.85 billion mass settlement of 50,000 claims arising out of the use of the drug Vioxx.”).

311. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. b (AM. LAW INST. 2009).

312. Silver & Miller, *supra* note 12, at 143 (common benefit work includes “all litigation-related services displaying a property known as jointness: when produced or performed once, many plaintiffs can use such services without reducing their value for any other plaintiff”).

313. *See generally* DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at 42 (“MDL Standard 3: [t]he transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation.”); MANUAL, *supra* note 1, §§ 10.221–.224 (describing trial court’s role in organization plaintiffs’ counsel in multiparty litigation).

314. Common benefit counsel typically include some combination of: (1) liaison counsel; (2) lead counsel; and (3) executive and/or steering committees, along with sub-committees created to address specific issues (e.g., expert discovery). The size and complexity of the common benefit counsel arrangements depend on the size of the case. *See* DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at 40–41.



management orders ensuring payment for common benefit work out of individual recoveries.<sup>315</sup>

Also in the early stages of mass tort proceedings, before any settlement is negotiated, MDL trial courts enter orders assuring payment for common benefit work via assessments on MDL plaintiff recoveries by trial or settlement directed to be paid into a common benefit fund to be used to spread the costs of common benefit work across all plaintiffs who benefit from it.<sup>316</sup> An example is the order arranging payment and reimbursement of costs for common benefit counsel in the Stryker Rejuvenate and ABGII hip implant products liability MDL.<sup>317</sup> The order—levying a three percent holdback on all plaintiffs for common benefit fees and one percent for common costs<sup>318</sup>—applies to all cases included in the MDL as well as “all cases or claims (filed or unfiled) of all Participating Counsel . . . and all cases or claims (filed or unfiled) in state or federal court where the Participating Counsel has a fee

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315. Professors Silver and Miller refer to these moves (along with fee transfers from and caps on non-lead counsel) as the key components of the “quasi-class action approach to MDL management.” Silver & Miller, *supra* note 12, at 110–11. This Article recognizes these arrangements as central to all mass tort practice, including class actions, and views them through the lens of efforts to inspire cooperation among counsel.

316. Federal courts claim the inherent authority to enter such orders. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 546–47 (3d Cir. 2009); *In re Air Crash Disaster at Fla. Everglades on December 29, 1972*, 549 F.2d 1006, 1016 (5th Cir. 1977). *See generally* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 379 (2014) (“Regardless of the legal basis given to explain its use, the common benefit doctrine has been consistently used and is well established as the justification for the payment of common benefit fees in MDLs.”). MDL trial court judges have extended the contribution requirements to state court litigants via orders aimed at the defendants over whom they have jurisdiction. *See, e.g., Amended Holdback Order Re: Common Benefit Fees and Costs at 3, In re Biomet M2A Magnum Hip Implant Prods. Liab. Litig.*, No. 3:12-md-2391 (N.D. Ind. Dec. 7, 2015), ECF No. 3022 (establishing a six percent common benefit “holdback,” and noting with regard to “plaintiffs’ attorneys litigating Biomet Hip Implant cases in state courts, the Amended Holdback Order will apply if the respective state court litigant and counsel sought the benefit of the work product of PSC II.”). *See generally* DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at 73–74.

317. *See* Order Establishing Common Benefit Fee and Expense Fund, *In re Stryker Rejuvenate & ABG II Hip Implant Prod. Liab. Litig.*, No. 13-2441 (D. Minn. May 28, 2014), ECF No. 327. Similar orders have been entered in other recent MDLs. *See, e.g.,* Order No. 42 [Establishing Common Benefit Fee and Expense Fund] at 15–19, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543 (S.D.N.Y. Mar. 26, 2015), ECF No. 743; Case Management Order No. 16 [Establishing Common Benefit Fee and Expense Fund] at 4–6, *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, No. 3:12-md-02385 (S.D. Ill. Nov. 13, 2012), ECF No. 61.

318. Order Establishing Common Benefit Fee and Expense Fund at 6, *In re Stryker Rejuvenate & ABG II Hip Implant Prod. Liab. Litig.*, No. 13-2441 (D. Minn. May 28, 2014), ECF No. 327. Counsel outside the MDL who agree to be bound by the order, e.g., in recognition of their use of MDL work product, must pay a higher holdback amount for common benefit fees of five percent ninety days after their first filed case is docketed in any jurisdiction.

interest.”<sup>319</sup> The term “Participating Counsel” is defined as “any lawyer (and his or her law firm) who represents a client with a case on file in the MDL now or in the future, or any other lawyer (and his or her law firm) who signs the Participation Agreement *or uses the work product* of the MDL.”<sup>320</sup> This innovation with regard to securing common benefit fees is a marked departure from past practice.

a. *Common Benefit Counsel Selection Criteria*

Whereas adequate representation in class actions turns to a great extent on an analysis of conflicts, in MDLs it does not. With the deferral of class certification to much later stages of proceedings, the law of administrative,<sup>321</sup> not class, aggregation provides the animating principles for organizing counsel in mass torts. Judges appointing MDL leadership at the outset of such proceedings, unconstrained by rule or statute, typically identify by modern convention three characteristics as paramount: experience, financial capacity, and cooperativeness.<sup>322</sup> Cooperativeness as a trait is normally not defined, but presumably implies the ability to minimize and settle disputes with other plaintiffs’ counsel and defendants. In addition, the trend is toward appointment of steering committees that are broadly inclusive and representative.

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319. *Id.* at 2.

320. *Id.* at 3 (emphasis added). The extent of the federal MDL court’s ability to levy such assessments is the subject of litigation and has not been definitively resolved by the Supreme Court, which just passed up an opportunity to enter the fray. *See Phipps Grp. v. Downing (In re Genetically Modified Rice Litig.)*, 764 F.3d 864, 864 (8th Cir. 2014) (affirming trial court’s levy against payments to non-MDL participants who enrolled in the settlement and thereby agreed to pay common fund assessments), *cert. denied*, *Phipps Grp. v. Downing*, \_\_ U.S. \_\_, 135 S. Ct. 1455 (2015).

321. The “law of administrative aggregation” includes 28 U.S.C. § 1407, FED. R. CIV. P. 42(a), case law interpreting them, the orders of the Judicial Panel on Multidistrict Litigation, and, most importantly, the orders of trial courts managing administratively aggregated matters, including the orders appointing counsel to leadership roles in such cases.

322. Courts identify these traits in the orders they enter soliciting applications for leadership roles. *See, e.g.*, Pretrial Order #1 at 9, *In re Bos. Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326 (S.D. W. Va. Feb. 29, 2012) [hereinafter *In re Bos. Sci.*] (“The main criteria for PSC membership will be: (a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation”), [http://www.wvsc.uscourts.gov/MDL/boston/pdfs/PTO\\_1.pdf](http://www.wvsc.uscourts.gov/MDL/boston/pdfs/PTO_1.pdf) [<https://perma.cc/9SM6-WZQN>]; Initial Conference Order at 6, *In re Yasmin and YAZ (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100 (S.D. Ill. Oct. 23, 2009), ECF No. 83 [hereinafter *In re Yasmin*] (“The Court intends to appoint Plaintiffs’ lead counsel and/or a Plaintiffs’ steering committee, as well as Plaintiffs’ liaison counsel. . . . The main criteria for these appointments are (1) willingness and ability to commit to a time-consuming process; (2) ability to work cooperatively with others; (3) professional experience in this type of litigation; and (4) access to sufficient resources to advance the litigation in a timely manner.”).

Cooperativeness as a selection criterion is particularly heavily emphasized.<sup>323</sup> The repeat player phenomenon documented by Professors Burch and Williams<sup>324</sup> reinforces the judges' ability to select for that characteristic, based on their direct experience, a review of the applicants' settlement records, and/or on conversations judges informally have with each other. An example of this is the recent VW emissions litigation, where, when appointing repeat player and leading member of the plaintiffs' mass tort bar Elizabeth Cabraser<sup>325</sup> as lead counsel, Judge Breyer specifically noted her support among fellow plaintiffs' counsel and his familiarity with and admiration of her work in a prior case, which suggested to him that "Ms. Cabraser will effectively represent and guide the plaintiffs toward a resolution that is in their best interests."<sup>326</sup> This suggests that persons selected are likely to fit the desired profile, and that persons, once selected, are likely to adhere to that profile in order to be eligible for leadership roles in future cases, either as court appointees or as members of sub-committees.

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323. See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. (forthcoming 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2724637](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724637) [<https://perma.cc/MF95-3728>]; Burch, *supra* note 15, at 73, 86; Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392 (2014). This selection criterion arguably amplifies the cooperation that litigation by committee naturally inspires. See, e.g., Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 ANTITRUST L.J. 1501, 1505 (1980) (describing litigation by "committee" as inspiring a certain level of cooperation: "[a] good trial lawyer's tenacious pursuit of his own theory of the case and his unwillingness to compromise his own client's interests in the slightest respect for the good of the majority are almost immediately taken as signs of pigheadedness on the part of this fellow counsel. The result is that he is quickly ostracized from the decision-making inner circle of lawyers on his side of the case").

324. Burch & Williams, *supra* note 323, at 21 ("On the plaintiffs' side, repeat players . . . held 767 out of 1,221 available leadership roles, or 62.8 percent. Fifty attorneys were named as lead lawyers in five or more multidistrict litigations and those 50 attorneys occupied 30 percent of all plaintiff-side leadership positions. . . . Repeat play among plaintiffs' law firms was even more evident. Again, even though only 40.7 percent of law firms were repeat players . . . lawyers from those 70 firms occupied 78 percent of all available leadership positions."). Professors Burch's and Williams' study confirms what others predicted in the period just before and after the enactment of CAFA, i.e., that it would privilege a select group of large national plaintiffs' firms and concentrate them in federal court MDL proceedings. See Erichson, *supra* note 60, at 1621 (noting that CAFA favors the nation's largest class action firms (citing Deborah Hensler as quoted in Michael Bobelian, *Congress Eyes Major Class Action Reforms*, N.J. L.J. at 9 (Jan. 12, 2004))).

325. See *Elizabeth J. Carabrer*, LIEFF, CABRASER, HEIMMAN & BERNSTEIN, <http://www.lieffcabraser.com/Attorneys/Elizabeth-J-Cabraser.shtml> [<https://perma.cc/DX54-CV6Z>].

326. See Pretrial Order No. 7: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel at 1–2, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672 (N.D. Cal. Jan. 27, 2016), ECF No. 1084.

The move toward inclusive leadership committees is of yet more recent vintage and gaining traction.<sup>327</sup> It has two components. One is diversity of membership in terms of the members' personal characteristics, such as gender.<sup>328</sup> The second is inclusiveness in terms of ensuring that the PSC represents the broadest possible swath of claimants or claims.<sup>329</sup> It is the latter meaning that is of greatest relevance to this analysis because it dovetails with changed judicial attitudes towards conflicts management and foreshadows one of the substitutes for incentive-based structural assurances of fairness. This desire for inclusiveness in leadership structures explains in part what appear at first blush to be unwieldy and large steering committees. The VW emissions MDL again serves as an example. Judge Breyer appointed one lawyer as MDL lead plaintiffs' counsel, and proceeded to appoint twenty additional lawyers from twenty other law firms to the steering committee.<sup>330</sup> The number of common benefit counsel appointed in that proceeding is due in part to its complexity and in part to plaintiffs' litigation funding needs. But it is also about creating the kind of buy-in by key counsel to the aggregate settlement process that, as explained below, is at odds with conflicts management approaches that rely on competition or adversarialism among plaintiffs' counsel representing warring camps.

Judges *could* consider the impact on conflicts as a criterion when selecting common benefit counsel at the front end of mass tort proceedings, a necessary first step for managing conflicts via market mechanisms. But, as noted, nothing in the text of the MDL statute requires courts to do so.<sup>331</sup> Rule 23(g)(3) is a bridge between, on the one

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327. DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at 46.

328. See DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at 46–47, 58. U.S. District Judge Kathryn Vratil of Kansas recently received attention for appointing the first majority-female plaintiffs' steering committee in an MDL that includes a majority of women, the MDL involving Ethicon, Inc.'s power morcellators, devices used in laparoscopic uterine surgeries, which are alleged to cause cancer. See *In re Ethicon, Power Morcellator Prods. Liab. Litig.*, No.2:15-md-02652 (D. Kan. Nov. 19, 2015), ECF No. 10; Amanda Bronstad, *In a First, Women Compose Majority of MDL Committee*, NAT'L L.J. (Nov. 19, 2015), <http://www.nationallawjournal.com/id=1202742961283/In-a-First-Women-Compose-Majority-of-MDL-Committee?slreturn=20160205180140> [<https://perma.cc/5G8S-ULUX>] (touting the gender diversity reflected in the order as a positive development). *But see* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 363–65 (2014) (presenting data regarding the lack of demographic diversity on MDL committees, especially regarding gender).

329. See DUKE STANDARDS AND BEST PRACTICES, *supra* note 298, at 57 (“Best Practice 4D(iii): [t]he transferee judge should consider the number, type, and nature of the applicant’s cases in mass tort and common disaster litigation.”).

330. Pretrial Order No. 7, *supra* note 326, at 3–4.

331. 28 U.S.C. § 1407 (2012).

hand, 28 U.S.C. § 1407's relatively open-ended and lax appointment standards, and, on the other, Rule 23's relatively more specific, stringent standards. That subsection of Rule 23, added by rule amendment in 2003, permits trial courts to "designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."<sup>332</sup> Courts exercising their discretion to appoint interim class counsel are required to apply the same criteria they would use when appointing class counsel on a motion for class certification, assessing adequacy of representation by attempting to uncover and address conflicts of interest.<sup>333</sup> But the existence of a doctrinal vehicle for assessing conflicts at the front end of MDL proceedings has proved to be of limited utility without a requirement that courts use it.

The trial courts in both the BP and NFL litigations followed the MDL model, appointing common benefit counsel early in the proceedings without contemporaneously appointing interim class counsel or otherwise using the standards of Rule 23(g) to guide the choice of counsel.

*b. Judicial Control over Pleading, Discovery, Trial, and Settlement Discussions*

Professor Richard Marcus has characterized the rules of civil procedure as providing for a level of "adult supervision" by the judge in civil litigation.<sup>334</sup> Modern mass tort practice goes further, in some instances taking the parties out of the process altogether, creating a degree of cooperation by fiat at all stages of the litigation, including pleading, discovery, and bellwether trials. Courts are also regularly involved, directly or through appointed neutrals, in settlement negotiations.

By way of example, courts managing mass tort proceedings now coordinate pleading practice by entering case management orders that call for form pleadings, sometimes bundling those pleadings to funnel

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332. FED. R. CIV. P. 23(g)(3).

333. *See, e.g., In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006) ("Although neither the federal rules nor the advisory committee notes expressly so state, it appears to be generally accepted that the considerations set out in Rule 23(g)(1)(C), which governs the appointment of class counsel once a class is certified, apply equally to the designation of interim class counsel before certification.").

334. Richard Marcus, *Cooperation and Litigation: Thoughts on the American Experience*, 61 KAN. L. REV. 821, 842–43, 846 (2013) (sampling rules that "urge or require behavior that could be called cooperative").

motion practice as Judge Barbier did in the BP litigation.<sup>335</sup> The order entered in the Stryker hip implant MDL is representative.<sup>336</sup> It requires common benefit counsel to “develop Master Long and Short-Form Complaints that set forth all potential claims that individual plaintiffs may assert against Defendants in this MDL” and which “supersede and replace all claims pled in any previously filed Complaint.”<sup>337</sup>

In discovery, mass tort judges may substitute their own agendas, and even specific requests, for those of the parties. An example is the core discovery order in the World Trade Center first responder litigation that involved approximately 10,000 personal injury claims consolidated for pretrial purposes under Rule 42 before Judge Hellerstein in the Southern District of New York.<sup>338</sup> Noting that the parties, left to their own devices, had failed to make progress in discovery, Judge Hellerstein appointed two special masters to (1) write discovery and (2) prepare a database for converting it into useful information, and ordered the parties to respond.<sup>339</sup> The judge later attributed successful resolution of the matter in large part to this usurpation of litigant autonomy.<sup>340</sup> While Hellerstein’s decision to entirely circumvent the parties is unusual, substantial judicial control over the sequence, timing, and content of discovery in modern mass tort practice is not.<sup>341</sup>

Judge Hellerstein’s control of discovery was also partly aimed at building the basis for bellwether trials.<sup>342</sup> While courts’ approaches to structuring bellwether trials vary, the scheduling of such trials is a

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335. In the BP oil spill MDL, Judge Barbier required the filing of master complaints in “pleading bundles,” corresponding to major categories of claims, such as economic loss and personal injury. See Pretrial Order No. 11 [Case Management Order No. 1] at 2–7, *In re Oil Spill*, No. 2:10-md-02179 (E.D. La. Oct. 19, 2010), ECF No. 569.

336. See Pretrial Order No. 6, *In re Stryker Rejuvenate & ABG II Hip Implant Prod. Liab. Litig.*, No. 13-2441 (D. Minn. Nov. 21, 2013), ECF No. 119; see also Pretrial Order #12 (Master and Short Form Complaint and Master Responsive Pleadings; Direct Filing), *In re Bos. Sci. Corp., Pelvic Repair Sys. Prod. Liab. Litig.*, No. 2326 (S.D. W. Va. Aug. 22, 2012), [http://www.wvsc.uscourts.gov/MDL/boston/pdfs/PTO\\_12.pdf](http://www.wvsc.uscourts.gov/MDL/boston/pdfs/PTO_12.pdf) [<https://perma.cc/NVZ8-YJME>].

337. Pretrial Order No. 6, *supra* note 336, at 7.

338. See generally Alvin K. Hellerstein, James A. Henderson, Jr., & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127, 177 (2012).

339. See *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 501, 523–24 (S.D.N.Y. 2009); Clarifying Order Regulating Discovery at 2–4, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-00100 (S.D.N.Y. Nov. 27, 2007), ECF No. 619.

340. Hellerstein et al., *supra* note 338, at 142–44.

341. See, e.g., Plaintiff Fact Sheet, *In re Pradaxa (Dabigatran Etxilate) Prod. Liab. Litig.*, No. 3:12-MD-02385-DRH-SCW (S.D. Ill. Oct. 29, 2012), ECF No. 54-1 (form discovery).

342. Hellerstein et al., *supra* note 338, at 144–52.

routine part of mass tort case management.<sup>343</sup> Bellwether trial outcomes are not binding on members of the aggregate, but nevertheless may impact them by shaping the allocation of common benefit resources and settlement efforts. The mechanism for selecting bellwethers, often in the early phases of proceedings, has the effect of narrowing the road toward specific categories of claims and issues that are thought to be important and representative.<sup>344</sup> Judicial management of discovery and the bellwether process in turn facilitates settlement discussions,<sup>345</sup> which MDL trial court judges aggressively promote<sup>346</sup> and either directly or indirectly monitor.

It's the one-two punch of concentration of authority in cooperative common benefit counsel whom the judges then micro-manage that has put judges, not counsel, at the center of mass torts, and has limited some of the worst excesses that plagued the institutional arrangements in place at the time the Court decided *Amchem* and *Ortiz*. As the following section explains, there are still spaces for disputes and competition among plaintiffs' counsel, and of course between the parties, but they are constrained by the bureaucratizing, standardizing, and prioritizing that characterize modern mass tort case management.

### B. *The Faded Threat of Reverse Auctions*

The likelihood of reverse auctions in mass torts has been substantially reduced as a result of the new institutional arrangements described in the

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343. See generally Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2358 (2008).

344. See Amended Case Management Order No. 24 Bellwether Trial Selection Plan at 5, *In re Yasmin and YAZ (Drospirenone) Mktg., Sales Practices & Prod. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF (S.D. Ill. Oct. 13, 2010), ECF No. 1329 ("Most modern plans seem to disfavor random selection in order to have better control over the representative characteristics of the cases selected" for bellwether trials); MANUAL, *supra* note 1, § 22.315 (selected "plaintiffs and their claims should be representative of the range of cases").

345. BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FEDERAL JUDICIAL CENTER, *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES* 44 (2011) (discussing usefulness of bellwether trials in establishing claim values to be used for settlement purposes).

346. Judicial involvement in settlement is heightened in MDL practice in general and mass tort litigation in particular. *Id.* at 4 ("One of the values of MDL proceedings is that they bring before a single judge all of the federal cases, parties, and counsel making up the litigation. They therefore afford a unique opportunity for negotiation of a global settlement."). For example, in the Pradaxa litigation, the court ordered the parties to confer about settlement at least once per month and to include a court appointed mediator in discussions. See Case Management Order No. 6 Unified Case Management Plan at 6–8, *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, No. 3:12-md-02385-DRH-SCW (S.D. Ill. Oct. 3, 2012), ECF No. 42; Case Management Order No. 39 Appointing Mediator at 1–2, *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, No. 3:12-md-02385-DRH-SCW (S.D. Ill. July 15, 2013), ECF No. 233.

preceding section. Plaintiffs' counsel are now concentrated in a single federal court proceeding,<sup>347</sup> arranged into broadly representative and inclusive leadership committees, and are guaranteed payment for common benefit work if plaintiffs—any plaintiffs—win a judgment or settlement. Courts insist on substantial case development before even considering class certification and cabin adversarialism among plaintiffs' counsel by tightly controlling all phases of litigation and settlement. Plaintiffs' counsel thus lack the incentive (role-insecurity) and the ability (early certification by inexperienced and isolated trial court judges) to race against each other to a class judgment.

At least two spaces still exist in which plaintiffs' counsel can conceivably engage in behaviors associated with reverse auctions. First, though the likelihood of a state court resolution is now low, it is not eliminated. Some state court actions within a category of mass tort litigation may still evade federal court litigation, because, among other reasons, they involve non-diverse parties and are not class or mass actions, or otherwise fall within one of CAFA's exceptions. The centrality of MDL proceedings and more active coordination between federal and state courts make it unlikely that defendants would now choose a state forum for a global resolution, especially given the red flags doing so would raise. But the state court is still formally available.<sup>348</sup>

Second, within a PSC, members may attempt to gain position with defendants and thus status and control over settlement by adopting less adversarial postures than their peers. This dynamic can occur any time more than one lawyer is given responsibility for engaging in settlement discussions with defendants, even in a consolidated proceeding where the court grants exclusive power to such lawyers to negotiate. This is so because even though payment for common benefit work is assured in successful mass torts, lawyers will still compete for the ability to justify a relatively larger share of any common fees awarded by the court post-settlement. An example is Holocaust-era litigation against Swiss banks, in connection with which multiple cases were consolidated under Rule 42 before Judge Edward R. Korman in the Southern District of New York.<sup>349</sup> The judge appointed an Executive Committee of plaintiffs'

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347. See Erichson, *supra* note 45, at 961 (noting that the combination of CAFA and 28 U.S.C. § 1407 “reduce the likelihood of competing class actions in multiple courts”).

348. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

349. The district court established a website that provides a chronology of proceedings. *Chronology: In re Holocaust Victim Assets Litigation, SWISS BANKS SETTLEMENT* (Nov. 22, 2016), <http://www.swissbankclaims.com/Chronology.aspx> [<https://perma.cc/ZSH3-A9Z7>]; see also Morris



counsel to oversee the litigation and settlement discussions.<sup>350</sup> Those lawyers competed with each other for position. When settlement talks stalled because of the gap between the parties over settlement amount, one subset of plaintiffs' counsel unilaterally held a press conference to announce a willingness to settle for amounts well below the \$1.5 billion figure other members of the Executive Committee had declared as a line in the sand.<sup>351</sup> The gambit failed in that one instance, where the \$1.5 billion floor had widespread support among not only plaintiffs' counsel but also victim advocate groups and state and federal political figures who were closely watching the proceedings.<sup>352</sup> It likely also failed because there was no alternative forum in which to effectuate a settlement below that which the majority of court-appointed plaintiffs' counsel was willing to accept.

Current mass tort institutional arrangements limit such behavior. MDL trial courts frequently appoint only one or two lead counsel, whom they select for their cooperative tendencies. Trial court judges or their appointed neutrals are frequently at the center of settlement discussions, which has the effect of anchoring discussions and making fragmentation of plaintiffs' counsel even less likely. Finally, as a matter of course, MDL courts now frequently ask committees of counsel who played key roles in the proceedings to render opinions for the court regarding the extent to which other applicants for common benefit fees contributed positively to the outcome,<sup>353</sup> counsel who might otherwise be tempted to win by losing know the likelihood of exposure is high.

As demonstrated in the following section, the very institutional arrangements that have allowed federal courts to substantially control for the worst of the conflicts problems of the pre-MDL-model, pre-CAFA era make those same courts all-the-more resistant to *Amchem's* conflicts management formula.

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A. Ratner, *The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212, 212 n.1 (2002).

350. Ratner, *supra* note 349, at 214.

351. See JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* 93 (2002) ("On July 15, [Robert] Swift announced, with Ed Fagan, that they were prepared to 'come off the \$1.5 billion figure' named by Weiss, provided the Swiss banks would increase their offer. Neither of them bothered to inform in advance the other eight members of the committee running the lawsuit.").

352. Ratner, *supra* note 349, at 214.

353. For example, in the BP litigation, Judge Barbier appointed a subset of the PSC to serve on a fee committee to review fee applications in that litigation. See Pretrial Order No. 59 (Appointment of Common Benefit Fee and Cost Committee and Guidelines for Common Benefit Attorneys' Fees and Cost Reimbursement) ["Initial Fee Order"], *In re Oil Spill*, No. 12-970 (E.D. La. July 15, 2015), ECF No. 14863.

C. *Institutional Dissonance: Why Amchem's Conflicts Management Blueprint Is Unappealing to Lower Federal Courts*

Even in the period immediately after *Amchem* was decided, some trial court judges chafed at its dictates. Writing at the turn of the century, Professor Resnik observed:

[C]lass actions still have their champions in state and federal courts. Many trial judges, less buffered from needy litigants than appellate judges, are acutely aware of injuries suffered by groups of plaintiffs, of the lack of congressional responses to date, of inequitable distribution patterns generated by case-by-case decision making, and of the inability of courts to render enough of those case-by-case decisions. Such judges continue to certify classes and help to craft settlements for some of them.<sup>354</sup>

Those impulses have magnified as lower courts have evolved new techniques for managing large-scale litigation described in the preceding section. Not only are the worst problems associated with late twentieth century mass tort practice now largely muted, but the aims and institutional structure of modern mass tort practice are inconsistent with *Amchem's* framework for managing conflicts.

1. *Judicial Confidence*

*Amchem's* agency cost framework relies on subclassing to harness counsel's fee-maximizing impulses in support of the interests of properly defined subclasses. This incentive-based approach may seem crude and limited, in that it accomplishes that interest alignment only as to that limited category of conflicts that result in subclassing and assumes that subclass counsel have sufficient leverage to advance subclass member interests.<sup>355</sup> But in the mass tort litigation landscape the Supreme Court surveyed in the late 1990s, it was attractive. Judges lacked sufficient control over proceedings due to jurisdictional limitations, and it was commonly perceived that they lacked sufficient knowledge of the claims and issues to effectively police for fairness based on the settlement terms, especially when settlements were presented.<sup>356</sup> The MDL trial court judges who oversee mass tort practice

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354. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2157 (2000) (citing, among other cases, *In re Austrian & German Holocaust Bank Litig.*, 80 F. Supp. 2d 164, 167 (S.D.N.Y. 2000) (approving a class settlement of Holocaust-era claims)).

355. See NAGAREDA, *supra* note 225, at 229 (teasing out the leverage problem).

356. See, e.g., Coffee, *supra* note 16, at 1348 (“[C]ourts have little ability or incentive to resist the settlements that the parties in class action litigation reach.”); Deborah R. Hensler, *Revisiting the*

today are differently situated. They typically are the center of gravity, even if some cases still escape the MDL vortex; exercise tremendous control over counsel and the proceedings, and are thus capable of assuring proper case development via discovery and establishment of bellwether trials; intervene and actively shape settlement discussions via direct involvement or the appointment of neutrals; and, in short, can be far more confident than could trial courts in earlier eras that the outcomes they produce bear a reasonable relationship to merits.

That confidence is reflected in the language used by Judges Barbier and Brody in their orders approving the BP and NFL settlements. Faced with objections regarding conflicts and challenges to the merits of the various settlements in both proceedings, the judges pointed to their own involvement, the involvement of the neutrals they appointed to oversee negotiations, and to the relationship between settlement payments and claim value as proof that they were able to capably manage the proceedings to a fair outcome.<sup>357</sup> That may read to some as a familiar expression of trial court hubris that predates the modern era. But these judges now have the institutional arrangements in place to justify it.

Judicial self-confidence partly explains the shift from market- or incentive-based conflicts management to a regulatory approach that depends on involved judges to steer litigation to fair outcomes. It also explains in part the resurgence of utilitarianism, where fair settlement terms suggest adequate and sufficiently conflict-free representation.

## 2. *The Settlement Endgame*

Confident federal trial court judges can still subclass. One major reason they do not do so with the frequency or in the manner *Amchem* and *Ortiz* imagined is captured in the Balkanization metaphor dissected above, i.e., the fear that the competition among plaintiffs' counsel subclassing naturally generates will make it harder to achieve the goal of the MDL model of litigating mass torts. A successful MDL judge is one who resolves the litigation, and the only way to do that short of knocking the cases out on a common issue, e.g., upon a motion to dismiss or summary judgment on a question of law or fact that is common to all coordinated actions, is via settlement.<sup>358</sup> The desire for

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*Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 206 (2001) (judges' lack of resources and expertise can make it challenging for them to perform their role as fiduciaries for the class).

357. See *supra* notes 248–49 and accompanying text.

358. See Burch, *supra* note 15, at 73 (noting that MDL judges use “innovative procedures to usher these cases toward settlement”); *id.* at 76 (noting “institutional pressure” toward settlement of

global resolution drives all facets of MDL management, because, per the MDL statute<sup>359</sup> and *Lexecon*,<sup>360</sup> cases not resolved in pretrial proceedings must, absent settlement, be sent back to their transferor courts. That rarely happens.<sup>361</sup> Instead, ninety-six percent of actions consolidated in MDLs terminate before trial, and anecdotal evidence suggests that the “large majority” of such resolutions are via settlement.<sup>362</sup>

### 3. *Timing Is Everything*

Settlement in the MDL model for processing mass tort claims occurs in one of two primary modes: contract or class. An example of an aggregate settlement achieved via contract is the Vioxx litigation, resolved pursuant to an agreement between defendant Merck and plaintiffs’ counsel.<sup>363</sup> The BP and NFL case studies are examples of class settlements, where only the representative plaintiffs and their counsel sign an agreement that results in a binding judgment upon those absent class members who do not opt out after receiving notice of its terms. The mode to be adopted is normally not known at the outset, when common benefit counsel are appointed as part of plaintiffs’ steering committees in the MDL. Instead, the settling parties in their discretion elect the form of aggregation at the back end of proceedings when they are negotiating settlement terms. Because no one seriously expects certification of a *litigation* class in most mass torts,<sup>364</sup> Rule 23 and its requirement of adequate representation need not be confronted unless and until the parties make the choice to settle on a class basis.

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MDLs); Silver & Miller, *supra* note 12, at 114 (noting that one of the purposes of the MDL statute was to promote global settlements). *But see* Dodge, *supra* note 328, at 333 (“Modern MDL judges no longer press settlement at all costs but instead embrace a wider variety of outcomes as successful resolutions.”). *See also* Issacharoff, *supra* note 63, at 829 (overworked federal trial court judges have an “overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members”).

359. 28 U.S.C. § 1407(a) (2012).

360. *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998) (MDL court cannot transfer a case to itself for trial.).

361. *See* Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985, 1986 (2011) (“Remands are so uncommon, however, that MDLs have been compared to ‘black holes.’” (citing, among others, Fallon et al., *Bellwether Trials*, *supra* note 343, at 2330 n.21)).

362. *DUKE STANDARDS AND BEST PRACTICES*, *supra* note 298, at xii.

363. *See* Erichson & Zipursky, *supra* note 15, at 274–81 (describing settlement).

364. *See supra* note 302 and accompanying text.

As noted above, nothing requires MDL courts to front-load those considerations when appointing MDL common benefit counsel. So they instead select along other dimensions, including cooperativeness. By the time of any class action settlement, it is too late as a practical matter to use subclassing to assure adequate representation via the alignment of interests of subclass counsel and subgroups of class members because a settlement has already been negotiated by conflicted counsel. As one set of BP objectors noted: “[f]irst, there was Plaintiffs’ Steering Committee; then there were settlement negotiations; and only then did the PSC select class representatives to ratify a *fait accompli*.”<sup>365</sup> That timeline naturally places downward pressure on the Rule 23 standards regarding adequacy of representation, and leads to an “anything but subclassing” mentality among trial court judges looking to preserve global settlements. If judges are confident they have helped to achieve a just class settlement that they view as their only viable endgame, and if a strict reading of *Amchem* disrupts that settlement, odds are that judges will read the strictness out of the decision. And so they have.

## CONCLUSION

The Supreme Court has yet to revisit *Amchem* and *Ortiz*. The Court is unlikely to waver from the basic principle they espoused, that adequate representation is the *sine qua non* of non-party preclusion. But late twentieth century sensibilities regarding the nature of class conflicts that might threaten adequate representation, regarding the role of conflicts management in assuring adequate representation, and regarding subclassing as the vehicle for achieving it, all now seem quaint and out of touch with current institutional arrangements. It’s high time to recognize the collapse of the class conflicts management regime announced in *Amchem* and *Ortiz* and to acknowledge the contours of the new regime emerging in its stead.

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365. Memorandum in Support of Objections to the Economic and Property Damages Settlement Agreement by Objectors Hunter Armour and Judith Armour at 10, *In re Oil Spill*, No. 02:10-cv-07777 (E.D. La. Aug. 31, 2012), ECF No. 101.