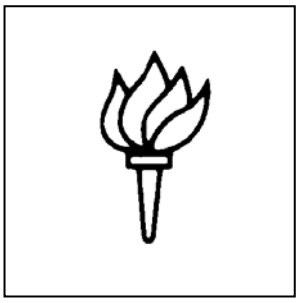
NEW YORK UNIVERSITY SCHOOL OF LAW

PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES
WORKING PAPER NO. 17-01

LAW & ECONOMICS RESEARCH PAPER SERIES
WORKING PAPER NO. 17-03



The Participatory Class Action

Elizabeth J. Cabraser and Samuel Issacharoff

January 2017

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Elizabeth J. Cabraser[1] and Samuel Issacharoff[2]

I. Introduction

For generations, the central problematic in class actions has been the legitimacy of one party binding another to a distant outcome. Once the Supreme Court in recognized[3] that representative litigation could conclusively resolve the rights of absent parties, the question immediately surfaced concerning when such *in abstentia* proceedings could achieve adjudicative finality. In the words of the seminal decision in *Hansberry v. Lee,* class proceedings necessarily strained the presumption "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 or to which he has not been made a party by service of process."[4]

Concern over representational legitimacy permeates the development of modern class action law.[5] The modern exhortation that class actions must be subject to "rigorous" examination comes from *General Telephone Co. of Southwest v. Falcon,*[6] an employment discrimination case in which an employee passed over for promotion claimed to speak for a broad class of Mexican-Americans never hired by the same employer. Most critical in modern law, the antagonistic interests between present asbestos claimants and future victims doomed the proposed class action settlements in *Amchem Products, Inc. v. Windsor*[7] and *Ortiz v. Fibreboard.*[8]

Together, *Amchem* and *Ortiz* serve as our point of departure.[9] In the modern world of non-trial resolution of cases, pretrial dispositive motions and settlements are the customary way of resolving the broad run of cases.

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[3] Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921).

[4] 311 U.S. 32, 40 (1940).

[5] *See* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L REV. 3165 (2013) (discussing the "agency problem" in class action representation).

[6] 457 U.S. 147, 161 (1982) denying certification to diverse employment class).

[7] 521 U.S. 591 (1997).

[8] 527 U.S. 815 (1999).

[9] Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (in *Amchem* "the perfect was the enemy of the good").

As *Amchem* noted, settlement may necessitate heightened scrutiny as a binding settlement may emerge from negotiations among parties burdened by all sorts of competing interests.[10] Indeed agency costs imposed by class representatives, specifically class counsel, has been the mainstay of critical scholarship on class actions for decades[11] and has even led to broad-scale indictments of settlement classes altogether.[12]

Despite these concerns, class actions, and especially settlement classes, continue to thrive. Over the years, concerns over representational legitimacy have been tamed, if never fully domesticated. *Amchem* invited the use of subclasses as a "structural protection" against rivalrous claims to limited recoveries.[13] Other courts, most notably the Seventh Circuit, have stressed the efficiencies of class actions for common economic harms emerging from discrete courses of conduct.[14] An increasing number of Circuit courts have encouraged the use of issue classes to resolve the central points of contestation in large-scale harms, even if the final resolution of individual claims is left to another day, as needed.[15] Yet others have allowed class resolutions to be the foundation for elaborate administrative structures that

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[10] *Amchem*, 521 U.S. at 620, 623-24.

[11] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUMB. L. REV. 1343, 1346 (1995) (tort "claim aggregation through class actions systematically tends to disfavor certain identifiable, but underrepresented" class members); John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUMB. L. REV. 669, 671-72 (1986) (pointing to "the conflicts that arise between the interests of [plaintiff's] attorneys and their clients").

[12] Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 952-53 (2014) (arguing that classes should never be certified for settlement alone).

[13] *Amchem*, 521 U.S. at 627 (1997) (noting the need for "structural assurance of fair and adequate representation for the diverse groups and individuals affected").

[14] *See, e.g.*, Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) (emphasizing the need and appropriateness of using class actions to resolve cases where "issues of liability are genuinely common" and where "tortious harms of enormous aggregate magnitude [are] so widely distributed as not to be remediable in individual suits"); Carnegie v. Household Intern., Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to [this] class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). *See also* Elizabeth J. Cabraser, *The Rational Class: Richard Posner & Efficiency as Due Process*, 920 GEO. WASH. L. REV. ARGUENDO 82, 85 (2014) (reviewing Judge Posner's emphasis on "judicial economy and litigation efficiency" in class certification decisions).

[15] *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *3 (N.D. Ohio July 10, 2010) ("[T]he presence of a single common question is enough for certification—as long as resolution of that question will advance the litigation."), *aff'd*, 722 F.3d 838, 854 (6th Cir. 2013) ("[D]etermination of damages may be reserved for individual treatment with the question of liability tried as a class action.'"), *cert denied*, Whirlpool Corp. v. Glazer, 134 S.Ct. 1277 (2014).

serve to channel individual claims for compensation, and then admit direct individual participation in subsequent phases.[16]

To this list of important doctrinal evolutionary trends in class action law we add a further consideration, one that has only begun to be acknowledged in case law, and has thus far escaped academic scrutiny. Increasingly, absent class members are never actually absent. Large swaths of class action law concern cases in which unnamed class members may monitor the proceedings, oversee class counsel, retain individual counsel, and help mold the ultimate relief in the case. This is the new "participatory class action," as we shall term it. Participatory class actions unsettle much of the operational assumption of modern class action law concerning "headless class actions,"[17] "lawyers without clients,"[18] and other such formulations that highlight the stark presumed divide between the interested (or self-interested) class leadership and the individual class member, rationally unable to monitor or shape a class action.

The participatory class action corresponds to two developments, one technological and the other jurisprudential. The technological change is quite straightforward. In an era in which presidential campaigns may be run by direct contact from candidate to voters through social media, who would imagine that the main form of class member notice would remain the tombstone advertisement in the back pages of the Wall Street Journal? Increasingly, class member identities are easy to "ascertain" from the needs of institutional defendants to maintain regular contact with their customer base.[19] In turn, Facebook, Twitter and other low cost media allow not only direct information to be given to class members on a regular basis, but provide a ready platform for interested class members to organize themselves to oversee class proceedings. Not surprisingly, this technological blitz is overwhelming formal class action law still organized around the injunction

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[16] *See In re* Deepwater Horizon, 732 F.3d 326, 329-332 (5th Cir. 2013) ("*Deepwater Horizon I*") (describing structure of settlement for business economic loss claims).

[17]. Satterwhite v. City of Greenville, 557 F.2d 414, 425 (5th Cir. 1977) (Gee, J., dissenting) (describing "a headless lawsuit with, in effect, no plaintiff,") *vacated*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated*, 48 U.S.L.W. 3610 (1980). *See also* Elizabeth A. Grimes, Satterwhite v. City of Greenville *& Breathing New Life Into the Headless Title VII Class Action*, 32 STAN. L. REV. 743 (1980).

[18] Per William Lerach, "I have the greatest practice of law in the world. I have no clients." William P. Barrett, *I Have No Clients*, FORBES MAGAZINE, Oct. 11, 1993, at 52-58. See *also* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 132 (2001) (discussing ethical problems in class action representation").

[19] *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 657-58 (7th Cir. Jul. 28, 2015) (declining to adopt the "heightened ascertainability" requirement). *See also* Briseno v. ConAgra Foods, Inc., No. 15-55727, 2017 WL 24618, at *1 (9th Cir. Jan. 3, 2017) (following Seventh Circuit interpretation).

of last century in *Mullane v. Central Hanover Bank & Trust Co.,* that all known class members must receive notice by first class mail.[20]

Less noticed, however, is the second source of change. Increasingly, class actions are organized out of the centralizing function of Multidistrict Litigation practice. In turn, the increased dominance of MDL consolidation has created the environment for the centralization of all claims, including state and federal regulatory actions into one central proceeding. MDL cases now account for over 40 percent of actively litigated claims in federal courts.[21] More significant than even the stunning growth in numbers is the role of MDL courts in consolidating mass harm cases owing to a common origin, as with defective pharmaceuticals, widespread environmental harms, common origin tort claims, or broad consumer fraud. It is no coincidence that the largest class action settlements of late – such as *Deepwater Horizon*,[22] *Volkswagen*,[23] or *NFL Concussion*[24] – all emerge from MDL consolidation of dozens or hundreds or thousands of individual claims against common defendants.

The MDL origin of these cases fundamentally alters class action practice. An MDL is by definition a pretrial consolidation of multiple cases from many jurisdictions. This means that prior to MDL consolidation there must be many cases on file, presumably with many different lawyers.

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[20] 339 U.S. 306, 318 (1950). In May 2016, the Advisory Committee on Civil Rules recommended an amendment to Rule 23(c)(2)(B) to explicitly provide for notice by "electronic means, or other appropriate means." ADVISORY COMMITTEE ON CIVIL RULES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES, at 2 (2016), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2016.

[21] As of 2014, MDLs made up 36% of the civil caseload, and 45.6% if prisoner and social security cases are removed from the tally. DUKE LAW SCHOOL CENTER FOR JUDICIAL STUDIES, STANDARDS & BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, at x (2014), *available at* https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (analyzing statistics from United States Courts, including Annual Reports of the Director, Statistical Tables for the Federal Judiciary, and Judicial Panel on Multidistrict Litigation: Judicial Business, available at http://www.uscourts.gov/statistics-reports). *See also* Morris A. Ratner, *Class Conflicts*, 92 Wash. L. Rev. _ [at 55] (*forthcoming* 2017) (discussing the rise in MDL as a proportion of federal caseloads between 2002-2014).

[22] *In re* Oil Spill by Oil Right Deepwater Horizon in the Gulf of Mexico, 910 F. Supp. 2d 891 (E.D.La. 2012) (certifying settlement class and approving settlement of economic loss and property damage claims), *aff'd*, *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) ("*Deepwater Horizon II*"), *cert denied*, BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S.Ct. 754 (2014).

[23] *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2016 WL 6248426 (E.D. Cal. Oct. 25, 2016) (granting final approval of settlement). Fourteen appeals were filed in the Ninth Circuit between November 3 and November 29, 2016.

[24] *In re* NFL Players' Concussion Injury Litig., 307 F.R.D. 351 (E.D.Pa. 2015) (certifying class settlement), *aff'd*, 821 F.3d 410 (3d Cir. 2016), *cert. denied*, Gilchrist v. NFL, 2016 WL 4585281 (Dec. 12, 2016) and Armstrong v. NFL, 2016 WL 7182246 (Dec. 12, 2016). *See In re* NFL Players' Concussion Injury, 307 F.R.D. at 365-69 (describing settlement terms).

Frequently, MDLs are formed from the consolidation of a mix of both individual suits and multiple putative class actions.[25] MDLs and class actions do not exist as separate spheres but as overlapping forms of consolidation of mass harm claims.[26]

Perhaps the merging of MDL and class action practice should come as no surprise. The first MDLs were coordinations of parallel class actions filed, first, under federal antitrust statutes, and then federal securities laws.[27] These were the paradigms of complex litigation, and were litigated and, largely, settled, under federal law in federal courts. The function of MDL centralization was to avoid duplication of judicial effort and pretrial discovery, and inconsistent class certification decisions.[28]

By contrast, the cases that today consume MDL practice were largely the province of state courts. Consumer claims and tort claims were matters of state law litigated in state courts. Only with some mass disaster cases, such as hotel fires,[29] did MDLs start to engage mass harms. But the so-called "dispersed mass torts" (typically involving asbestos or drugs or medical devices distributed nationally) were filed individually in state courts by

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[25] In *Volkswagen*, the MDL also included government regulatory actions and suits filed by individual states. *In re* Volkswagen Litig., MDL No. 2672 CRB (JSC), 2016 WL 6248426 at *2.

[26] One of the present authors, Elizabeth Cabraser, is widely regarded as one of the preeminent class actions lawyers in the U.S., handling a wide array of consumer, mass tort, and environmental claims, among others. *See, e.g.*, Sara Randazzo, *The Plaintiffs' Lawyer Chasing VW*, WALL STREET J., Mar. 4, 2016, at B3. A review of her cases filed over the past 20 years reveals that there is not a single case that she filed that did not end up as part of an MDL proceeding, regardless whether postured as a putative class action or not.

[27] *See, e.g.*, Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 341 F. Supp. 1077 (E.D.Pa. 1972) (involving consolidation of 370 plumbing fixture antitrust cases), *vacated*, 540 F.2d 102 (3d Cir. 1976); *In re* Four Seasons Sec. Laws Litig., 58 F.R.D. 19 (W.D. Okla. 1972) (consolidated securities class actions).

[28] *See, e.g.*, *In re* Seeburg-Commonwealth United Merger Litig., 312 F. Supp. 909, 911 (J.P.M.L. 1970) (describing the purpose of consolidation as "to serve the convenience of parties and witnesses and to promote the just and efficient conduct of [multidistrict] actions."); *In re* Fourth Class Postage Regulations, 298 F. Supp. 1326, 1327 (J.P.M.L. 1969) (emphasizing that consolidation would "eliminate any need for repetitive depositions and other discovery" and "avoid[] injury to like parties caused by inconsistent judicial treatment"); *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 491-93 (J.P.M.L. 1968) (describing the "remedial aim [of § 1407] to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions . . . [and to avoid] pretrial chaos in conflicting class action determinations"). .

[29] *See, e.g.*, Order No. 364, *In re* San Juan Dupont Plaza Hotel Fire Litigation, No. 17178 (D.P.R. July 23, 1991) (distributing approximately $220 million to 1400 claimants in consolidated litigation); *In re* MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983) (approving $138 million settlement in consolidated litigation); *In re* Fed. Skywalk Cases, 97 F.R.D. 380 (W.D. Mo. 1983) (approving settlement committing $150 million to payment of compensatory damages for voluntary class action stemming from collapse of two skywalks at the Hyatt Regency Hotel in Kansas City).

plaintiffs' counsel, and MDLs were utilized strategically by defendants to cabin cases that had been removed to federal court.

Following the enactment of the Class Action Fairness Act (CAFA),[30] a new wave of consumer actions came into the federal courts, to be centralized through the MDL process just as federal antitrust, securities, and to a lesser extent, employment cases, had been. MDL judges then borrowed the organizing and judicial supervision principles of Rule 23 to manage non-class aggregations of tort claims, whether openly labelled as "quasi-class" case management by judges[31] or presented as originating with private contracts among the parties.[32] The increase in scope of federal diversity jurisdiction for consumer claims after 2005, the growing resignation to, if not comfort with, federal court management of tort claims, combined with the expansion of antitrust, securities, and auto safety enforcement from 2008-2016, created the expansion of MDLs that continues today. The scope of this workload alone would suggest a rational interest in renewed or expanded use of established case management, adjudication, resolution, and preclusion mechanisms. The Rule 23 class action is the most established and familiar of these, with pre-existing procedures and a robust jurisprudence. It should not be a surprise that, in recent years, use of the class action is rising, not falling.[33]

Yet what is most noteworthy is the reemergence of class actions in the highest-profile, most difficult, and most tort-like situations: a scenario that only a few years ago would have seemed nigh-impossible. The participatory class action has bridged the gap between the situation as of the early 2000s, when the mass tort class action seemed to have been severely diminished in

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[30] Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1453, 1711 to 1715 (West 2016).

[31] *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122 (E.D.N.Y. 2006) (classifying as a "quasi-class action" a case involving "many of the characteristics of a class action," including "a large number of plaintiffs subject to the same settlement matrix approved by the court").

[32] *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (consolidating 148 actions for proceedings in Eastern District of Louisiana); *In re* Vioxx Prods. Liab. Litig., MDL 1657 (E.D.La. Nov. 9, 2007) (settlement agreement). *See also* Howard M. Erichson & Benjamin Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 274-81 (2011) (describing settlement reached by agreement between defendant Merck and plaintiff's counsel); Morris A. Ratner, *Class Conflicts*, 92 Wash. L. Rev. _ [at 68] (*forthcoming* 2017) (same).

[33] . Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L. J. 1569, 1589 (2016) (describing rising trends in securities cases). *See* SEYFARTH SHAW LLP, 12TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, at 14 (2016) (finding year-on-year increases in employee wage FLSA filings and a 450% increase over the last 15 years); Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Birth With Two Stones: The Use & Abuse of Class Actions & Collective Actions in Employment Litigation*, 31 HOFSTRA LAB. & EMPL. L. J. 387, 387-89, 395-96 (2014) (noting year-on-year trends of increasing FLSA actions). *See also* Elizabeth Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 800 (2015) (arguing that, despite legal scrutiny, "straightforward application of enduring Rule 23 principles to produce the fair and efficient adjudication—or resolution—of core questions . . . may again be on the rise.").

the aftermath of *Amchem/Ortiz*, and the contemporary scene, which is punctuated with the examples of *Deepwater Horizon, NFL Concussion*, and *VW*.[34] Each of these, alone, could reasonably be viewed as exceptional, and none of them is likely to be replicated. Yet a pattern emerges: the pattern of engagement and participation by claimants and their individual lawyers, enabled by direct, frequent, and court-authorized communications among class counsel, class members, non-class counsel, and the courts themselves.

In what follows, we play out some of the implications of the new participatory class action. First, we use the recently resolved Volkswagen and NFL cases to demonstrate that this new form of class action is alive and well. Second, we examine the implications of class member participation for inherited class action law, running from the presumption of class member passivity to the insistence on the role of the court as the only fiduciary for the absent class members. But our point is to push this much further than current law allows. In the popular typology in academic examination of class actions,[35] class action law should insist on the loyalty of agents and the importance of individual ability to exit as guarantors of systemic legitimacy. In the participatory class action, voice emerges as a critical element with the capacity of the normally silent class members to assert their interests and their views. As with the need for class action law to move from first-class mail to Twitter, so too must the law embrace the implications of real participation in the assessment of representational propriety.

II. Class Member Voice.

The so-called "numerosity" requirement of Rule 23(a)(1) is, technically and expressly, an impracticability of individual joinder standard.[36] In the class action of the 20th Century, impracticability of joinder derived from the expense and difficulty of communications with the class, exacerbated, perhaps, by the geographical dispersion of its members. While Rule 23 imposes no express threshold of numerosity, in common practice, and at common law, the numerosity threshold was as low as forty (40) persons. Above that level, it was thought that the communication and participation essential to active party status was inherently impractical, and a representative suit was the only viable alternative. The representative suit was seen as a fallback from a truly participatory action such as a binary suit

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[34] In furtherance of full and complete disclosure, the authors were involved in all three of these matters.

[35] *See* John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, & Loyalty in Representative Litigation*, 100 COLUMB. L. REV. 370 (2000); Samuel Issacharoff, *Governance & Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 (1999)..

[36] FED. R. CIV. P. 23(a)(1) (providing as a prerequisite that "the class [be] so numerous that joinder of all members is impracticable").

or a multiparty action covered through joinder intervention or interpleader, and the defining characteristics of class members were passivity and absence.

Indeed, "absent class members" became the common descriptor of class members, who were additionally tagged as the passive beneficiaries of the action.[37] Class notice was rare, cumbersome, and expensive. Indeed, one of the most influential classic class action decisions of the Supreme Court, *Eisen v. Carlisle & Jacquelin*,[38] addressed whether adequacy of representation and due process required the named plaintiffs to underwrite the considerable cost of mailed notice to the class.

Early consumer actions were marked by anxiety over administrative burdens: the cost of preparing a check and mailing it to a class member might equal or exceed the value of that check itself. Consumer class actions, especially, teetered uneasily on the dividing line between utility and cost-ineffectiveness. And for those who might wish to actively participate in their litigation, the class action was simply not an option: the "superiority" checklist of Rule 23b(3) included "the interests in individually controlling" their actions as a disqualifier.[39] The confluence of active participation and class membership was seen to be, at the very least, incongruous, if not categorically impossible. Mass litigation featuring many active plaintiffs might be a "mass action" or an aggregation, and, as noted above, become an increasingly dominant model with the rise of MDLs, but it was not seen as the model for a class suit.

Fast forward to 2016: communication is instantaneous and cheap, if not free, courtesy of the internet, email, Facebook, Twitter, and formats of electronic discourse as yet unimagined.[40] With the marginal cost of

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[37] Phillips Petroleum, Co. v. Shutts, 472 U.S. 797, 810 (1985) ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.").

[38] 417 U.S. 156 (1974).

[39] FED. R. CIV. P. 23(b)(3) (providing that a class action may be maintained if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy").

[40] Consumers and attorneys have used social media platforms to coordinate and share information about class actions and alleged harms or product defects. For example, a nationwide class action against Procter & Gamble alleging that certain diapers manufactured by the company harmed children reportedly grew out of consumer posts and discussions on Facebook. *See Pampers Dry Max Gave My Baby Chemical Burns and Rashes!*, FACEBOOK https://www.facebook.com/groups/115137328510785/?fref=nf (last visited Jan. 16, 2017), (public Facebook group); Sean Wajert, *Facebook Groups and Class Actions*, MASS TORT DEFENSE BLOG (June 4, 2010), http://www.masstortdefense.com/2010/06/articles/facebook-groups-and-class-actions. *See also, e.g.*, Lieff Cabraser Heimann & Bernstein, LLP (@LieffCabraser), FACEBOOK (Sept. 27 2016), https://www.facebook.com/LieffCabraser/ (providing information on Whirlpool moldy washer class action settlement and link to submit claims via Facebook post); Cassie Collignon & Paul Karlsgodt, *Class Actions 101: A New 'Viral' Class Action?*, AM. BAR ASSOC. (Nov. 20, 2012), http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-class-

additional communication approaching zero, class notices may be transmitted electronically, without the former logistical and cost inhibitions of mass mailings. Whereas a simple mailing of class notice to a class of 1 million members would have cost, in terms of postage and copying alone, over $5 million in the 1980s, electronic transmission of the same notice, on the same scale, is effectively free today.

In a traditional class action, these costs are logistical barriers meant that there would be one, or at most two, occasions for notices: when the class was certified, and when it was settled. The class action and the class members were, for most of the lifecycle of the suit, strangers to each other. Indeed, the formidable cost barrier of class notice led, more than any other circumstance, to the practice of class certification for settlement purposes: combining a notice of class certification with a notice of proposed class settlement. Courts often voiced unease with this convergence, but it became the norm rather than the exception. A plaintiff lawyer "using" class certification might be unable, or rationally unwilling, to front the considerable cost of class notice in a case that could drag on for years and multiple appeals. As *Eisen*[41] held, class notice was the class representative's responsibility. In a settlement, on the other hand, the settling defendant either addressed or predictably reimbursed notice costs, as part of the settlement administration/claims process. A recurring account of the reason that settlements so frequently followed on the heels of class certification casts hydraulic pressure on defendants as the catalyst. In reality, both sides had incentives to combine certification at settlement.

There are contemporary risks to a class certification ruling today that were not present in the classic era: since 2003, Rule 23(f) has provided an avenue of interlocutory appellate challenge to class certification determinations.[42] The motion to decertify has become an acknowledged part of practice, and defendants can file them repeatedly. While the incidence of class trials has increased, and such trials always existed, the challenges presented to both sides of how, exactly, to try a class action as such, and anxieties—on both sides—about the scope of preclusion of a class verdict,

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actions-101-new-viral-class-action.html (discussing "viral" opt-out campaigns, such as the campaign via Twitter, YouTube and a website, DontSettleWithHonda.org encouraging class members to opt out of a settlement related to mileage problems with Honda Civic hybrids); *Samsung Washing Machine Recall – Consumer Report (Unofficial)*, FACEBOOK, https://www.facebook.com/groups/932938046762433/ (last visited Jan. 16, 2017) (closed Facebook group for consumers to share information and provide a discussion forum related to a recall of Samsung washing machines).

[41] 417 U.S. at 178-79 (holding that "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit").

[42] FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.").

has operated to maintain the class settlement as the most likely outcome of a certified class action. Thus, the class action settlement notice remain the first formal, Rule-sanctioned occasion for communications with the class. Despite "plain language" exhortations, these notices devolve to a ritualized style seeking to touch all the bases established by the rules, case law, and judicial expectations of best practices. But these are no longer the sole, or only, components of class communications in the emerging participatory class action.

Now, courts supervising large litigations, whether as class actions or multi-district litigation dockets, routinely maintain official case-specific websites that post schedules, orders, transcripts, notices, and important briefs.[43] When a class action is resolved, the class action settlement website becomes the hub of information, communication and claims processing in major class action settlements. Because Rule 23e(1) (currently the subject of a proposed amendment to add "flexibility to class notice")[44] has often been interpreted as favoring or requiring first class mail notice, class action communications have not fully kept pace with communications in other areas of commercial life. Simply put, the average American is inured to hundreds of email messages, Facebook postings, and Tweets per day, and could be forgiven for wondering why the litigation in which she is ostensibly a participant is not taking full advantage of these communications media. In many cases, this is already happening, and the proposed amendment to Rule 23(c)(2)(B), acknowledging "electronic means" of class notice is intended and expected to promote much more frequent communications to and from class members.[45] The hallmark of class membership is no longer passivity or silence. It is, increasingly, participation and voice.

Further, the structure of the MDL adds something missing from the prototypical class action. Much of the class action law leading to *Amchem/Ortiz* assumed no intermediation between appointed class counsel and the class membership. The class itself not only lacked meaningful opportunity to participate, it had little incentive to do so. In negative value cases, one of the prime justifications for class aggregation,[46] individual class

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[43] *See, e.g.*, IN RE GENERAL MOTORS LLC IGNITION SWITCH LITIGATION, http://gmignitionmdl.com/ (last visited January 15, 2017); *In re Volkswagen "Clean Diesel" MDL*, UNITED STATES DISTRICT COURT: NORTHERN DISTRICT OF CALIFORNIA, http://cand.uscourts.gov/crb/vwmdl (last visited January 15, 2017).

[44] The proposed amendment would require that the "court must direct notice in a reasonable manner to all class members who would be bound by the proposal *if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal . . . and (ii) certify the class for the purposes of judgment on the proposal*." ADVISORY COMMITTEE ON CIVIL RULES, *supra* N. 20, at 2-3.

[45] ADVISORY COMMITTEE ON CIVIL RULES, *supra* n. 20, at 2 (amending Rule 23(c)(2)(B) to explicitly provide for notice by "electronic means, or other appropriate means").

[46] *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (distinguishing the case at hand from "most class actions—and those . . . in which the rationale

members are "rationally apathetic"[47] and cannot be expected to engage with whatever class counsel does. Similarly, in the sweeping asbestos cases, the Court confronted classes so broad as to include virtually the entire American population,[48] most of whom lacked any identification of themselves as being at risk of distant future manifestations of asbestos injury. In such circumstances, the easy judicial assumption was that only the courts stood between the class and potential maltreatment – hence the courts were called upon to act as the fiduciaries for the absent class members.[49]

The MDL origin of these new class cases fundamentally alters class action practice. An MDL is by definition a pretrial consolidation of multiple cases from many jurisdictions. This means that prior to MDL consolidation there must be many cases on file, presumably with many different lawyers. With the appointment of a Plaintiffs' Steering Committee or even interim class counsel, these other lawyers and their individually named clients do not disappear. Rather, they become the organizing springboard for a monitoring group that has the ability and the incentive to challenge the fruits of the representative action. In short, at least some absent class members in an MDL-based class action already have separate, independent counsel and have individually asserted their own claims.

III. Meaningful Non-Exit.

Two insights have dominated the critical commentary on class actions. First, whether colorfully engaged as a "Frankenstein's monster"[50] or more prosaically as an "entity,"[51] class actions had a more organic institutional form than a mere joinder of related claims. Second, agency costs plagued the gulf between the intense interests of class counsel and the generally passive

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for the procedures is most compelling—[where] individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation").

[47] John C. Coffee, Jr., *Class Action Accountability*, *supra* n. 35, at 382 (noting that, in negative value claims with small individual damages, "the individual stakes are [not] large enough to overcome the clients' rational apathy"). *See also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) ("Many persons in the exposure-only category . . . may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.").

[48] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 602 n.5 (1997) (defining class as everyone who worked or had a family member who worked in the U.S. prior to 1993).

[49] *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002) (describing judge as "a fiduciary of the class"). *See also* Chris Brummer Note, *Sharpening the Sword: Class Certification, Appellate Review, & the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1059 (2004) ("a trial judge not only has a general duty to uphold the rights of absent class members, but is also a fiduciary for them").

[50] Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979).

[51] David Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

class of stakeholders,[52] replicating the classic separation of ownership and control that preoccupied the law of corporate governance.[53] Together the idea of a class as an independent organizational form with poorly tethered leadership dominated the growing academic assessment of class actions. When *Amchem* stressed the incentives facing class counsel and the need for structural protections of absent class members,[54] the agency cost theory emerged at the heart of class action jurisprudence.

In the aftermath of *Amchem* and *Ortiz,* the question became what forms of structural protections might suffice to overcome the inherent problem of insufficient class member capacity to monitor class counsel. One approach was to generalize from the inherent tensions between present and future claimants in the asbestos context and demand extensive subclasses that would each be as homogeneous as possible, thereby avoiding intragroup conflict. That approach risked easy balkanization of the class away from any workable entity that could litigate or settle claims effectively. In the recent NFL setting, for example, amicus Public Citizen proposed subclasses that would include players' wives with consortium claims, those players who suffered specific symptoms, such as headaches and insomnia, together with separate representation based on years of play, and so on.[55] Endless subclassing, and its attendant dissolution of the advantages of coordinated proceeding, had little appeal to courts or commentators.[56] Indeed, as Morris Ratner notes, in reality, even the largest class actions have utilized only minimal subclassing to address fundamental crevices in the class, rather than attempting to provide separate representation for all potential subgroups.[57]

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[52] *See* Coffee, *supra* note 11.

[53] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. a (AM. LAW INST. 2010) ("A foundational insight of the economic literature on agency relationships is that ownership of assets and control of their disposition must often be separated to achieve economies of scale"); ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[54] *Amchem*, 521 U.S. at 627 ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.").

[55] *See* Brief for Public Citizen as Amici Curiae Supporting Petitioners, Armstrong v. NFL, 2016 WL 7182246 (Dec. 12, 2016) (No. 16-413).

[56] *See, e.g.*, Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) (rejecting subclass treatment in favor of a recovery compensation formula to create a common interest of the class); Lynn A. Baker & Charles Silver, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1496-97 (1998) (arguing that prohibition of some conflict accommodation within a class would be the "reductio ad absurdum' that would deny "plaintiffs the benefits that make group litigation attractive."; Coffee, *supra* note 36, at 374-75.

[57] *See* Ratner, *supra,* at ___ ("Since the 1990s, the lower federal courts have chipped away at the foundation of [the subclassing] 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.").

Academic discourse turned instead to the pioneering work of Albert Hirschman in organizing relations between institutions and their constituents along a spectrum of exit, voice, and loyalty.[58] Of the three, loyalty fit most easily within the stated concerns in *Amchem/Ortiz* about the inevitable tension in class counsel making intragroup allocations that invariably would lead to robbing Peter to pay Paul.[59] Having an agent with incentives antagonistic to the principal necessarily compromised the duty of loyalty. This aspect of *Amchem/Ortiz* was internalized in class action practice with surprising ease, yielding the common practice of using special masters and claims administrators rather than class counsel to handle intraclass allocations.[60] Further, greater vigilance over attorneys' fees sought to link the payment of class counsel to the amount of proceeds actually obtained by the class, again a form of scrutinizing loyalty.[61]

Exit had already attained independent constitutional status in *Philips Petroleum v. Shutts,* at least for purposes of establishing personal jurisdiction over absent class members.[62] From there it was a short step to generalizing a right of exit through the opt out mechanism as securing a minimal level of constitutional legitimacy for ultimate class resolutions.[63] Indeed, the offer of a "back-end" opt out for future disease manifestations in the *Diet Drugs* class settlement[64] was, for Richard Nagareda, the wise use of the exit option to salvage broad class resolution from the conflict concerns of *Amchem/Ortiz.*[65]

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[58] *See* Albert O. Hirschman, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); Coffee, *supra* note 36; Issacharoff, *supra* note 36.

[59] *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002). *See generally Amchem*, 521 U.S. at 626 ("In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future."); *Ortiz* 527 U.S. at 856 ("[A] class divided between holders of present and future claims requires division into homogeneous subclasses…to eliminate conflicting interests of counsel.").

[60] This "Ken Feinberg-ization" of class action practice has now become routine. *See e.g.*, *In re* Oil Spill, No. 14644-1, 2015 U.S. Dist. LEXIS 165622, at *12 (E.D. La. Dec. 10, 2015) (noting that the Halliburton and Transocean Settlement Agreements both provide for a court-appointed "Allocation Neutral" to allocate the aggregate payments between the old class and the new class).

[61] *See e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 (AM. LAW INST. 2010) (requiring that fee awards be based on the actual value of the judgment or settlement); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007) (proposing fee scrutiny as indispensable for overcoming agency cost problem).

[62] 472 U.S. 797 (1985).

[63] *See* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Action,* 77 NOTRE DAME L. REV. 1057 (2002) (discussing the importance of opt out availability).

[64] *In re* Diet Drugs Prods. Liab. Litig., 431 F.3d 141, (3d Cir. 2005), *cert. denied*, 547 U.S. 1109.

[65] *See* Nagareda, *supra* note 61.

For all the attention to Hirschman, voice was relegated to a silent partner in the literature. There were some ill-founded proposals for class voting, a hollow form over substance among the rationally indifferent.[66] The implicit assumption was that class members speak by exiting – in effect, the decision not to opt out showed approval of the stewardship of class counsel and of the decisions regarding litigation or settlement.[67] When cases settled, the usually sparse numbers of opt outs[68] could then be compared to the silence of the majority, a skewed way of determining the level of class member support for the settlement. Silence might very well equal assent; silence might also reflect the rationality of not paying attention to claims not meriting individual prosecution. The same efficiency concerns that justified collective treatment of the claims – particularly when small stakes rendered the individual claims of negative litigation value – also made informed consent problematic.

Now contrast the emerging participatory class action model. Any class originating in the pretrial consolidation of already filed cases in an MDL presupposes a significant number of individually-represented plaintiffs (a prerequisite for MDL transfer to a centralizing court) and independent representation by lawyers who may ultimately serve on the Plaintiffs' Steering Committee, or who may not. Independent groups of counsel provide a more engaged form of monitoring of class counsel that either court oversight or unrepresented class members making a yes/no decision on a settlement offer. The fact that class members filed suits on their own prior to MDL centralization would make more likely that they will avail themselves of social media to follow the progression of their claims.

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[66] *See* Coffee *supra* note 36, at 417. Voting among the disengaged has the same artificiality as the early proposal of the Third Circuit task force that individual class members be selected to monitor and negotiate with class counsel. *See* Court Awarded Atty. Fees, 108 F.R.D. 237, 256 (3d Cir. 1985) ("[I]t is recommended that the court appoint a non-judicial representative…who will negotiate the arrangement in the usual marketplace manner and submit the proposal for the court's approval."). For a fuller account of the difficulty of applying democratic legitimacy norms to class actions, *see* Issacharoff, *supra* note 5.

[67] *See, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 117 (2d Cir. 2005) (considering nine factors, including "the reaction of the class to the settlement"); *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534-535 (3d Cir. 2004) (considering nine factors including "the reaction of the class to the settlement"); Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir. 1988) (considering four factors including the amount of opposition to the settlement); Laskey v. Int'l Union, 638 F.2d 954, 956 (6th Cir. 1980) (giving weight to the fact that "only seven out of 109 made any kind of objection"); *In re* Beef Indus. Antitrust Litig., 607 F.2d 167, 180 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981) (considering as a "significant element" of settlement fairness that there were "virtually no objections from members of the settlement class").

[68] *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) ("[O]n average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements.").

IV. Doctrinal Implications of the Participatory Class Action.

As with all new developments, one should be cautious in not claiming this to be the exclusive new model. Our aim is not to suggest that this new participatory capability explains all or most class actions, or even most MDLs. But it is a feature that class members in cases like NFL or BP or VW are active, contact class counsel frequently, made demands for consumer service, are frequently represented by independent counsel, and have points of intermediate organization on Facebook or Twitter that allows them to function more like a group. Thus, as January 14th, 2017, 451,363 of the 474,000 owners of the VW 2 liter engine class had registered with the claims administrator for settlement benefits, even though the appeals process had barely begun.[69] Similarly, in *NFL Concussion,* more than half the roughly 22,000 class members had taken initial steps to enroll for settlement benefits, even while ongoing appeals delayed the commencement of benefits.[70] These extraordinary levels of participation to accept the settlement terms simply cannot be compared to the older judicial inquiries into the paltry number of opt outs in cases where mail notice was the only point of engagement with the class litigation.[71]

We can leave to the side the question of how extensive this new form of participatory class action might be.[72] For now our argument turns not on the empirical issue of how broad class participation will prove to be. Rather, the claim is that where there is evidence of such class member participation, the judicial inquiry should be adjusted to absorb this new reality. First and

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[69] Transcript of January 18th, 2017 Status Conference, *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2016 WL 6248426 (E.D. Cal. Oct. 25, 2016).

[70] Joint Report on Preparation to Implement the Settlement Program after the Effective Date, at 2, *In re NFL Players' Concussion Injury Litig.,* No. 2:12-md-02323-AB (E.D. Pa. Oct. 7, 2016) (ECF No. 6919).

[71] Indeed, in the *Deepwater Horizon* litigation, BP did not account for the likely levels of class member participation, and the resulting demand for compensation under the settlement. *See In re Deepwater Horizon*, 739 F.3d 790, 795 (5th Cir. 2014) ("BP also now asks this court to vacate the district court's order, although BP is not formally an appellant and, in fact, BP originally supported both class certification and settlement approval before the district court.").

[72] The phenomenon is broader than just the blockbuster cases. Consider for example the moldy washer case. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP- 65000 2016 WL 5338012 (N.D. Ohio Sep. 23, 2016). Under the settlement, owners experiencing mold problems could claim $50 cash, 20% off in credit toward a new machine, or up to $500 in out-of-pocket repair costs. Of the 5.5 million or so machines sold (most between 8-15 years old at the time of settlement) class counsel estimate that 22.7% of those appliances were experiencing mold. Over 331,000 class members—or about one third—made such claims, responding to a multi-media/social media claims campaign. *See* email from Jonathan D Selbin, to authors (Jan. 16, 2017 6:12 EST) (on file with authors).

foremost, the *Amchem/Ortiz* assumption that the bulk of the affected class was necessarily passive before class counsel breaks down under scrutiny. Neither the formality of subclasses nor the formal oversight of class counsel provides the main check against improper internal compromises. As Judge Ambro wrote in *NFL Concussion*:

> [O]ne of the principal concerns driving *Amchem*'s strict analysis of adequacy of representation was the worry that persons with a nebulous risk of developing injuries would have little or no reason to protect their rights and interests in the settlement. We have evidence that in this case the concern is misplaced because many retired players with no currently compensable injuries have already taken significant steps to protect their rights and interests. Of the 5,000 players who sued the NFL in the MDL proceedings, class counsel estimated that 3,900 have no current Qualifying Diagnosis. These 3,900 players are represented, in turn, by approximately 300 lawyers. And with so many sets of eyes reviewing the terms of the settlement, the overwhelming majority of retired players elected to stay in the class and benefit from the settlement. We thus have little problem saying that their interests were adequately represented.[73]

The diversity of points of oversight ensures representative oversight far better than the formal allocation of responsibility through subclasses. This is simply the application of the law of large numbers in that thousands of claimants and hundreds of lawyers are more likely to view any proposed settlement through the range of class member experiences than any tractable number of subclasses.

Second, the participatory class alters the role of the class representative and takes considerable pressure off the poorly specified inquiry into typicality in Rule 23(a)(3). The typicality requirement has long been the weak link in the prerequisites for class certification, and the case law has largely subsumed the typicality requirement under the general rubric of adequacy of representation.[74] In turn, courts quickly came to understand that

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[73] *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 433 (3d Cir. 2016).

[74] *See e.g.*, General Tel. Co of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982) (noting that typicality and adequacy-of-representation requirements merge); E Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 724 (7th Cir. 2011) ("In many cases, including this one, the requirement of typicality merges with the further requirement that the class representative 'will fairly and adequately protect the interests of the class.'").

efficiency-driven class actions under Rule 23(b)(3) were largely the product of entrepreneurial lawyers and that the class of all purchasers of a stock offering or a consumer product likely had little organic ties among them other than common participation in the broad markets of mass society. Accordingly, adequacy of representation under 23(a)(4) focused on the incentives and ability of class counsel, leaving the typicality of the named plaintiff largely a formalistic inquiry.[75]

As initially formulated, Rule 23(a)(3) linked the typicality of the class representative to the ability to adequately represent the class under Rule 23(a)(4). The class action was a representative suit and, it would seem to follow, the typicality of the representative was the operative guarantee of the adequacy of the protection of the interests of the absent class members. The reality was otherwise and it soon became apparent that a named representative with a small claim had no greater incentive to monitor the progress of the class suit than the rationally passive absent class member.

When Congress recast standards for securities fraud litigation in 1995 in the Private Securities Litigation Reform Act (PSLRA),[76] one of the primary aims was to change the selection mechanism for selection of the named class representative. The statutory lead plaintiff became presumptively the class member with the largest loss in the alleged fraud. The underlying theory is that having the class representative be the largest loss bearer would give that class member the greatest incentive to monitor litigation performance, and would allow the absent class members to free ride on the lead plaintiff's unique interest.[77] In effect, the PSLRA model rejected rule 23(a)(3) in favor of selecting the class representative precisely because of the lead plaintiffs' being atypical.

Even if the PSLRA rejection of Rule 23(a)(3) were accepted, it would be hard to generalize to the broad consumer case, or to the tort-based aggregate proceeding in which all individuals stand in pretty much the same relation to the defendant. The post-*Amchem* search for multiple sub-classing may be seen as an attempt to cure the representation problem by focusing on fine-grained distinctions of typicality. Objectors in *NFL Concussion,* for

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[75] *See e.g.*, *Amchem*, 521 U.S. at 617 ("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." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997))).

[76] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

[77] *See* John S. Beckerman & Elliott J. Weiss, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995).

example, sought to challenge the named class representatives on the question whether they had in their individual capacities asserted all the potential injuries that could result from brain injuries in football.[78] Both the district court and the Third Circuit rejected this argument in favor of holding the named class representatives only to an adversarial relation to the NFL defendants, and being at risk as a result of the alleged common conduct of the defendants.[79]

This minimal view of the role of the class representative in the new class action makes sense of recent case law that looks to the named representative primarily as the guarantor of an actual case or controversy. As the Fifth Circuit wrote in the primary merits appeal in *Deepwater Horizon,* the court did not need to establish the individual standing of each putative class member because "the class action in this case survives Article III because the named plaintiffs have each alleged injury in fact, traceability to the defendant's conduct, and redressability by the relief requested."[80] The named plaintiffs provided the jurisdictional foundation for the case, and for that purpose, "Each one of these named plaintiffs satisfies the elements of standing by identifying an injury in fact that is traceable to the oil spill and susceptible to redress by an award of monetary damages."[81]

In *Spokeo, Inc. v. Robins,* the Supreme Court further specified that standing under Article III required both a cognizable concrete injury and the "particularization" of that injury to the named plaintiff.[82] The limited inquiry into the Article III standing of the named plaintiff also resonates in the Court's rejection of the "pick-off" strategy of proffering a Rule 68 offer of judgment to the named class representative to abort the class claims. If the role of the class representative is largely to ensure an initial level of constitutionally-mandated adversariality – that is, to occupy the left side of the "v" to ensure a formal controversy – the representative becomes part of

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[78] *See* Petition for Writ of Certiorari, Armstrong v. NFL, 2016 WL 7182246 (Dec. 12, 2016) (No. 16-413).

[79] *See In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 428 (3d Cir. 2016) ("class members need not 'share identical claims'… What matters is that [class representatives] seek recovery under the same legal theories for the same wrongful conduct as the subclasses they represent."); *In re* NFL Players' Concussion Injury Litig.), 307 F.R.D. 351, 372 (E.D. Pa. 2015) ("The factual differences among Retired Players do not defeat typicality. Class members need not 'share identical claims.'").

[80] *In re* Deepwater Horizon, 739 F.3d 790, 802 (5th Cir. La. 2014).

[81] *Id.* at 803.

[82] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized"). *See also* Strubel v. Comenity Bank, 842 F.3d 181, 194 (2d. Cir. 2016) (interpreting *Spokeo* to require particularized manifestation of harm to named plaintiff).

the threshold inquiry, not the fulcrum of the dispute. As the Supreme Court recognized in *Campbell-Ewald Co. v. Gomez,* the class certification process is itself an adversarial proceeding – defendants almost universally opposed class treatment for litigation purposes. Thus, as the Court expressly held, the initial inquiry into the standing of the class representative is the predicate for the class to then take form: "While a class lacks independent status until certified …a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."[83]

The passing reference to the "independent status" of the class once certified may be the closest the Court has come to acknowledging that a certified class in indeed an entity with norms of structure, governance and participation that must be tailored to the practical realities of the reason the class was certified. Where there is evidence or real participation, as in *NFL Concussion,* that participation should be an important component in determining whether "certification is warranted."

V. Conclusion

Five years ago, Judge Scirica of the Third Circuit sounded a caution that *Amchem/Ortiz* had not so much ended the era of aggregate treatment of mass harm cases but instead driven them into obscurity outside the understood contours of Rule 23:

> [C]lass settlement in mass tort cases (especially personal injury claims) remains problematic, leading some practitioners to avoid the class action device …. This is significant, for outside the federal rules governing class actions, there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members.[84]

For Judge Scirica, the class action vehicle had to be harnessed to the demands of mass harm cases:

> The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts

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[83] 136 S.Ct. 663, 672 (2016).
[84] Sullivan v. DB Investments, Inc., 667 F.3d 273, 336 (3d Cir. 2011).

> have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality. Arguably a legal system that permits robust litigation of mass claims should also provide ways to fairly and effectively resolve those claims. Otherwise, mass claims will likely be resolved without independent review and court supervision.[85]

The aggregation of mass harm cases in the federal courts did not end with *Amchem/Ortiz*, it just took more experimental and less transparent forms. For the asbestos cases that prompted Supreme Court review, the specialized treatment of asbestos under Section 524(g) of the Bankruptcy Code provided an organizing mechanism that transferred much of the settlement structure at issue in *Amchem/Ortiz* into a different forum.[86] Regardless of the forum, the same issues of due process in representation, fairness in distribution, and procedural transparency followed asbestos into the bankruptcy setting in ways that echoed the Rule 23 concerns.[87]

Outside asbestos, the most recent data on MDL cases[88] reveals that MDLs have become the situs for the consolidation and resolution of mass harm cases, even as the class action device has been relegated to a background role.

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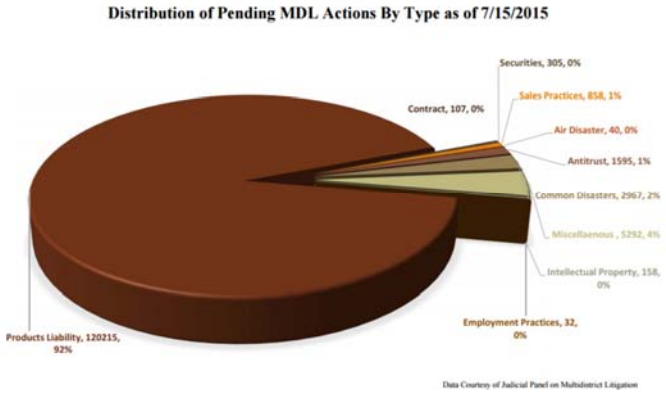
[85] *Id.* at 340.

[86] Bankruptcy Code, 11 U.S.C.A. § 524(g)(2)(B)(i)(I) (current through P.L. 114-524); William Hao, Alessandra Backus & Tom Clinkscales, *Recent Developments in the Case Law of Section 524*, 2016 Norton Annual Survey of Bankruptcy Law 23 (2016) (describing the background and recent developments in case law related to § 524(g), which "codified the treatment of asbestos-related claims" and "provide[d] for the establishment of a trust to which present and future asbestos claims may be 'channeled' and from which such claims may be paid"). *See also* Troy McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation,* 87 NYU L. REV. 960, 963 (2012) (arguing that the presumption of collective resolution gives bankruptcy law an organizational advantage in dealing with mass torts).

[87] *See In re* Combustion Engineering, 391 F.3d 190, 237 n. 49 (3d Cir. 2004) (invoking *Amchem/Ortiz* and due process to strike down a bankruptcy allocation plan: "In the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process.").

[88] The data in the Table were assembled by Professor Issacharoff for presentation to a gathering of MDL judges. The data come from the researchers at the Federal Judicial Center and special thanks are owed to Emery Lee for assistance in this undertaking.



Although there are many kinds of *actions* spread across the MDL courts today, the reality is that the overwhelming concentration of *cases* consolidated are the sorts of mass harms that lend themselves to the participatory form of the class action. What is perhaps even more significant is that the MDL is the only forum that provides the necessary framework for consolidated resolution. By one account, of the roughly 550,000 cases transferred to MDL courts between 1968 and 2015, almost 75 percent are resolved in the MDL court and only a paltry 2.9 percent are ever remanded for trial to the court of origin.[89]

What then happens in the MDLs? Increasingly, judges rely on tools that ensure fairness in aggregation. As with the Third Circuit's invocation of class action practice in the bankruptcy setting, the tools of choice rely heavily on the experience gained in 50 years of class action practice, whether denominated the quasi-class action or simply case management. But some significant number of these MDLs are not simply class actions of old. They provide a mechanism for participation and oversight that legitimates the process and needs formal recognition in doctrine, as begun in *NFL Concussion.* Under this approach, the class action is not so much a means to assign responsibility for *in abstentia* representation of absent parties, as long dominated the thinking about class actions. Rather, the class action becomes

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[89] *Judicial Business 2015: Judicial Panel on Multidistrict Litigation*, ADMIN. OFF. U.S. COURTS (2015), http://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2015 (citing statistics maintained by the clerk's office of the Judicial Panel). *See also* Elizabeth Chamblee Burch, *Judging Mulitdistrict Litigation*, 90 NYU L. Rev. 71, 73 n. 4 (2015) (discussing statistics in MDL between 1968 and 2013).

a structured, organizing process for collective resolution of claims of common origin, with a formal leadership structure, but also with judicial attentiveness to class member voice.

This then leads to the ultimate aim. Many of the new MDL class actions we describe provide great benefits by being able to exchange a bill of peace for the defendant to obtain enhanced value for the claimants collectively.[90] The participatory class action salvages that collective benefit by expanding the domain of Rule 23, and its mature forms of judicial oversight. At the same time, class member participation should lower agency costs by providing multiple forms of scrutiny of class counsel and the effects of any proposed class resolution. The capacity of the class to participate, and evidence of that participation, is a significant development in the real world of practice and one with which doctrine is only now starting to catch up. Through the large scale harm cases such as *VW* and *NFL Concussion,* and increasingly in the smaller harms consolidated in the MDL process, it becomes apparent that the class mechanism has attained a flexibility to accompany its formality, and has captured a characteristic once seen as incongruous: the active participation of class members.

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[90] *See* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement & the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413-18 (2014) ("Defendants in mass litigation want peace, and they are often willing to pay for it."). *See also* Sullivan v. DB Invs., Inc., 667 F.3d 273, 310-11 (3d Cir. 2011) (en banc) ("From a practical standpoint, . . . achieving global peace is a valid, and valuable, incentive to class action settlements. Settlements avoid future litigation with all potential plaintiffs—meritorious or not.")..