A Transactional Model of Adjudication

WILLIAM B. RUBENSTEIN*

INTRODUCTION

The traditional premise of American civil adjudication is that ours is an adversary system: Litigation is a process by which an impartial arbiter resolves a dispute between private parties following an adversarial demonstration of privately developed facts and zealously presented legal arguments.[1] The adversarial model may always have been more ideal than reality.[2] But two developments during the past twenty-five years sapped the model of significant explanatory power and led to the creation of two competing models, each with its own inherent limitations. The structural injunction, primarily utilized in civil rights cases during the 1960s and 1970s, spurred the development of a "public law litigation" model.[3] The central concern posed by this model's deviation from the adversary system is that the judge appears to be acting as legislator, not adjudicator. Settlement, the primary means of resolving private civil litigation in the 1970s and 1980s, gave rise to the second model, "managerial"

---

* Acting Professor, UCLA School of Law. For their helpful comments, conversations, and encouragement, I thank Rick Abel, David Binder, Gary Blasi, Bob Bone, Dan Bussel, Elizabeth Cabraser, Ann Carlson, Peter Eliasberg, Carole Goldberg, Mitu Gulati, Jerry Kang, Ken Klee, Lynn LoPucki, Alan Morrison, Grant Nelson, Eric Talley, Georgene Vairo, and John Wiley. I also thank my colleagues who attended faculty and junior faculty workshops at which I presented earlier versions of this paper; the comments I received were invaluable.

I owe special thanks to three of my colleagues. Steve Bainbridge provided extensive and extremely valuable assistance with many earlier drafts. He also invited me to present this paper to his Spring 2000 Corporate Governance seminar; the students in the seminar offered very useful feedback. Jody Freeman and Steve Yeazell similarly suffered through innumerable earlier variations, with generous support and extraordinary insight. All excesses that remain in the paper are attributable to Jody, all understatements to Steve. All other errors are mine.

UCLA law students Dawn Anaiscourt, Heather E. Stern, Brian England, Laura Godfrey, S.R. Sinai Megibow, and Aaron Moore provided helpful research assistance; I thank UCLA Law librarian Linda O'Connor for enabling and assisting in their efforts. I received generous financial support for this project from the UCLA Academic Senate and the UCLA School of Law Dean's Fund.

1. The classic rendition can be found in Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354-55 (1978). Though Fuller's article was published in the 1970s, it was initially drafted in the 1950s, *see id.* at 353 (Special Editor's Note), and is characteristic of the Legal Process school of jurisprudence of the 1950s. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MEANING AND APPLICATION OF LAW lxvii-xcvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For further materials on the adversarial model, see AMERICAN BAR ASSOCIATION SECTION ON LITIGATION, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (Stephan Landsman ed., 1988) [hereinafter READINGS ON ADVERSARIAL JUSTICE].

2. Indeed, Fuller himself stated that in attempting to define "true" adjudication, he was "of necessity describing something that never fully exists." Fuller, *supra* note 1, at 357. He defended his approach in part, however, by noting that "it is only with the aid of this nonexistent model that we can pass intelligent judgment on the accomplishments of adjudication as it actually is." *Id.*

3. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

judging.[4] The central concern posed by this model's deviation from the adversary system is that the judge appears to be acting primarily as an executive official "managing" cases, not as an impartial arbiter adjudicating disputes.

My premise in this Article is that just as the adversarial model failed to account for what courts were doing in fact, so too do these newer conceptions fail to explain much of what is now happening in complex private litigation. A new model of civil litigation has emerged: a "transactional" model. The large, sprawling class action lawsuits that occupy the current procedural domain have more in common with business deals than they do with traditional adversarial litigation, legislative activity, or executive management. The salient attributes of contemporary class actions are most familiar in transactional terms:

> (1) The courthouse has become the site for large financial transactions. In complex class actions, defendants purchase a commodity—finality. They buy from the plaintiffs' representative the plaintiffs' rights to sue. The financial transaction is a transaction about legal rights, to be sure, but the buying and selling of these legal rights, not their possible adjudication, is the core purpose for coming together in an adjudicatory framework.
>
> (2) The attorneys' activities are primarily business-oriented, not legal, in nature. They negotiate and structure large financial arrangements. Traditional litigation work—client meetings, legal research, discovery, motion practice, brief drafting, oral argument, trial—is of secondary importance. The most conventional aspect of transactional lawyers' efforts comes when they must secure judicial approval of the already finalized business deal. Complex class action attorneys are as likely to read *Business Week* and worry about pay-out schedules as they are likely to read *U.S. Law Week* and stay up nights sweating over briefing schedules.
>
> (3) The familiar signposts of adjudication—pleading, discovery, and

4. Judith Resnik coined the phrase "managerial judges" and her work best describes this paradigm; Resnik, however, describes it to critique it. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*].

The "managerial" model emerged from the efforts of judges to control their dockets and from the judges' increasing interactions with one another about case management. The Manual on Complex Litigation, now in its third edition and produced by the Federal Judicial Center (FJC), reflects the managerial approach. For a good history, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) [hereinafter Resnik, *Trial as Error*]. In addition to the institutional work of the FJC, individual judges have preached the virtues of case management for decades. *See e.g.*, Alvin Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Court*, 4 JUST. SYS. J. 135 (1978); William Schwarzer et al., *A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Court*, 73 TEX. L. REV. 1529 (1995); S. Arthur Spiegel, *Settling Class Actions*, 62 U. CIN. L. REV. 1565 (1994); Hubert Will, *Civil Case—Filing to Disposition, in* SEMINARS FOR NEWLY APPOINTED DISTRICT JUDGES 15 (1971).

trial—are of minor importance. Pleadings often do not initiate adjudicatory activity, but rather succeed the finalization of the transaction, and rarely do they frame the nature of the dispute as much as they reflect the nature of the deal. Huge transactions take place based on discovery from other cases, or no discovery at all. Trial is rarely contemplated. If familiar adjudicatory activity occurs, it tends to arise when objectors make an appearance to challenge the deal itself (at a fairness hearing), and even then, the objectors are as likely to be either disgruntled trial attorneys or excluded dealmakers as they are to be real parties raising independent legal concerns.

(4) At best, the judicial function in these transactions is one of presiding at a fairness hearing to bless the transaction. Quite often, however, the judiciary is a driving force behind, and a very interested party in, the transaction, even long before it is a formally filed legal dispute. The judicial branch has a vested interest in transactions that create finality because they are thereby absolved of adjudicatory work. Judges may act more as self-interested deal-brokers than as impartial dispute resolvers.

(5) The desire for nationwide deals and global peace has displaced familiar sovereign boundaries on the judicial capacity and function. Absent plaintiffs can be bound to legal decisions in jurisdictions with which they have no physical contacts.[5] Irresistible financial settlements evade the need to resolve tricky choice of law problems. The Supreme Court has ordered courts to enforce transacted judgments from other jurisdictions, even if the dealmaking judicial system would have had no jurisdiction to litigate the transacted case.[6] The *Manual on Complex Litigation, Third*, urges judges to coordinate with one another not only within a state or the federal system, but also across states and between states and the federal system.[7]

Twenty-five years ago, Professor Chayes stated that if a public law case is "recognizable as a lawsuit [it is] only because it takes place in a courtroom before an official called a judge."[8] Transacted cases barely even share those attributes, however, as what happens in the courtroom before an official called a judge plays such a relatively minor part in the enormous transactional framework. Transacted proceedings are more likely to be recognized as lawsuits because they bear some similarity to bankruptcy proceedings, which are self-

5. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

6. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996).

7. *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.123 at 13-14 (1995) [hereinafter MANUAL FOR COMPLEX LITIGATION, THIRD].

8. Chayes, *supra* note 3, at 1302.

consciously dealmaking in nature,[9] or because they have some roots in historic equity practice.

The explanatory power of the transactional model becomes especially apparent after a consideration of how poorly current adjudicatory doctrine and theory account for prevailing class action practice. This Article will demonstrate this point through an in-depth analysis of a central contradiction in current class action jurisprudence—the disparate treatment of securities and mass tort cases. Securities cases are considered easy cases for class certification (even after Congress's enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA)),[10] while mass tort cases are generally deemed inappropriate for class certification. Yet, when probed, the commonly accepted explanations for the disparate certification presumptions do not fare well. Something else must explain what courts are doing in these cases, and that something, I propose, is the transactional model.

While the transactional model helps make sense of courts' handling of securities and mass tort cases, this application of the model is only one of its benefits. The model also helps explain other judicial decisions and attorney practices. I focus on this particular contradiction in class action practice, however, because it facilitates a full review of how these cases really work and of how courts explain their handling of such cases. A thorough analysis of these two key areas of complex class action practice helps expose the weaknesses in current practice and thus sets the stage well for the introduction of an alternative model.

My argument proceeds as follows. Part I describes the courts' differing reactions to securities and mass tort cases. It focuses on three recent Supreme Court decisions: *Amchem*,[11] *Ortiz*,[12] and *Matsushita*.[13] Parts II, III, and IV canvass the three common doctrinal explanations for the distinct approaches to securities and tort class actions. Part II scrutinizes the contention that "common" issues are more likely to predominate in mass tort cases than in securities cases. Part III examines the argument that certification of securities classes is appropriate because such classes consist of small claims, while certification of mass tort cases is inappropriate because these classes consist of large claims. Part IV explores ideas about the adequacy of representation in the two sets of cases. These Parts establish that both courts' and commentators' attitudes about securities and tort class actions are not supported by compelling doctrinal

---

9. *Cf.* THURMOND ARNOLD, THE FOLKLORE OF CAPITALISM 230 (1937) ("[Bankruptcy] is a municipal election, an historical pageant, an anti-vice crusade, a graduate school seminar, a judicial proceeding and a series of horse trades all rolled into one.").

10. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1 to 78j-1 (2000).

11. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) [hereinafter *Amchem III*]. The district court's primary decision in *Amchem*, Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994) is hereinafter referenced as *Amchem I*. The Third Circuit decision, Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), is hereinafter referenced as *Amchem II*.

12. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

13. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

distinctions. Part V makes the same claim about available conceptual explanations for the differing treatment of securities and tort class actions. This Part examines the familiar theoretical models of American adjudication—the traditional adversarial model, the public law litigation model, and the managerial model—and shows that none of them adequately describes or predicts what is really happening in class actions.

Part VI makes the case for conceptualizing large, private law class action lawsuits as commercial transactions. This Part describes in greater detail the attributes of such a model and demonstrates how this approach provides a more satisfactory explanation of class action practice. Part VI also presents some initial thoughts about the normative concerns raised by the transactional model. Are we really comfortable with the idea that our courthouses have become sites for large-scale business transactions that commodify res judicata? If we are uneasy about this development, what exactly is the nature of that uneasiness? And what alternatives really exist?

This initial sketch does not purport to provide final answers to these larger questions. The goal of this Article is simply to reorient our thinking toward the reality of class action litigation, a reality that our current doctrinal discussions and theoretical conceptions tend to mask. Conceptualizing class actions as a market for res judicata is a crude portrayal of our beloved adjudicatory system. But are our ideals ultimately better served by averting our gaze or by acknowledging what is happening?

I. THE DISTINCT HANDLING OF MASS TORT AND SECURITIES CLASS ACTIONS

Courts instinctively certify securities class actions while, with similar reflexiveness, they reject certification in mass tort cases. These presumptions provide a good opportunity to demonstrate the failure of current class action doctrine and theory. This Part begins by establishing the existence of these presumptions.

One empirical study of class actions found that "[a] (b)(3) class was certified in 94% to 100% of the securities cases . . . ."[14] The study's authors thus concluded that securities certification was an "easy application" of Rule 23.[15] By contrast, a leading mass tort treatise simply states: "Only a handful of class actions have been established and operated in the mass tort arena, and among these, a specific factual situation often explains the use. A much greater number

14. Thomas W. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 89 (1996). The study found that the certification rate for nonsecurities actions was sixty-four percent to ninety-three percent. *See id.* These nonsecurities certification numbers, however, should not be confused with the certification rate for mass tort cases. *See infra* notes 16, 79-81.

15. Willging et al., *supra* note 14, at 89; *see also* Jared L. Kopel, *Procedural Reforms*, *in* SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES 118 (Edward J. Yodowitz et al. eds., 1994) ("Class certification in securities class action lawsuits has long been regarded as a routine, virtually automatic procedure against which opposition was invariably futile.").

of times, courts have denied the use of the class action."[16] Three recent Supreme Court decisions demonstrate the judiciary's attitudes toward the two sets of cases, while simultaneously confirming several common explanations for the disparate treatment. In two of these cases—*Amchem*[17] and *Ortiz*[18]—the Court refused to permit federal courts to certify nationwide class actions so as to resolve mass tort claims arising out of the asbestos crisis. In the third, *Matsushita*,[19] the Court approved a state court settlement of a series of nationwide securities class actions. While the issues decided by the Court in this securities case did not go to certification directly, the Court's opinion can be read to reflect the judiciary's generally more tolerant attitude toward securities certifications.

A. THE PRESUMPTION AGAINST MASS TORT CERTIFICATION

In the *Amchem* case, a federal district court had certified a nationwide settlement class action in an attempt to resolve all occupation-related asbestos claims that had not yet been filed in court.[20] Despite in-depth fact-finding by the district court supporting Rule 23(b)(3) class certification, both the Third Circuit[21] and the Supreme Court found certification inappropriate. Writing for the Court, Justice Ginsburg identified two central shortcomings in the district court's certification analysis.[22] First, the Court held that Rule 23(b)(3)'s requirement that "[common] questions of law or fact ... predominate over any questions affecting only individual members" precluded certification.[23] Although acknowledging an "overarching dispute about the health consequences of asbestos exposure,"[24] the Court approvingly quoted the Third Circuit's analysis of why noncommon issues were more significant:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma .... Each has a different history of cigarette smoking, a factor

16. PAUL D. RHEINGOLD, MASS TORT LITIGATION 3:1 (1996). It is true that mass tort class actions are more generally accepted now than they were twenty years ago. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356-58 (1995) (describing growing acceptance of mass tort class actions in lower courts). Yet, as discussed below, *see infra* text accompanying notes 79-81, acceptance remains grudging and far from universal.

17. *Amchem III*, 521 U.S. 591 (1997).

18. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

19. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

20. *See Amchem I*, 157 F.R.D. at 314.

21. *See Amchem II*, 83 F.3d at 624.

22. The Court was also concerned with the notice provided to class members, particularly the notice problems presented by the presence of many unknown class members. Given the alternative grounds for affirming the Third Circuit's denial of certification, however, the Court declined to rule on the notice issue. *See Amchem III*, 521 U.S. at 628.

23. *Amchem III*, 521 U.S. at 621-622 (quoting Federal Rule of Civil Procedure 23(b)(3)).

24. *Amchem III*, 521 U.S. at 623-24.

> that complicates the causation inquiry . . . . The exposure-only plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.[25]

While disparaging the argument for commonality among these tort claimants, the Court was careful to note that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[26] But with regard to the asbestos personal injury actions, the Court concluded, "certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design."[27]

The Court's second problem with the *Amchem* certification concerned the adequacy of the class representatives. The parties sought certification of a singular class, although, as is evident from the Third Circuit's objections excerpted above, significant distinctions existed among class members. The Court was particularly concerned with the difference between those class members who already had manifest asbestos-related illness and those who had been exposed but were not yet ill. These two groups could not be adequately represented by a single set of plaintiffs because, "for the currently injured, the critical goal is generous immediate payments . . . [while] the interest of exposure-only plaintiffs [is] in ensuring an ample, inflation-protected fund for the future."[28]

Thus, the Court concluded that:

> The settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.[29]

Amchem was a "settlement class action," a case which had been resolved before the complaint was filed and before the court was asked to certify the class. The Supreme Court had granted review "to decide the role settlement may play . . . in determining the propriety of class certification."[30] But because that goal was quickly and easily accomplished,[31] the Court's opinion in *Amchem* cut

---

25. *Id.* at 623-24 (quoting *Amchem II*, 83 F.3d at 626).
26. *Id.*
27. *Id.*
28. *Id.* at 626.
29. *Id.*
30. *Id.* at 616-17.
31. The Justices ruled that the settlement is relevant at certification, but that it cannot displace the doctrinal certification requirements found in Rules 23(a) and 23(b). *See id.* at 618-20.

far deeper. The holdings as to predominance and adequacy underscored a theoretical limitation on class certification in mass tort cases, regardless of whether certification was proposed in the context of settlement. Noting that the class action rule "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,"[32] the Court appeared to answer this issue in the negative not just for this mass tort settlement class, but for most, if not all, mass tort cases.

If any doubt existed, at least with respect to the asbestos cases, the Court's decision in the *Ortiz* case two years later solidified its resistance to mass tort certification. *Ortiz* was perhaps an even easier case for de-certification than *Amchem*, but for that reason, the scope of the Court's opinion is all the more astonishing. *Ortiz* involved a complicated set of relationships between a company that had once produced asbestos, two of its insurance carriers from the 1950s, and various classes of present and future tort claimants.[33] In 1995, a federal district court in Texas certified a nationwide class action to settle all unfiled asbestos claims against the Fibreboard Corporation.[34] Unlike the *Amchem* settlement, however, the *Ortiz* settlement was certified as a limited-fund class action under the provisions of Rule 23(b)(1)(B). As such, the certifying court did not have to demonstrate that common issues "predominated," a requirement that pertains only to (b)(3) class actions, and thus the court appeared to sidestep the primary pitfall of the *Amchem* case.[35]

Whereas in the (b)(3) class action, the predominance requirement ensures the cohesive nature of the group, in the (b)(1)(B) class action, the "limited fund" is the necessary conceptual glue; class treatment guarantees that the limited available funds are distributed on a pro rata basis, rather than in a race to the courthouse where the early victors take all.[36] In *Ortiz*, the district court and the Fifth Circuit had both held that individual litigation created a serious risk of depleting the resources available to compensate the tort victims, and further, that the exigencies of a piece of related litigation created an additional risk that

---

32. *Id.* at 622.

33. The *Ortiz* settlement essentially recognized three distinct groups: (1) a class consisting of three types of potential future claimants, *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 827 n.5 (1999), 186,000 in all, whose claims were being released by the class action settlement; (2) a group of 45,000 claimants with filed claims who were each individually represented by the class counsel separate from the class settlement (the inventory plaintiffs); and (3) a group of approximately 53,000 other plaintiffs in filed but unsettled cases, *see id.* at 852.

34. *See* Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 523-24 (E.D. Tex.), *aff'd*, *In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

35. Indeed, when the Supreme Court ordered the Fifth Circuit to reconsider its approval of the *Ortiz* settlement in light of the Court's subsequent ruling in *Amchem III*, the Fifth Circuit disposed of *Amchem III*'s relevance in a few paragraphs. *See In re* Asbestos Litig., 134 F.3d 668, 669-70 (5th Cir. 1998) [hereinafter *Asbestos II*].

36. As stated by Justice Souter: "The concept driving this type of suit was insufficiency, which alone justified the limit on an early feast to avoid a later famine." *Ortiz*, 527 U.S. at 838.

available insurance proceeds might be lost absent a prompt global settlement.[37] The Fifth Circuit went so far as to assert that the presence of a limited fund was "incontestable."[38]

The Supreme Court reversed. Justice Souter, writing for the Court, identified three principles that traditionally supported limited-fund certification: (1) the fund had to have a "definitely ascertained limit"; (2) all of the fund had to be put into the litigation; and (3) the judgment had to distribute the full amount of the fund on a pro rata basis among all available claimants.[39] The Court found all three characteristics lacking in this case: (1) the limitations on the available assets were established by the parties and did not reflect actual limitations existing outside the litigative arena; (2) not all of Fibreboard's available funds would be put into the settlement, as the company retained all but $500,000 of its several hundred million dollar equity; and (3) intra-class inequity existed because not all of Fibreboard's asbestos creditors would be required to claim through the fund, only those tort victims without already-pending lawsuits.[40]

On one hand, the decision appears modest in tone and conclusion. First, the Court stopped short of announcing that mass tort cases could never be fit into the (b)(1)(B) form.[41] Second, the Court explicitly refused to provide guidance with respect to several of the principles it had teased out of Rule 23(b)(1)(B).[42] Third, the Court identified a related critical concern of the (b)(1)(B) class case—how much notice should be given to claimants—but again expressed "no

---

37. *Ahearn*, 162 F.R.D. at 526-27, *aff'd*, *In re* Asbestos Litig., 90 F.3d at 982-86. The related litigation was between Fibreboard and the two insurance companies concerning their coverage obligations. A California court had ruled in favor of Fibreboard in the coverage litigation. However, the insurers had appealed and the California appellate court was poised to review the decision. The possibility that the appellate court might reverse created a risk that the classmembers might lose access to the insurance monies, spurring them to settle their underlying claims against Fibreboard so long as the insurance companies contributed to the settlement fund. Simultaneously, the insurance companies—facing the possibility that they might lose the appeal—also had an incentive to settle at a value of the lower court award discounted by the risk of reversal. *See Ortiz*, 527 U.S. at 869 (Breyer, J., dissenting).

38. *Asbestos II*, 134 F.3d at 670.

39. *See Ortiz*, 527 U.S. at 841.

40. *See id.* at 848-62.

41. *See, e.g.*, *id.* at 862 ("While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale . . . ."); *id.* ("Assuming arguendo that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants . . . .").

42. Justice Souter identified, then declined the opportunity to settle, a split in the circuits about what standard courts should employ in evaluating whether a fund is limited in mass tort cases. *See id.* at 848 n.26 (comparing *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982) (stating that "class proponents must demonstrate that allowing the adjudication of individual claims will inescapably compromise the claims of absent class members"), with *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (requiring only a "substantial probability—that is less than a preponderance but more than a mere possibility— that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets")). The Court had denied petitions for certiorari in both of these cases.

Justice Souter also refused to decide whether a defendant had to give up all, or just most, of its equity to gain limited-fund certification. *See Ortiz*, 527 U.S. at 860 n.34 ("We need not decide here how close to insolvency a limited fund defendant must be as a condition of class certification.").

opinion on the need for notice or the sufficiency of the effort to give it in this case."[43]

Notwithstanding these avowals of restraint, the Court's opinion is strikingly broad in another respect, namely in its repeated, although superfluous, denigrations of the adequacy of class counsel's representation. The Court's ruling that the parties had not demonstrated the limited nature of the fund at issue was sufficient to support reversal. Nothing more was necessary. But as in *Amchem*, the Court again coupled its concerns about whether the case fit within a 23(b) category with repeatedly stated apprehension about the adequacy of the class's representation. Two of the Court's statements are worthy of quotation. First, in discussing whether the fund at issue was truly limited, the Court disparaged the lower courts' acceptance of the parties' agreement on this point; in so doing, the Court stated:

> One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees. In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.[44]

In response to Justice Breyer's dissent, the Court then reiterated the point. Justice Breyer had described the peculiar exigent circumstances that supported both certification and settlement here—namely, the fact that a related case on appeal elsewhere created unique but time-bound incentives for all parties to settle here.[45] Rejecting this argument, the majority stated:

> But this is to say that when the clock is about to strike midnight, a court considering class certification may lower the structural requirements of Rule 23(a) as declared in *Amchem*, and the parallel equity requirements necessary to justify mandatory class treatment on a limited fund theory . . . . We believe that if an allowance for exigency can make a substantial difference in the level of Rule 23 scrutiny, the economic temptations at work on counsel in class

43. *See Ortiz*, 527 U.S. at 841 n.19. This is an important issue because Rule 23(c)(2) *requires* notice to be given to class members only in (b)(3) class actions, and such actions can only bind those persons to whom notice was directed. *See* FED. R. CIV. P. 23(c). As class members cannot opt out of Rule 23(b)(1)(B) class actions, the only purpose of presettlement notice is to enable them to object to the terms of the settlement. How much notice the Court will require for this purpose remains an important, and unanswered, question.

44. *Ortiz*, 527 U.S. at 852 & n.30 (citations omitted).

45. *See supra* note 37 and accompanying text.

> actions will guarantee enough exigencies to take the law back before *Amchem* and unsettle the line between mandatory class actions under subdivision (b)(1)(B) and opt-out actions under subdivision (b)(3).[46]

As I will discuss below, these are astonishingly broad statements that, were they meant to apply across the board, would cast serious doubt on almost every class action settlement (which is almost every class action case).[47]

In both asbestos cases, then, the Court undertook an active searching review of district court decisions certifying mass tort cases. In each instance, the Court rather casually cast aside findings of fact made by the district judges, without even referencing the standards of review that typically constrain appellate oversight of trial court factual determinations. In so doing, the Court cast grave doubt upon the class representative structure, carefully reviewing the relationship between plaintiffs' counsel, the representative plaintiffs, their claims, and the claims of the rest of the class members. Cumulatively, the Court rejected two distinct theories about why the asbestos cases were appropriate for class treatment. The spirit of the Court's decisions evidenced a general dislike for mass tort class actions and a sense that the "problem" of asbestos specifically, if not mass torts generally, ought to be resolved legislatively. In adopting this attitude, the Court reflected a pervasive feeling among much of the judiciary.[48]

B. THE PRESUMPTION FOR SECURITIES CERTIFICATION

It is striking to read the Supreme Court's 1997 decision in a securities class action, the *Matsushita* case,[49] side by side with its decisions in the asbestos cases. Although the *Matsushita* case is not directly about class certification, the Court indirectly addressed the issue in a footnote that provides some indication of courts' generally lax approach to certification in the securities context.

To appreciate the move that the Court made in the footnote, and the attitude that is thereby revealed, requires a bit of background on the complicated history of the *Matsushita* decision. In September 1990, the MCA Corporation (perhaps best known as the parent of Universal Studios) announced that it was in buyout negotiations with the Japanese electrical giant, Matsushita (perhaps best known as Panasonic).[50] The announcement triggered the filing of a series of class action lawsuits, primarily in Delaware state court.[51] Two months later, Matsushita made a formal tender offer to MCA shareholders. The terms of the tender

---

46. *Ortiz*, 527 U.S. at 864.

47. *See* Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L. REV. 497, 501 (1987) (finding that of forty-six certified class actions in the Northern District of California, thirty-six settled and only ten were litigated).

48. *See supra* text accompanying notes 14-16.

49. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

50. *See, e.g.*, Laura Landro & Richard Turner, *Media: Matsushita Explores Purchase of MCA*, WALL ST. J., Sept. 25, 1990, at B1.

51. *See* Amended Stockholders' Class Action Complaint, *In re* MCA Inc. Shareholders Litig., Civ. Action No. 11740 (filed Sept. 26, 1990). *See generally* Richard Turner, *In Play: Missed Opportunities,*

offer appeared to favor MCA's long-time chiefs Lew Wasserman and Sidney Sheinberg.[52] This touched off a new set of class action lawsuits filed in federal court in Los Angeles. The federal cases were based on federal securities claims that could only be brought in federal court.

The filing of the federal cases created an increased incentive for a settlement of the Delaware actions.[53] MCA's attorneys and the Delaware plaintiffs' attorneys proposed such a settlement to the Delaware chancellor within a month after the conclusion of the tender offer. The Delaware chancellor rejected the initial settlement, ruling that the federal claims, which the plaintiffs purported to release but which had only been filed weeks earlier, were still of unknown value.[54] Ultimately, the federal district court ruled against the plaintiffs on the federal claims. While an appeal was pending in the Ninth Circuit, the Delaware parties presented a second global settlement to the chancellor. This time the chancellor accepted the settlement and entered a class action judgment settling all claims arising out of the Matsushita-MCA deal.[55] The global settlement therefore released both the exclusively federal and the state law claims.

To produce the global settlement, the Delaware chancellor had to do precisely what the federal district courts had done in the asbestos cases: He had to certify the Delaware case as a class action. As the Delaware class action rule tracks the

---

Old-Fashioned Style Push MCA to Merge, It Has Global Aspirations But Was Slow to Change as Its Rivals Expanded, WALL ST. J., Sept. 26, 1990, at A1.

52. The Matsushita tender offer amounted to $71 per share for MCA common stock. Wasserman did not tender his shares at $71—for which he would have recouped $350 million—but rather made a separate arrangement. By that arrangement, monies totaling 106% of the tender price were placed in a holding company that pays him 8.75% annually, redeemable upon his death. Through this arrangement Wasserman—whose stock basis was three cents per share—also escaped tax liability. Sheinberg tendered his 1.1 million shares at $71 per share, but two days after the tender offer was completed, "Sheinberg received an additional $21 million in cash, ostensibly in exchange for unexercised MCA stock options." Epstein v. MCA, Inc., 50 F.3d 644, 646-47 (9th Cir. 1995).

53. The Delaware plaintiffs' attorneys had more incentive to settle because if the federal cases settled first, the Delaware attorneys would receive no fees for their efforts. The defendants had more incentive to settle because they now faced litigation in two fora under two sets of legal requirements. Moreover, with competing class actions, the defendants' attorneys could play the plaintiffs' attorneys off against one another, creating a reverse auction for the cheapest settlement. For a good summary of these dynamics, see Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 472-75 (2000). On "reverse auctions," see generally 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 (1991).

54. *See In re* MCA, Inc. Shareholders Litig., 598 A.2d 687, 695 (Del. Ch. 1991). The chancellor's rejection of the initial *Matsushita* settlement was at once an almost certainly correct decision and also an extraordinarily surprising one. A study of the Chancery's approach to securities settlements during the same era found that "the Court of Chancery approved 96 of 98 proposed class action and derivative settlements, with 95% being approved as submitted." CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 1109 (Lewis D. Solomon et al. eds., 4th ed. 1998) (citing Carolyn Berger & Darla Pomeroy, *Settlement Fever*, 2 BUS. L. TODAY, Sept./Oct. 1992, at 7). The chancellor's rejection of the first *Matsushita* settlement was one of the two settlement rejections noted in the study.

55. *See In re* MCA, Inc. Shareholders Litig., Fed. Sec. L. Rep. (CCH) ¶ 97,749 (Del. Ch. Feb. 16, 1993).

federal rule,[56] the chancellor had to find the presence of the 23(a) requirements and fit the case into one of the 23(b) categories. The case appears to have fit effortlessly into the 23(b)(3) category. The chancellor assumed that it did,[57] and in all of the appeals, collateral attacks, and scholarship that the case has engendered, no one appears to have questioned this finding.

Suspicion about the global settlement in *Matsushita* centered on two other issues: first, whether the state court could release claims of exclusive federal jurisdiction, and second, whether the plaintiffs were adequately represented in the Delaware action. These suspicions were aired in the appeal of the federal cases, where MCA argued for dismissal on the grounds that the global Delaware class action settlement should be accorded full faith and credit. The Ninth Circuit initially rejected MCA's defense, holding that the federal courts did not have to give full faith and credit to the Delaware settlement because the Delaware court could not release the exclusive federal claims.[58]

The Supreme Court reversed.[59] The heart of Justice Thomas's decision for six members of the Court centered on the federalism aspects of the full faith and credit analysis. The majority concluded that the Ninth Circuit had analyzed the federalism question incorrectly and that the correct mode of analysis would have established the legitimacy of the state court release.[60] The Court thus reversed the appellate court on the federalism issue.[61]

But Justice Ginsburg, writing for herself and for Justices Stevens and Souter, raised the second suspicion with the Delaware judgment—that it might not be entitled to full faith and credit because serious questions existed about the adequacy of representation afforded by plaintiffs' counsel. Justice Ginsburg, the former civil procedure professor, cited hornbook class action cases for the proposition that the Due Process Clause prohibits a court from binding nonparties to a judgment if their interests were not adequately represented in that action.[62] While not purporting to decide whether the Delaware representation

---

56. *See* DEL. CH. CT. R. 23.

57. In fact, the chancellor had initially certified the Delaware action as a (b)(2) class action, *see In re* MCA, Inc. Shareholders Litig., 598 A.2d at 692-93, though he rejected the terms of the settlement at that point. It was a (b)(2) class action because the primary relief the plaintiffs sought was an injunction barring the tender offer. When the chancellor later accepted the second settlement, the tender offer had long since been completed. The chancellor referred throughout his opinion to the case now being an "opt out" class action, though he never discussed how or why it fit within the requirements of Rule 23(b)(3), much less how the case had magically transformed itself from a (b)(2) class action into a (b)(3) class action. *See In re* MCA, Inc. Shareholders Litig., Fed. Sec. L. Rep. (CCH) ¶ 97,749 (Del. Ch. Feb. 16, 1993).

58. *See* Epstein v. MCA, Inc., 50 F.3d 644, 661-62 (9th Cir. 1995).

59. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 387 (1996).

60. *See id.* at 373-87.

61. All nine Justices agreed on that point, though two of them would have remanded to the Ninth Circuit rather than reversing outright. *See id.* at 387 (Stevens, J., concurring in part and dissenting in part); *id.* at 388 (Ginsburg, J., concurring in part and dissenting in part).

62. *See id.* at 395 (Ginsburg, J., concurring in part and dissenting in part) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985), and citing Hansberry v. Lee, 311 U.S. 32, 42-43 (1940)).

was in fact adequate, Justice Ginsburg nonetheless noted (from the parties' briefs) that:

> The order approving the class for settlement purposes . . . contains no discussion of the adequacy of the representatives, and the order and final judgment approving the settlement contains only boilerplate language referring to the adequacy of representation. The Delaware Supreme Court approved the Court of Chancery's judgment in a one paragraph order.[63]

Justice Ginsburg's opinion thus evidenced a distrust of the Delaware certification that is reminiscent of the Court's distrust of certification in the asbestos cases.

However, here Justices Ginsburg, Souter, and Stevens stood alone. The Court's majority appeared unconcerned about the Delaware court's certification. Justice Thomas stated:

> [R]espondents contend that the settlement proceedings did not satisfy due process because the class was inadequately represented. *Respondents make this claim in spite of the Chancery Court's express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class.* We need not address the due process claim, however, because it is outside the scope of the question presented in this Court. While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below.[64]

The italicized sentence can be read in a variety of ways, but each reflects a dismissive attitude toward concerns about class certification in the securities context. One way of reading the footnote is to see it as embracing the wisdom of the Delaware certification decision itself because that decision was an express ruling and had followed argument on the issue. However, as noted in Justice Ginsburg's opinion quoted above, the Chancery Court's "express ruling" amounted to a few cursory paragraphs about the challenges to adequacy coupled with boilerplate fitting the case into one of the 23(b) categories. In the asbestos cases, the federal district court also made express rulings that followed argument on the issue. The express rulings in those cases covered dozens of pages of the federal reporters and followed significant investigation and evidentiary hearing. If Justice Thomas's footnote is read to say that what the court did here was sufficient to determine adequacy of representation for a securities case, it strongly demonstrates the distinct attitude the Court has toward securities certification, as opposed to mass tort certification.

63. *Id.* at 398 n.8 (opinion of Ginsburg, J.) (citations omitted).
64. *Id.* at 379 n.5 (emphasis added) (citations omitted).

Perhaps the italicized sentence in Justice Thomas's footnote means something less grand, though. It is possible that Justice Thomas is merely saying that because the Delaware court had litigated and decided the issue, it was not open to collateral attack.[65] This reading lends somewhat less weight to my argument that *Matsushita* illustrates the Court's approval of easy certification in securities cases. Under this reading, the Court is embracing easy issue preclusion, not easy certification. Yet even this finality reading is demonstrative of a relatively lax attitude toward certification. Why? Because the basic rule of class actions is that adequacy is open to collateral attack, if not completely so, at the very least in certain circumstances.[66] To insist on the finality of adequacy is thus to insist, at least somewhat, on the presence of adequacy itself. To do so in this case is to do so on a flimsy record, especially as compared to the records developed preceding certification in the mass tort cases.

In fact, the Court's later decision in *Ortiz* helps illuminate its casual attitude toward certification in the *Matsushita* securities case. The *Ortiz* Court had reiterated the *Amchem* Court's statement that a fairness hearing should not "swallow the preceding protective requirements of Rule 23."[67] But this is precisely what happened in *Matsushita*, where the class was certified and settled in one proceeding. The *Ortiz* Court was dubious about a settlement that emerged from a factual setting rendered precarious by an impending California state court decision. Eerily, this is again precisely what happened in *Matsushita*; the second settlement was approved by the chancellor in the shadow of the Ninth Circuit's forthcoming review of the dismissal of the federal case. Finally, the *Ortiz* Court's distrust of the plaintiffs' attorneys, given the huge fees they were to collect, would apply as well to the plaintiffs' attorneys in *Matsushita*. The language the Court employed in *Ortiz*, doubting the fairness of *any* class action settlement with the potential for large attorney fees, was decidedly

---

65. This is the reading that the Ninth Circuit ultimately applied on remand. *See* Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999).

66. *See Hansberry*, 311 U.S. at 40, 42; Gonzalez v. Cassidy, 474 F.2d 67 (5th Cir. 1973); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. a (noting that in certain circumstances, a "represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings"). While the general rule is that adequacy should be open to some form of collateral review in some circumstances, the law is far from clear on what circumstances and what level of review. *See* Wasserman, *supra* note 53, at 495-98 (collecting cases). One side of the debate argues that "as long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally." Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 264. The other contends that "the general rule [is] that absent class members are entitled to have a second court rule on whether they were adequately represented in the class suit." Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1170 (1996). *See generally* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81 (1998).

67. Ortiz v. Fibreboard Corp., 527 U.S. 815, 863-64 (1999); *see also id.* ("[T]he settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b).").

generic, eschewing reliance on the *type* of class case at issue. If a class action settlement is dubious when "an already enormous fee [is] within counsel's grasp,"[68] it ought to be equally dubious whether the fee is for a securities settlement or for a tort settlement. The fee in the *Ortiz* case was far larger than the fee in the *Matsushita* case. But the *Matsushita* fee nonetheless neared one million dollars, all of which would be lost if the federal case crossed the finish line first. Surely this is a large and precarious enough stake to raise similar concerns about attorney incentives.

That a majority of the Justices would be uninterested in scrutinizing class certification in this securities class action is not a surprising ruling. It is consistent with how lower courts generally have approached securities certifications since 1966.[69] What explains the divergent approaches to these two types of class actions? The next four Parts explore the logic of the common doctrinal and conceptual explanations. Together these Parts demonstrate the failure of the available procedural models to account for current class action practice.

II. WHY "PREDOMINANCE" DOCTRINE DOES NOT EXPLAIN THE DISTINCTION

The primary explanation for the disparate treatment of securities and mass tort certifications focuses on the nature of the underlying substantive issues. All forms of representative litigation are premised upon the idea that class members share significant legal claims or factual issues, but in a category (b)(3) class action these common issues must *predominate* over the non-common, or individual, issues. In the words of the *Amchem* Court, the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[70] The predominance/nonpredominance distinction provides a neat explanation for the securities certification/mass tort noncertification presumptions. The Court has been clear that individual issues, particularly those of causation, predominate in mass tort cases and thus preclude certification. Simultaneously, it has opined that such individual causation questions do not preclude certification of securities classes.[71]

The problem is, however, that the distinction rests upon something of a hedge. As this Part demonstrates, securities class actions, particularly securities fraud cases, raise individual issues that are not dramatically different from those at issue in mass tort cases. Fraud, after all, is a tort, and thus securities fraud cases are, in one sense, simply a subset of mass tort cases. Securities classes are certified notwithstanding individual questions of causation and damage only because the Supreme Court has embraced concepts such as the "fraud-on-the-market" theory to relieve securities plaintiffs from having to demonstrate

68. *Id.* at 853 n.30.

69. *See supra* note 15.

70. *Amchem III*, 521 U.S. 591, 622 (1997).

71. *See, e.g., id.* at 23-24 (noting, in denying certification of mass tort class, that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud").

individual reliance (causation) in most cases.[72] Conversely, mass tort cases are deemed noncertifiable, although, like securities cases, they often turn on the crucial common issue of the defendant's behavior. This insight challenges the common presumption that "predominance" explains the distinct manner with which courts approach these two types of cases. Something else motivates courts to excuse predominance in securities cases while insisting upon it in personal injury cases.

A. INDIVIDUAL CAUSATION: THE WEAKNESS OF THE MASS TORT CLASS

To appreciate the inconsistency in the Court's approach to Rule 23(b)(3)'s predominance requirement, one must start with its rulings concerning the absence of predominance in the mass tort cases. The heart of the point has been rehearsed above. In certifying the settlement class, the trial court in *Amchem* had found the predominant issue to be the fairness of the settlement to each of the class members.[73] Both the Third Circuit and Supreme Court rejected this determination, noting that the common legal and factual issues justifying certification had to *precede* the settlement, not be occasioned by it. This was the question upon which certiorari was taken, the question addressed by the parties in their briefs, and the one to which the Court provided a simple and straightforward answer.[74]

But neither the Third Circuit nor the Supreme Court stopped there. Both went on to assess the common and non-common issues in the underlying lawsuit (separate from the settlement itself), and to rule that the common issues did not predominate. The Third Circuit acknowledged the presence of some common issues, writing:

> All of the putative class members assert claims based on exposure to the asbestos sold by the . . . defendants. The capacity of asbestos fibers to cause physical injury is surely a common question, though that issue was settled long ago . . . . Although not identified by the district court, there may be several other common questions, such as whether the defendants had knowledge of the hazards of asbestos, whether the defendants adequately tested their asbestos products, and whether the warnings accompanying their products were adequate.[75]

---

72. *See* Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988); *see also* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152-53 (1972) (holding that plaintiffs are not required to prove reliance in 10b-5 action involving a failure to disclose in face-to-face transactions; materiality establishes a presumption of reliance). *See generally* Tim A. Thomas, *When Is It Unnecessary to Show Direct Reliance on Misrepresentation or Omission in Civil Securities Fraud Actions Under § 10(b) of the Securities Exchange Act of 1934?*, 93 A.L.R. FED. 444 (1989).

73. *See Amchem I*, 157 F.R.D. 246, 316 (E.D. Pa. 1994).

74. *See Amchem III*, 521 U.S. at 622 (holding that predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement").

75. *Amchem II*, 83 F.3d 610, 626 (3d Cir. 1996) (citations omitted).

The Supreme Court was more grudging, noting on this side of the predominance equation only the possibility of an "overarching dispute about the health consequences of asbestos exposure."[76] Against that, the Supreme Court noted, were "the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions . . . ."[77] As noted above, the Court then simply repeated the Third Circuit's recitation of the disparate individual causation issues, and concluded by making clear that predominance is a test readily met in many securities cases.[78]

Though "predominance" itself is not defined by the federal rules, the Court's interpretation of it in the *Amchem* decision appears reasonable. Lower federal courts had largely reached the same conclusion for many years,[79] with a few exceptional cases in which mass tort classes were certified in the 1980s.[80] The cases granting certification, however, have remained the exception to the otherwise generalizable rule that mass tort certification is largely disfavored primarily because of the predominance concern.[81] This rule, however, does not exist in a vacuum—it is the same calculus, rooted in the same exact doctrinal language, that the federal courts have undertaken in securities cases. As the next section demonstrates, in the securities cases, courts, including the Supreme Court, have gone out of their way to reach precisely the opposite result.

B. INDIVIDUAL CAUSATION: EXCUSED IN THE SECURITIES CLASS

A standard securities fraud class action challenges the legality of a corporate representation or omission that (arguably) caused investors to buy or sell shares

---

76. *Amchem III*, 521 U.S. at 623-24.

77. *Id.* The Court therefore implied that predominance entails both a quantitative and qualitative dimension.

78. *See supra* text accompanying note 26.

79. Cases denying mass tort certification include: Abed v. A.H. Robins Co., 693 F.2d 847 (9th Cir. 1982) (Dalkon Shield punitive damages litigation); Ikonent v. Hartz Mountain Corp., 122 F.R.D. 258 (S.D. Cal. 1988) (flea and tick spray products liability litigation); Raye v. Medtronic Corp., 696 F. Supp. 1273 (D. Minn. 1988) (faulty pacemaker litigation); Caruso v. Celsius Insulation Res., Inc., 101 F.R.D. 530 (M.D. Pa. 1984) (foam insulation litigation); Mertens v. Abbott Labs., 99 F.R.D. 38 (D.N.H. 1983) (DES litigation); Payton v. Abbott Labs., 100 F.R.D. 336 (D. Mass. 1983) (DES litigation); Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979) (synthetic estrogen litigation); Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974) (asbestos litigation); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa. 1974) (industrial air pollution litigation).

80. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (Agent Orange government contractor defense); Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986) (asbestos); *In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986) (asbestos property damage litigation); Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (tobacco punitive but not compensatory damages), *rev'd*, 84 F.3d 734 (5th Cir. 1996); Payton v. Abbott Labs, 83 F.R.D. 382, *vacated*, 100 F.R.D. 336 (D. Mass. 1983) (DES); *cf.* R.J. Reynolds Co. v. Engle, 672 So. 2d 39 (Fla. App. 1996) (permitting certification of state class in tobacco litigation).

81. *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 750 (3d ed. 1999); RHEINGOLD, *supra* note 16, § 3.55; CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §1783 (1986 & Supp. 1999); 63B AM. JUR. 2D PROD. LIABILITY § 1718 (1997); NEWBERG ON CLASS ACTIONS § 17.17 (3d. ed. 1992).

in the corporation.[82] To sustain a 10b-5 claim, which evolves out of the common law tort of deceit,[83] a plaintiff must demonstrate that the defendant

> (1) made a false representation
>
> (2) of a material fact
>
> (3) with knowledge of its falsity or with reckless disregard for its truth;
>
> (4) with the intention that the plaintiff act in reliance upon the representation and that
>
> (5) the plaintiff did justifiably rely on the representation; and
>
> (6) thereby suffered damages.[84]

The falsity of the representation, its materiality, and the defendant's scienter and intent (issues one through four, above) will generally be common questions. But reliance and damages (issues five and six) are more problematic. To prove reliance in the traditional sense, a plaintiff would have to show that she transacted the security based upon the information at issue. In other words, the plaintiff would have to show that she acted differently than she would have absent the misrepresentation or omission.[85] Since investment decisions are commonly the result of a multitude of factors, and since buyers or sellers often

---

82. There are many types of securities fraud cases; a leading treatise identifies at least seven types of 10b-5 actions. *See* 5 A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10B-5 § 36, at j2-5 (1987). This section's discussion of courts' willingness to forgive individualized reliance in securities cases applies to most types of securities fraud cases, as discussed *infra* note 101. While individualized assessments of reliance and causation are not disposed of in all securities cases, the situations collected in this section are nonetheless so vast and so central to securities class action litigation that it is reasonable to focus upon them (using "fraud on the market" as a broad proxy).

83. At times, the Court has noted the similarity of the 10b-5 action to a fraud case. *See, e.g.*, United States v. Chiarella, 445 U.S. 222, 235 (1980); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471-77 (1977). On other occasions, it has emphasized the distinction between the face-to-face dealings in tangible commodities covered by common law actions and the anonymous, national securities transactions policed by federal securities rules. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 388-89 (1983) (noting that "the antifraud provisions of the securities laws are not co-extensive with common law doctrines of fraud"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744-45 (1975) (same); *cf.* Mirkin v. Wasserman, 858 P.2d 568, 571 (Cal. 1993) (rejecting adoption of fraud-on-market theory in state fraud cases because of differences between common law fraud and Rule 10b-5). For an interesting examination of the relationship between common law deceit cases and securities fraud cases, see generally Nicholas L. Georgakopoulos, *Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud*, 49 U. MIAMI L. REV. 671 (1995), and see also R. Douglas Martin, Note, Basic Inc. v. Levinson: *The Supreme Court's Analysis of Fraud on the Market and Its Impact on the Reliance Requirement of SEC Rule 10b-5*, 78 KY. L.J. 403, 407-10 (1989/1990).

84. ROBERT C. CLARK, CORPORATE LAW 310 (1986) (citing WILLIAM PROSSER, HANDBOOK ON THE LAW OF TORTS 728 (5th ed. 1984)); *see also* RESTATEMENT (SECOND) OF TORTS §§ 525-530 (1977).

85. *See, e.g.*, List v. Fashion Park, 340 F.2d 457, 463 (2d Cir. 1965) (citing RESTATEMENT OF TORTS § 546 (1938)). The common law would not allow recovery for misrepresentation torts absent reliance. The Restatement (Second) of Torts states:

never even know of the false information at issue,[86] individualized reliance would be difficult to prove. Even if a plaintiff could demonstrate reliance on the material misrepresentation, assessing her damages presents yet another difficult question: How much was she actually damaged and how much of any loss she may have suffered is truly attributable to the fraudulent misrepresentation?[87] In addition, each investor's decision is an overwhelmingly individualistic one—while thousands of individuals might have bought or sold, each did so for his or her own set of reasons.

Had one read only *Amchem*, and then been asked to apply the Court's holding to a securities fraud class action, surely one would have to conclude that the individual issues predominated over the common question.[88] In *Basic Inc. v. Levinson*,[89] the Supreme Court was faced with precisely such a dilemma, but embraced a way around the problem. Basic was the target of a takeover starting,

---

> If the recipient [of a fraudulent misrepresentation] does not in fact rely on the misrepresentation, the fact that he takes some action that would be consistent with his reliance on it and as a result suffers pecuniary loss, does not impose any liability upon the maker.

RESTATEMENT (SECOND) OF TORTS, § 537 cmt. a (1977); *see also* Dan Fischel, *Use of Modern Finance Theory in Securities Fraud Involving Actively Traded Securities*, 38 BUS. LAW. 1, 7 (1982) ("The requirement of reasonable reliance is a prerequisite for establishing injury and damage under the traditional model of the investment decision.").

86. *See* Homer Kripke, *The Myth of the Informed Layman*, 28 BUS. LAW. 631, 631-32 (1973) (describing disclosure documents as "fairly close to worthless" to average investor); Jonathan R. Macey et al., *Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic v. Levinson, 77 VA. L. REV. 1017, 1020 (1991) (stating that "most security holders rarely read proxy solicitations or annual reports or listen to public corporate announcements").

87. *See* Fischel, *supra* note 85, at 8 ("Proving the existence and amount of economic loss causally related to conduct by the defendant is difficult, particularly where economic loss suffered by the plaintiff . . . may be attributable to market-, or industry-, or even firm-specific factors having nothing to do with the challenged conduct of the defendant.").

88. *See, e.g.*, Simon v. Merrill Lynch, Pierce Fenner & Smith, 482 F.2d 880, 882-83 (5th Cir. 1973) (no predominance in aggregated common law fraud actions); Serfaty v. Int'l Automated Sys., Inc., 180 F.R.D. 418, 420 (D. Utah 1998) (holding that absent fraud-on-market presumption common issues do not predominate); Young v. Nationwide Life Ins. Co., 183 F.R.D. 502, 510-11 (S.D. Tex. 1998) (rejecting predominance and fraud-on-the-market theory in challenge to marketing of mutual funds); Sanders v. Robinson Humphrey/Am. Express Inc., 634 F. Supp. 1048, 1063 (N.D. Ga. 1986) (finding certification "highly inappropriate" as each class member must prove individual reliance on misrepresentations); *rev'd sub nom.*, Parker v. Paine Webber Group, 827 F.2d 718 (11th Cir. 1987); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 66 (N.D. Tex. 1984) ("As long as reliance remains an issue, it predominates over common questions of law or fact, thus precluding maintenance as a class action . . . .").

The Advisory Committee that drafted the 1966 version of Rule 23 was itself of two minds on the question of predominance in fraud cases:

> [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed.

FED. R. CIV. P. 23(b)(3) advisory committee note (1966).

89. 485 U.S. 224 (1988).

in earnest, in late 1976. However, on three occasions in 1977 and 1978, Basic made public statements denying that it was engaged in negotiations. Following the acceptance of a tender offer for Basic shares in December, 1978, investors who had sold their shares after the company first denied it was in merger negotiations brought a class action lawsuit. The suit alleged that the merger denials were misleading public statements (in violation of section 10(b) of the 1934 Securities Exchange Act and of the SEC's Rule 10b-5) that artificially depressed the sales price these investors received.[90]

After concluding that the denials of merger negotiations were, in this context, "material" misrepresentations,[91] the Court turned to the question of (b)(3) certification. Justice Blackmun, writing for the Court, first acknowledged the presence of several common issues: "The falsity or misleading nature of the three public statements made by Basic, the presence or absence of scienter, and the materiality of the misrepresentations, if any."[92] Summarizing how the District Court had proceeded, Justice Blackmun next noted the central problem in the case: "Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones."[93] In other words, the Court here acknowledged that predominance impedes securities certification just as it prohibits mass tort certification. But in the securities field, it turns out, predominance is a surmountable barrier, not an absolute bar.

This is so because the Court adopted a theory to relieve plaintiffs of the burden of demonstrating reliance. Critically, the Court insisted that reliance is indeed an element of a 10b-5 cause of action: "[R]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[94] But to eliminate the need for demonstrating individual reliance, the Court embraced the "fraud-on-the-market" theory previously adopted by several circuit courts.[95] The fraud-on-the-market theory supported the creation of a presumption "that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of [the defendants']

---

90. *See id.* at 226-28. For a fuller recitation of the underlying facts, see Levinson v. Basic Inc., 786 F.2d 741, 742-45 (6th Cir. 1986); Levinson v. Basic Inc., [1984-1985 Transfer Binder] (CCH) ¶ 91,801, at 90,011 (N.D. Ohio Aug. 3, 1984).

91. *Basic*, 485 U.S. at 232-41.

92. *Id.* at 242.

93. *Id.*; *see also Levinson*, 786 F.2d at 750 (noting that the district court had held that requiring each individual investor to demonstrate direct reliance on the misstatements would create "a barrier to class actions in rule 10b-5 cases").

94. *Basic*, 485 U.S. at 243.

95. *See* Panzier v. Wolf, 663 F.2d 365, 367-68 (2d Cir. 1981), *vacated as moot*, 459 U.S. 1027 (1982); Shores v. Sklar, 647 F.2d 462, 471-72 (5th Cir. 1981) (en banc); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975). For good descriptions of the doctrinal development of the fraud-on-the-market theory in the courts, see Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. REV. 435, 447-57 (1984); Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1146-53 (1982).

material misrepresentations, that price had been fraudulently depressed."[96] In an efficiently operating market, "reliance on the market price is conceptually indistinguishable from reliance upon representations made in face-to-face transactions,"[97] thus "a misstatement can cause injury without reliance because it will influence prices."[98]

In one fell swoop, then, the presumption-creating fraud-on-the-market theory solves at least two prickly problems in securities class actions: the evidentiary problem of demonstrating reliance in a complex market transaction and the procedural problem of having common issues predominate so as to justify class certification.[99] As to the latter, the Court acknowledged the procedural import of its decision, quoting the District Court's conclusion that the fraud-on-the-market theory provided "a practical resolution to the problem of balancing the substantive requirement of proof of reliance in securities cases against the procedural requisites of [Federal Rule of Civil Procedure] 23."[100] In sum, fraud-on-the-market enables certification by turning common-law individual issues into market-based common issues, leaving for adjudicative resolution only the shared question of whether the misstatement was material.[101]

Justice White's separate opinion in *Basic*, joined by Justice O'Connor, chastised the Court not only for relying on an economic theory that exceeded the Court's expertise,[102] but also for relying on an economic theory of recent and

---

96. *Basic*, 485 U.S. at 245; *see also id.* at 247 ("An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.").

97. *In re* LTV Sec. Litig., 88 F.R.D. 134, 142 (N.D. Tex. 1980).

98. Georgakopoulos, *supra* note 83, at 713.

99. The fraud-on-the-market theory also enables a fairly straightforward methodology for assessing damages, if any, in fraud cases. *See* Black, *supra* note 95, at 441 n.30 ("Courts adopting the fraud on the market theory believe that the actual value of the stock over the period can be determined by expert testimony; accordingly, awarding the appropriate recovery to each plaintiff becomes mechanical."); Stephen J. Brown & Jerold B. Warner, *Using Daily Stock Returns: The Case of Event Studies*, 14 J. FIN. ECON. 3 (1986); Macey et al., *supra* note 86, at 1028-42 (describing "event study" methodology).

100. *Basic*, 485 U.S. at 242 (quotations omitted).

101. The Supreme Court's decision in *Basic* purports to limit the circumstances in which reliance is excused to those cases involving impersonal investor decisions in an efficient market. *See id.* at 247. But as Barbara Black has demonstrated, the phrase "fraud on the market" is a label used to forgive individualized reliance in widely divergent factual situations. *See generally* Barbara Black, *The Strange Case of Fraud on the Market: A Label in Search of a Theory*, 52 ALB. L. REV. 923 (1988); Black, *supra* note 95, at 447-57. Moreover, the Supreme Court itself has forgiven the requirement of individual demonstrations of reliance in circumstances beyond those labeled "fraud on the market." *See, e.g.*, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (holding materiality sufficient to establish causal connection in an action under Rule 14a-9); *cf.* Arthur Young & Co. v. United States Dist. Ct., 549 F.2d 686 (9th Cir. 1977) (allowing original issue security purchasers to rely on integrity of regulatory process in place of demonstrating individual reliance).

102. *Basic*, 485 U.S. at 253 (White, J., concurring in part and dissenting in part) ("[W]ith no staff economists, no experts schooled in the 'efficient-capital-market hypothesis,' no ability to test the validity of empirical market studies, we are not well equipped to embrace novel constructions of a statute based on contemporary microeconomic theory.").

untested vintage.[103] Justice White's sentiments help underscore my contention that the Court was driven by some unarticulated desire to be forgiving of securities class action plaintiffs, a desire found lacking when the Court turned, a decade later, to mass tort certification. My point is *not* that tort and securities cases are the same; skeptical readers may quickly expound important distinctions between the cases.[104] I, too, believe the cases have procedurally relevant differences.[105] My point is, however, that whatever these distinctions are, they are not truly captured by the concept of "predominance," or by the doctrine that has developed interpreting it. Rather, the Court has reacted differently to the two types of cases and has justified its desire to do so through reference to the predominance doctrine. The Court's generosity in the securities context is conventionally explained by two assumptions: first, that absent class certification, securities fraud cases will not be brought;[106] and second, that if securities class actions are not brought, the broad remedial purposes of the securities laws will be frustrated.[107] The next Part addresses the (procedural) logic of these underlying assumptions.

III. WHY "SUPERIORITY" DOCTRINE DOES NOT EXPLAIN THE DISTINCTION

The Court's premature adoption of the fraud-on-the-market theory, enabling certification of securities class actions, might be explained by a second common understanding of the difference between securities and tort class actions, namely,

---

103. *Id.* at 250 (White, J., concurring in part and dissenting in part) ("Even when compared to the relatively youthful private cause-of-action under § 10(b), the fraud-on-the-market theory is a mere babe. Yet today, the Court embraces this theory with the sweeping confidence usually reserved for more mature legal doctrines.") (citation omitted). Justice White asserted that "widespread acceptance of the fraud-on-the-market theory in the Court of Appeals cannot be placed any earlier than five or six years ago." *Id.* at 250-51 n.1; *see also* Macey et al., *supra* note 86, at 1061-67 (noting the lack of a "formal, conceptual development of market efficiency," characterizing the Court's analysis as "skeletal," and criticizing the Court for its "failure to articulate the theoretical underpinnings of its decision").

104. One example is the claim that the fraud-on-the-market theory is "correct." I do not refute that possibility. Rather, the point is: (1) that the Court was quick to embrace this theory in securities cases; and (2) that our legal system is not willing to even consider similar, reliance-removing, economic theories in the context of mass personal injury cases. *See infra* text accompanying note 252. Another distinction between securities and tort law concerns the nature of the legal norms governing each set of cases. Because the securities case is based upon federal law, a nationwide class would all share a common legal basis for its claims. By contrast, a typical nationwide mass tort case, where the underlying causes of action are based upon state law, presents complicated choice of law problems. The Court mentioned this as a factor in *Amchem III*, but, interestingly, hardly relied upon it as a decisive factor.

105. *See infra* Part VI.

106. *See, e.g.*, Note, *supra* note 95, at 1159 ("[T]he fraud on the market theory, by eliminating issues of individual reliance, facilitates class action recovery of claims that would otherwise be too small to be litigated individually.").

107. *See* CLARK, *supra* note 84, at 332 ("Effective enforcement of an anti-fraud provision in the context of the national securities markets, where a given fraud may cause a large investor loss that is nevertheless spread among many investors, requires a relatively streamlined judicial procedure such as the class action."); Note, *supra* note 95, at 1159 (asserting that "only if courts allow class actions to proceed will underinclusive recoveries and hence a failure to deter fraud at its inception be avoided").

the former are thought to involve "small claims" while the latter involve "large claims." Small claims cases fit within a readily accepted conception of the class action precisely because of the limited nature of the individual rights at issue, while large claim cases defy such categorization precisely because of the vast nature of the personal injury action.[108] In doctrinal terms, certification is appropriate in small claims cases because class treatment is deemed to be a superior method of adjudication to nonclass treatment, while certification is inappropriate in large claim cases because representative litigation is not deemed superior to individual adjudications.[109] In particular, class members with large claims are characterized as having an interest in "individually controlling the prosecution . . . of separate actions," a factor cutting against certification.[110] In the words of the *Amchem* Court: "While the text of Rule 23(b)(3) does not

---

108. Harry Kalven and Maurice Rosenfield defined the small-claims conception of the class suit shortly after the adoption of the Federal Rules of Civil Procedure. *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 684-86 (1941). Group litigation is important, Kalven and Rosenfield emphasized, because of the growing number of situations in which individuals have "a small stake in a large controversy." *Id.* at 684. Such situations include securities buyers misled by a prospectus, ratepayers bilked by their utility, and small businessmen fallen victim to restraints of trade. These situations are marked by the fact that "[t]he type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims." *Id.* In such circumstances, Kalven and Rosenfield worried that individuals would not pursue their rights and such quiescence would "operate to seriously impair the deterrent effect of the sanctions which underlie much contemporary law." *Id.* at 686. Group litigation is the means for overcoming these particular problems of mass society. With incentives provided by a fee provision, the plaintiffs' class action attorney becomes the agent for the entire class. She aggregates the class members' claims into a single action, disgorges the defendant's wrongful profit, and redistributes the damages (minus her fee) to the class members.

In this vision, the class action attorney serves as a "private" attorney general, filling a gap left by the inability of public agencies to enforce adequately these legal norms. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 557 (4th ed. 1992) (claiming that "the rise of the class action in recent decades reflects the . . . view that government agencies cannot adequately enforce certain rights"). Thus the Court has stated that:

> The aggregation of individual claims in a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.

Deposit Guar. Bank v. Roper, 445 U.S. 326, 339 (1980). For an overview of the costs and benefits of private litigation as a mechanism of law enforcement, see generally John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

109. The superiority requirement is part of Federal Rule of Civil Procedure 23(b)(3). When certifying a class action under this section, a judge must find that common questions "predominate" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

110. *Id.*; *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967) ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.").

exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.' "[111]

The small/large distinction provides a tidy explanation for the securities certification/mass tort noncertification presumptions. The problem is, however, the distinction is not empirically valid. As this Part demonstrates, most securities classes are no longer comprised solely of a collection of small claims, nor are most mass tort classes comprised of a collection of large injury claims. This insight challenges the common presumption that "superiority" explains the distinct manner in which courts approach these two types of cases. Something else motivates courts to find superiority in modern securities class actions, but not in tort cases.

A. SECURITIES CLASSES ARE (NOT) COMPRISED SOLELY OF SMALL CLAIMS

For at least the past fifty years, the Kalven-Rosenfield conceptualization has been the theoretical justification for the securities class action:[112] (1) securities cases tend to involve fraudulent activity that is alleged to injure many information-ignorant small investors in a relatively uniform, but exceedingly complex, manner; (2) because such abuses exceed the abilities of public regulators, private adjudication is required to safeguard the securities markets;[113] (3) but because the class is thought to consist of small stakeholders, class action treatment is necessary to overcome the inherent collective action problem.[114] Absent class certification, the wrongdoer will go free, securities fraud will be

---

111. *Amchem III*, 521 U.S. 591, 614-16 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INT'L & COMP. L. REV. 497, 497 (1969)); *see also* Coffee, *supra* note 16, at 1351-52.

112. Thus, for example, most treatments of securities litigation begin from this premise. *See, e.g.*, JAMES D. COX ET AL., CORPORATIONS 399 (1997) ("A shareholder class action . . . is a practical and inexpensive way for numerous claimants, *especially ones with small claims*, to obtain relief by pooling their claims into one lawsuit brought by one or a few individuals for and on behalf of the entire group.") (emphasis added).

113. *See generally* NEWBERG ON CLASS ACTIONS, *supra* note 81, § 22-6 ("Private enforcement is necessary to afford relief to those injured by violations of the securities laws. The SEC and the judiciary have recognized that the class action may be the only meaningful and viable method by which securities investors may remedy their claims. Thus Rule 23 has been liberally construed in favor of certification."). So prevalent is this aspect of securities enforcement, that even the Republican Congress that enacted the PSLRA, *see infra* text accompanying notes 116-26, did not question the underlying need for a private enforcement regime. *See* S. REP. No. 104-98, at 8 & nn. 17-18 (1995); Statement of Managers—The "Private Securities Litigation Reform Act of 1995," 141 CONG. REC. H13691-08 (daily ed. Nov. 28, 1995) ("Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.").

114. *See* Green v. Wolf Corp., 406 F.2d 291, 295 (2d Cir. 1968) ("[The] ultimate effectiveness of the federal [securities fraud] remedies . . . may depend in large measure on the applicability of the class action device.") (quoting 3 LOUIS LOSS, SECURITIES REGULATION 1819 (2d ed. 1961)); LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4605 (3d ed. Supp. 1996) (listing cases); David J. Bershad et al., *A Dissenting Introduction*, *in* SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES, *supra* note 15, at 12

unremediable, and confidence in the securities markets will decline. The small claims nature of the securities case thus provides the conceptual justification for class action certification.

But here's the hitch: it turns out that securities classes do not consist of a multitude of tiny claimholders. Securities classes may traditionally have encompassed many small stakeholders, but the structure of the firm has changed with a recent rise in institutional investors. Thus, according to the New York Stock Exchange, institutional investors owned the following percentages of all outstanding equities:[115]

Figure 1
Institutional Investors' Ownership of Outstanding Equities

1950	7.2%
1970	28.2%
1990	41.6%
1995	44.1%
1997	47.7%

Recent case law confirms the empirical evidence that securities classes today typically include large investors with huge chunks of money at stake. To understand how this new case law has changed the proceduralist's understanding of securities classes, and to appreciate what its ramifications will be for future securities class certification, a short detour into the history of Congress's recent securities reform law, particularly the Private Securities Litigation Reform Act of 1995 (PSLRA), is necessary.[116]

("Unless small investors are permitted to join forces in a class action, large-scale securities violations cannot be remedied.").

115. NYSE 1998 FACT BOOK 61-62.

116. *See* 15 U.S.C. §§ 77z-1 to 78j-1 (2000). Several years after enacting the PSLRA, Congress augmented its securities reform with enactment of the Securities Litigation Uniform Standards Act of 1998. *See* Pub. L. No. 105-353, 112 Stat. 3227 (1998). While the provisions of the 1998 law further the goals of the PSLRA, they are less central to the conceptual analysis of this Article and are discussed only in passing.

Ironically, the central objections to securities class actions have never really focused on the conceptual basis for class treatment. Rather, condemnation of the securities class action has typically been trained directly on the peculiar incentives at work on the plaintiffs' attorney.[117] The two distinct concerns at the heart of this critique were raised during congressional hearings following the 1994 Republican takeover of Congress. On the one hand, Congress worried about "strike suits"—nonmeritorious cases brought by overzealous class attorneys.[118] On the other hand, Congress worried about "sell outs"—meritorious cases that were settled for too low a price in return for higher fees for the plaintiffs' attorneys.[119] The common thread was distrust for the plaintiffs' securities bar,[120] characterized repeatedly by the sound-bite provided, perhaps accidentally, by a prominent plaintiffs' attorney: "I have the greatest practice of law in the world. I have no clients."[121] The PSLRA was meant, in no uncertain terms, to return securities class actions to the clients.[122]

What was odd about this was that securities class actions were never thought to be in the hands of the clients. The procedural theory of the securities class action was that no significant "client" existed. Nonetheless, Congress proceeded

---

117. This is not to say that attacks on the conceptual basis of the securities class action have not been mounted. Some economists have argued that since each plaintiff has suffered minute harm, the costs of the defendant's wrongdoing are more appropriately left spread among them, particularly if there are less expensive means (than litigation) of reducing social costs. *See Developments—Three Theories of the Class Action*, 89 HARV. L. REV. 1329, 1356-57 (1976). These economic objections to small claims cases have never prevailed in policy debates.

118. *See* S. REP. No. 104-98, at 4-5 (1995) ("The Committee heard substantial testimony that today certain lawyers file frivolous 'strike' suits alleging violations of the Federal securities laws in the hope that defendants will quickly settle to avoid the expense of litigation.").

119. *See id.* at 6 ("The lawyers can decide when to sue and when to settle, based largely on their own financial interests, not the interests of their purported clients."); *id.* at 687 (criticizing plaintiff firms that "researched potential targets for these suits, enlisted plaintiffs, controlled the course of the litigation, and often negotiated settlement that resulted in huge profits for the law firms with only marginal recovery for the shareholders").

120. *See generally* 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. 699, 714 (1986). The strike suit and sell-out share few other characteristics, as they actually present quite distinct problems. Class members, in theory, care little about the strike suit (except perhaps morally) because they gain something from the defendant, even after attorneys' fees, for a meritless case. By contrast, class members ought to care a lot about a sell-out because they lose the value of their worthy case to their greedy attorneys. Placing more control in the classmembers' hands might help remedy the second problem, but would help remedy the problem of strike suits only if the plaintiff monitors act altruistically, or with a market perspective that exceeds the short term gains available even in a meritless strike suit.

121. *See* S. REP. No. 104-98, at 6 & n.8 (1995) (citing William P. Barrett, *"I Have No Clients"*, FORBES, Oct. 11, 1993 (quoting William Lerach)).

122. *See, e.g., id.* at 6 ("S-240 is intended to empower investors so that they, not their lawyers, control securities litigation."); *id.* at 10 ("The Committee believes that the lead plaintiff—not lawyers—should drive the litigation."). Congress repeatedly criticized "professional plaintiffs" who were thought to be shills of the class action attorneys and who are banned by the PSLRA. In fact, an empirical study of 141 class actions involving 353 named individual class representatives discovered only four individuals and one corporation whose names appeared in more than one class case. *See* Willging et al., *supra* note 14, at 99.

on the assumption that there were larger shareholders who, because of their institutional savvy, could monitor plaintiffs' attorneys.[123] The PSLRA constructs a multi-pronged procedure to accomplish that function. First, it requires any shareholder filing a securities case to provide notice (by prominent publication) to all affected shareholders.[124] Second, it permits any shareholder to intervene in the action and seek to be the "lead plaintiff."[125] And finally, it requires courts to presume that the largest intervening shareholder is the most qualified "lead plaintiff" and should be so appointed, absent factual findings that upset the presumption.[126]

Given the fact that certification of securities cases is premised on the idea that the class consists of many minute shareholders, the conceptual framework of the PSLRA might have seemed suspect. However, cases proceeding under the Act have attracted investors with millions of dollars in damages to intervene and to undertake the lead plaintiff's attorney-monitoring function. Since enactment of the PSLRA, there are more than a dozen reported cases concerning contests for the lead plaintiff provision. In each, the prevailing lead plaintiff had a significant investment at stake, as did many of the competing, proposed lead plaintiffs.[127] Some of the lead plaintiffs in these cases are actually groups of smaller claimants, who are combined by plaintiffs' attorneys to become the largest participating, and hence the controlling, investor.[128] Nonetheless, these

123. *See* S. REP. No. 104-98, at 10 (1995) ("The Committee intends to increase the likelihood that institutional investors will serve as lead plaintiffs . . . .").

124. *See* 15 U.S.C. § 77z-1(a)(3)(A)(i) (2000).

125. *See id.* § 77z-1(a)(3)(A)(i)(II).

126. *See id.* §§ 77z-1(a)(3)(B)(iii)(I)(aa)-(cc).

127. *See, e.g.*, Laborers Local 1298 Pension Fund v. Campbell Soup Co., No. CIV.A 00-152, 2000 WL 486956 (D.N.J. 2000) (appointing as co-lead plaintiffs two private investors claiming losses of $131,000 and an institutional investor claiming losses of $1 million); *In re* McKesson HBOC, Inc. Sec. Litig., 97 F. Supp. 2d 993, 1000 (N.D. Cal. 1999) (appointing lead plaintiff that claimed losses of over $39 million); *In re* Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803, 809 (N.D. Ohio, 1999) (appointing as lead plaintiffs two blood-related private investors claiming combined losses of $1.08 million); *In re* Party City Sec. Litig., 189 F.R.D. 91, 95-96 (D.N.J. 1999) (appointing as co-lead plaintiffs a private investor claiming losses of $703,661 and an institutional investor claiming losses of $842,507); Gluck v. Cellstar Corp., 976 F. Supp. 542, 546 (N.D. Tex. 1997) (appointing lead plaintiff that held more than 1.6 million shares and claimed losses of over $10 million during the class period); *In re* Donkenny Inc. Sec. Litig., 171 F.R.D. 156, 158 (S.D.N.Y. 1997) (appointing lead plaintiff that claimed losses of $4.8 million during the class period).

128. *See, e.g.*, *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780, 783 (N.D. Ill. 2000) (appointing lead plaintiff group consisting of six institutional investors holding an aggregate of 77,200 shares); *In re* Ribozyme Pharms., Inc. Sec. Litig., 192 F.R.D. 656, 661 (D. Colo. 2000) (appointing lead plaintiff group consisting of five private investors claiming combined losses of $53,428.13); Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 250 (E.D. Va. 1999) (appointing lead plaintiff group consisting of five pension funds with combined claimed losses of $715,592); *In re* Advanced Tissue Sciences Sec. Litig., 184 F.R.D. 346, 347 (S.D. Cal. 1998) (appointing lead plaintiff group consisting of over 250 unrelated individual investors who purchased approximately 720,000 shares during the class period and claimed losses of $4,508,950); *In re* Milestone Scientific Sec. Litig., 183 F.R.D. 404, 414 (D.N.J. 1998) (appointing lead plaintiff group consisting of several investors with combined claimed losses of $11,789,419.94); *In re* Cendant Corp. Litig., 182 F.R.D. 144, 147 (D.N.J. 1998) (appointing lead plaintiff group consisting of three state retirement funds claiming losses greater than $89 million);

cases demonstrate that securities class actions are not just small claims cases. They are cases involving some quite large, and many quite small, claims.

Two inquiries immediately follow from this revelation. First, why do large plaintiffs bother with the class form? A party that believes it has been defrauded of millions of dollars typically has sufficient incentive to file an individual lawsuit. These incentives are even greater once the disincentives of the class action—the substantive and procedural requirements of the PSLRA—are taken into account.[129] Beyond the strategic responses to the PSLRA, though, lies a second, deeper, structural question. The PSLRA has helped reveal that securities classes are *not* comprised solely of a multitude of small stakeholders in need of a court-appointed representative to overcome the collective action problems hindering deterrence and restitution.[130] Under what provision of Rule 23(b) are courts now certifying these mixed claims classes as class actions? The answer to that question is remarkable, though not surprising: courts simply ignore the problem. More than fifty securities class actions have been reported since enactment of the PSLRA. In only three of these actions was class certification rejected on Rule 23(b) grounds, and, in these cases, the denial of certification was completely unrelated to the presence of a large institutional investor.[131] A handful of other cases discuss Rule 23(b) in certifying the class,[132] but the vast majority of the cases never even entertain a discussion of the reasons for certification.[133] In sum, courts continue to engage in the pro forma Rule

---

In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 44-45 (S.D.N.Y. 1998) (appointing co-lead plaintiffs that included three groups of both individual and institutional investors claiming losses of over $22 million); Zuckerman v. Foxmeyer Health Corp., 1997 WL 314422, at *1 (N.D. Tex. 1997) (appointing lead plaintiff group consisting of eleven separate entities with a combined 189,500 shares of common stock and 15,800 shares of preferred stock during the class period); *see also* Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 351 n.16 (1998) (noting that PSLRA has encouraged plaintiff firms to "vie to sign up large numbers of shares" to gain control of class actions).

129. *Cf.* Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 558 (1997) ("[M]otivating institutional investors to take securities fraud litigation more seriously creates an enhanced risk that institutions may choose to opt out of class actions in the same way that individual large claimants may opt out of other types of class actions, rather than seeking to exert greater control within the class action format."). For an in-depth analysis of institutional investor behavior, see Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 572-77 (1996).

130. *See* Fisch, *supra* note 129, at 558 ("Although securities fraud cases have traditionally been viewed as small claimant cases, the increasing representation of institutional investors as class members casts some doubt upon the accuracy of this characterization.").

131. In all three cases, class certification was denied because the court found that individual questions of fact concerning the reliance element of fraud predominated over the common questions of fact. *See* Ganesh v. Computer Learning Ctrs., Inc., 183 F.R.D. 487, 491 (E.D. Va. 1998); Young v. Nationwide Life Ins. Co., 183 F.R.D. 502, 507 (S.D. Tex. 1998); Fischler v. AmSouth Corp., 176 F.R.D. 583, 589 (M.D. Fla. 1997).

132. *See, e.g.*, *In re* Blech Sec. Litig., 187 F.R.D. 97, 107-08 (S.D.N.Y. 1999); Medine v. Washington Mut., FA, 185 F.R.D. 366, 371 (S.D. Fla. 1998); Schwartz v. Celestial Seasonings, Inc., 178 F.R.D. 545, 554 (D. Colo. 1998); Lyons v. Scitex Corp., 987 F. Supp. 271, 274-76 (S.D.N.Y. 1997).

133. *See, e.g.*, *In re* Ribozyme Pharms., Inc. Sec. Litig., 192 F.R.D. 656 (D. Colo. 2000); *In re* Health Management Sec. Litig., 184 F.R.D. 40 (E.D.N.Y. 1999); Sherleigh Assocs. LLP v. Windmere-

23(b)(3) analysis that preceded enactment of the PSLRA, even though, according to the *Amchem* Court, cases accumulating such large individual claims fit uneasily into the conceptual framework of Rule 23(b)(3).[134]

B. MASS TORT CLASSES ARE (NOT) COMPRISED SOLELY OF LARGE CLAIMS

A common procedural barrier to mass tort certification is that the mass tort class is comprised of large stakeholders, that is, individuals with significant personal injuries. This is a barrier to certification because courts feel it would be wrong to deprive such individuals of their day in court.[135] It is one thing to aggregate the claims of many individuals who would never file lawsuits themselves, as in the small claims situation. But to force individuals who would otherwise have incentive to bring lawsuits into a consolidated procedural posture runs counter to the spirit of our adjudicatory system. In the words of one commentator:

> There is no need for class action. In ordinary class actions many people have a small claim in damage (e.g., the loss of value of shares of stock), but in tort actions injured persons could traditionally obtain their own counsel. This is both because the contingent fee is a way for counsel to be paid and because the injuries are often large.[136]

In the parlance of Rule 23(b)(3), when each individual has enough at stake to afford her own day in court, individual lawsuits are "superior" to aggregative treatment.

In reality, however, this "large claims" characterization of the mass tort class is as problematic as the commonly accepted "small claims" characterization of

---

Durable Holdings, Inc., 184 F.R.D. 688 (S.D. Fla. 1999); Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246 (E.D. Va. 1999); *In re* Donkenny Inc. Sec. Litig., 171 F.R.D. 156 (S.D.N.Y 1997); Greebel v. FTP Software, Inc., 939 F. Supp. 57 (D. Mass. 1996). The courts in these cases may have undertaken such an analysis, but not published it. Yet, the discussions in the published accounts as to appointment of a lead plaintiff and settlement would suggest they did not do so. Further, if there were any significant discussion of the 23(b) question, it would likely have led to a published discussion.

134. Classes with a few large investors and many small investors might still warrant class treatment, but the conceptual basis is somewhat distinct. The rationale for the Kalven-Rosenfield class action is (defendant) deterrence, not (plaintiff) compensation. Individual suits by large institutional investors, if brought, should in many circumstances be able to accomplish this deterrence goal. Class actions might nonetheless be appropriate if complete plaintiff compensation were made a goal, or if it was feared that institutional investors would act sluggishly in the absence of small investors having the ability to spark activism through class action filings. This latter rationale goes to the adequacy of the institutional investor to represent the class and is discussed *infra* Part IV.

135. For example, the *Ortiz* Court noted "the inherent tension between representative suits and the 'day-in-court' ideal . . . ." Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999). On the "day-in-court" ideal, see Martin v. Wilks, 490 U.S. 755, 762 (1989) (stating that it is "our 'deep-rooted historic tradition that everyone should have his own day in court.' " (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449 (1981))).

136. RHEINGOLD, *supra* note 16, § 3:45 (citing Bruce H. Nielson, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. LEGIS. 461 (1988)).

the securities class. Mass tort classes tend to aggregate small, medium, and large size claims into one action, not unlike securities classes do. In the mass tort context, cases that have been resolved in some aggregative format illustrate this point. The Dalkon Shield intrauterine device case is an example. After the Ninth Circuit reversed a nationwide punitive damages class certification in 1982,[137] the A.H. Robins company filed for bankruptcy.[138] Through Robins's reorganization, a trust was established to settle the tort claims. In processing Dalkon Shield claims, the Dalkon Shield Claimants Trust established three options for claimants.[139] Option one offered a quick pay-out of approximately $725 to women who suffered only minimal injuries from the Dalkon Shield. Option two offered a medium size pay-out, also expeditiously, to women who had demonstrable injuries, but had problems proving causation. Option three essentially captured the cases that would otherwise have been litigated in court. The Trust's decade-long claims experience is represented in the following table:

Figure 2
Dalkon Shield Claimaints Trust Payouts[140]

	OPTION 1	OPTION 2	OPTION 3
# CLAIMANTS	132,000	18,000	49,000
TOTAL PAYOUT	$90 million	$100 million	$2 billion
AVERAGE PAYOUT	$682	$5,555	$40,816

This table demonstrates how a typical mass tort class is comprised of individuals with large, medium, and small claims. On the one hand, the large claimants recouped most of the Trust's proceeds, cumulatively recovering ten times as much as the small and medium size claimants combined. On the other hand, the small claimants outnumbered the medium and large claimants by

137. *See In re* Abed v. A.H. Robins Co., 693 F.2d 847, 857 (9th Cir. 1982), *rev'g* 526 F. Supp. 887 (N.D. Cal. 1981).

138. For a thorough description of the bankruptcy proceedings, see generally RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991).

139. On the work of the trust, see generally Georgene M. Vairo, Georgine, *the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79 (1997) [hereinafter Vairo, *Claims Resolution*]; Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 FORDHAM L. REV. 617 (1992).

140. *See* Vairo, *Claims Resolution*, *supra* note 139, at 133-138.

about two to one. The Dalkon Shield experience is fairly representative of many mass tort classes.[141]

Even if the Dalkon Shield example does not perfectly track all mass tort classes, its general qualities help illustrate the real issue at the heart of mass tort certification. Certification of the mass tort class ensures relief for thousands of injured individuals whose claims would otherwise not be economically feasible. To accomplish this result, however, class certification sweeps in individuals with large tort claims who might otherwise prosecute their own cases. These large claimants will generally recover less through a class settlement than they would have been able to in an individual case before a jury or in an individual settlement.[142] Mass tort certification therefore may not be a superior method of adjudication for large claimants. However, it is, as securities cases have always been, a superior—indeed the only—method of adjudication for small tort claimants.[143]

---

141. Like the Dalkon Shield Trust, most mass tort settlements "schedule" damages into general categories and typically the schedules reproduce the types of distinctions noted in the text. *See, e.g.*, Heller v. Schwan's Sales Enters., Inc., 548 N.W.2d 287, 290 (Minn. Ct. App. 1996) (describing scheduling of salmonella ice cream poisoning class); RHEINGOLD, *supra* note 16, §14:30 (describing scheduling of Agent Orange class); *id.* § 14:31 (describing scheduling of DDT class); Dee-Ann Durbin, *Implant Settlement in Doubt*, COLUMBIAN, Aug. 1, 1999, at A5 (describing scheduling of silicone breast implant class); *Hospital Enters into Proposed Class Action Settlement in Suit Involving Proplast Jaw Implant*, 15 VERDICTS, SETTLEMENTS, & TACTICS 461 (1995) (describing scheduling of TMJ implant injury class). *See generally* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 223-24 (1996). Nonetheless, scholars have not focused on the meaning of the heterogeneously structured damages classes for *certification* purposes. Professor Coffee has distinguished three types of classes: those consisting of all small claims (classic securities or antitrust cases), those consisting of all large claims (a mass disaster such as a plane crash in which everyone is killed), and those consisting of "a high variance among the settlement values of the legal claims possessed by the different plaintiffs; that is, some have high value claims and some low value claims." John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 652 (1987) [hereinafter Coffee, *Rethinking*]. Professor Coffee has also discussed questions of conflict in heterogeneously sized tort classes. *See* John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products*—Or What Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1555-56 (1998) [hereinafter Coffee, *Conflicts*]. In addition, Professor Coffee has suggested that "the propriety of asking 'high stakes' plaintiffs to subsidize 'low stakes' plaintiffs seems to raise more troubling issues of justice than its proponents have yet recognized." Coffee, *Rethinking*, *supra*, at 664. However neither Professor Coffee nor other scholars have closely considered the relevance of heterogeneity to class certification. *See* Grundfest & Perino, *supra* note 129, at 563-77 (analyzing the mixed nature of securities classes, but without reference to class certification consequences).

142. *See* Coffee, *Rethinking*, *supra* note 141, at 653 ("[P]laintiffs with high value legal claims will be forced to make wealth transfers to those having lower value claims.").

143. Peter Schuck has stated the point as follows:

> . . . A much higher percentage of tort victims file claims and receive some payment under these mass tort settlements than would sue and recover in tort. The vice of this virtue, however—and it is a great vice indeed—is that mass tort actions attract, and mass tort settlements encourage and pay, a large number of claims that are insubstantial—or, in the words of one experienced plaintiffs' lawyer, "junk." Moreover, these junk claimants may obtain substantial recoveries under the global settlements. Still, the relatively high percentage

These two sections have demonstrated that the large/small distinction does not map as neatly onto the tort/securities distinction as courts have presumed. Most securities classes, like most tort classes, are comprised of a mass of small stakeholders and relatively fewer, though still a significant number of, large stakeholders. If the compositions of tort and securities classes are both of mixed composition, this factor cannot explain the disparate treatment that courts have accorded to the two types of cases at the point of class certification. Generally speaking, representative adjudication is no more superior in one situation than the other.

IV. WHY "ADEQUACY" DOCTRINE DOES NOT EXPLAIN THE DISTINCTION

A third common understanding of the difference between securities and tort class actions concerns the question of who, if anyone, can speak on behalf of the class of claimants. Representative litigation is legitimated not only by a common legal situation, but also by the identification of a class representative adequate to protect the interests of the nonpresent plaintiffs who will be bound, despite their absence, to the outcome of the case.[144] The adequacy requirement both guarantees that the named plaintiffs' interests are not antagonistic to those of any members of the represented class,[145] and ensures that class counsel is competent and has no conflicting interests.[146]

The adequate representative distinction provides a third explanation for the disparate treatment of securities and mass tort certifications. In the mass tort

---

of genuine victims who will recover something under global settlements must be counted as a weighty advantage.

Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 961 (1995) (citations omitted); *see also* Alexander, *supra* note 128, at 353 (stating that "in the tort area we see that individual recoveries are smaller under class treatment than when claims are individually litigated, except perhaps for very low-value claims").

Professor Coffee describes the *Amchem* settlement differently. He suggests that the plaintiffs' attorneys sold out the small tort claimants to ensure compensation for the large tort claimants. *See* Coffee, *supra* note 16, at 1398 ("Ultimately, class counsel in [*Amchem*] simply waived compensation for most class members with non-malignant conditions in return for cash payments to those class members with serious malignant conditions."). Coffee's description, if correct, furthers my argument that the mass tort class is composed of both large and small tort claimants, though it suggests ways in which one set of attorneys might not be able adequately to represent such a group.

144. The requirement of adequate representation finds a basis both in Rule 23(a)(4) and in the Constitution. The Court has long held that the Due Process Clause protects an individual from being bound to the outcome of a lawsuit to which she was not made a party, unless, in her absence, her interests were adequately represented. *See* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807-08 (1985).

145. *See Amchem III*, 521 U.S. 597, 623-26 (1997). Thus, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Tex. Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).

146. *See generally* NEWBERG ON CLASS ACTIONS, *supra* note 81, § 22.24 ("[T]he two facets that have emerged as basic guidelines for Rule 23(a)(4) are an absence of potential conflict between the named plaintiff and absent class members and an assurance of vigorous prosecution on behalf of the class.").

area, the Court's sense that the asbestos class did not cohere sufficiently to create predominant common issues also colored its reaction to representation. If no cohesive class exists, it is difficult to identify those with "typical" claims who can adequately represent the class.[147] In securities cases, though, once predominance is presumed by the fraud-on-the-market theory, all traders are theoretically similarly situated and each can be adequately represented by anyone. Moreover, in the mass tort area, the Court expressed concerns about the attorneys' loyalty to the class in light of their huge attorneys fees, a concern courts have only rarely articulated in securities class actions.

Again, however, these distinctions are less certain than courts acknowledge. The types of differences among class members and doubts about class counsel that have precluded the search for adequate representation in mass tort cases similarly infect securities classes. Although securities classes are seen to cohere because of the fraud-on-the-market doctrine, the excusal of reliance across the class of traders does not, as most courts have assumed it does, eradicate all significant differences between class members. Moreover, class counsel's interests may conflict with class members' interests in securities, as well as in torts, cases. This insight challenges the common presumption that "adequacy" explains the distinct manner in which courts approach these two types of cases. Something else motivates courts to find adequacy in modern securities class actions, but not in tort class actions.

A. THE INADEQUATE MASS TORT REPRESENTATIVE

The Court's objection to class certification in the asbestos cases rested as much upon its concerns with class representation as it did upon its concerns about the 23(b) category.[148] The two particular adequacy problems the Court emphasized in the asbestos cases were conflicts among class members and skepticism about the incentives facing the class counsel.

In *Amchem*, the Court's adequacy evaluation focused solely[149] on the intra-class conflict, specifically on the clash between class members with current

147. The Court elsewhere has noted that the requirements of commonality and typicality are closely linked to the adequacy requirement—all "serve as guideposts for determining whether under the particular circumstances . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

148. Sam Issacharoff argues that adequacy was the predominant concern of the Court in the asbestos cases and is emerging as the critical issue in large-scale class cases. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 352-53; *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

149. In *Amchem*, the District Court had spent an extraordinary amount of time describing class counsel's qualifications and defending class counsel against the argument that they suffered from conflicts of interest with the class members. *See Amchem I*, 157 F.R.D. 246, 293-314, 326-32 (1994). The Third Circuit ignored this issue completely, *Amchem II*, 83 F.3d 610, 630 (1996) ("Although questions have been raised about [class counsel's qualifications] we do not resolve them here."), as did the Supreme Court.

medical injuries and those who had been exposed to asbestos, but who were not yet injured. The Court stated that the former had an interest in quick medical payments while the latter had an interest in "ensuring an ample, inflation-protected fund for the future."[150] More generally, the Court noted that the global settlement required class representatives to assent to allocational decisions that divvied up the settlement pie among them. The group of individuals serving as class representatives did in fact represent a broad range of different types of plaintiffs.[151] But the Court held that this was insufficient, stating that there was no "*structural assurance* of fair and adequate representation for the diverse groups and individuals affected,"[152] and that there was no guarantee that the named plaintiffs "operated under a proper understanding of their representational responsibilities."[153]

Although the Court's adequacy analysis focused on the named plaintiffs and not on class counsel, it is fair to assume that the counsel structure was what truly upset the Justices. We can assume this for two reasons, one straightforward and one nuanced. The straightforward reason is that the requirements for being a class representative are almost nil. Representative plaintiffs do not need to have any specific knowledge of the claims or issues in the action, nor are they required to play a personal role in the case.[154] Thus, the Court's lament that the class representatives did not "operate under a proper understanding of their representational responsibilities" makes little sense. The more nuanced explanation demonstrates that the logic of the Court's objection only makes sense if applied to class counsel. The eleven named plaintiffs themselves *did* in fact represent various subgroups. If anyone thought the named plaintiffs had real authority, the fact that they represented the range of asbestos-illness possibilities suggests that the class was structured in a way to allow competing factions, if any,[155] to fight it out among themselves. The Court's imagined alternative (to take the eleven named plaintiffs and to split them into eleven subclasses) changes nothing about what the named plaintiffs would be doing—competing over allocational decisions. What subclassing really accomplishes in this circumstance is that it provides each class representative subunit with its own lawyering team. This analysis demonstrates that the Court was concerned about the class being represented by one group of lawyers more than it was concerned about the class being represented by one—very diverse—group of plaintiffs.

---

150. *Amchem III*, 521 U.S. at 626.

151. For a description of the eleven class representatives and their experiences with asbestos and asbestos-related injuries, see the *Amchem I* decision, 157 F.R.D. at 261-62.

152. *Amchem III*, 521 U.S. at 626 (emphasis added).

153. *Id.*

154. *See, e.g.*, Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir. 1982); Snider v. Upjohn Co., 115 F.R.D. 536, 541 (E.D. Pa. 1987).

155. It is worth noting that the District Court had found that, because the case was not one involving a limited fund, class members with different interests had no inherent antagonism toward one another: "Class Counsel was able to negotiate compensation schedules for varying diseases without competition between medical categories for the same dollars." *Amchem I*, 157 F.R.D. at 318.

The *Amchem* Court's focus on the class counsel is not misplaced, simply indirect.[156]

In *Ortiz*, the Court more directly addressed its concerns about the adequacy of class counsel. Although the issue was not even before the Court, the Justices disparaged the *Ortiz* settlement both for not subclassing and, this time, for class counsels' conflicts. The Court criticized the lower courts for not creating subclasses so as "to provide the structural protection of independent representation."[157] In addition, as set forth in Part I, the Court impugned class counsel, implying that the lawyers' zeal for their clients' case was undermined by the "enormous fee within counsel's grasp."[158]

Given the characteristics of the modern mass tort case, the Court's hesitancy to declare absent parties adequately represented is understandable. What is less comprehensible is why the Justices' skepticism is restricted to mass tort class actions.

B. THE ADEQUATE SECURITIES REPRESENTATIVE

In certifying securities class actions, courts have spent far less time worrying about the adequacy of the class's representation than they have in tort cases. Given the small claims conception of the securities class this makes some sense; courts might well assume that any one plaintiff is as representative as any other and, further, if class counsel is disloyal to the class members, any one class member is losing so little that it is hardly worth significant judicial resources to police the representational scheme. This is not to say that concerns about adequate representation have been absent from securities case law. However, where concerns have surfaced, they have focused almost exclusively on the identity of the class representative or the class attorney; intraclass conflict has been a secondary concern.

Only occasionally have defendants attempted to defeat securities certification on intraclass conflict grounds. Intraclass conflict can be analyzed either as a problem of typicality under Rule 23(a)(3), or of adequacy under Rule 23(a)(4). Defendants have argued that differences in the amount of damages among

---

156. Focusing on class counsel is appropriate because in a large, complicated, nationwide class action case, an individual class member's ability to monitor class counsel is extremely limited. For an in-depth analysis, see Coffee, *supra* note 108, at 229-35, and see also Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998) ("[C]lass representatives often are recruited by class counsel, play no client role whatsoever, and—when deposed to test the adequacy of representation—commonly show no understanding of their litigation."). While courts want class counsel to be accountable to a client, few courts or commentators would pretend that mass tort class representatives serve as anything other than figureheads. *See generally* Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990). For a contrary view, see Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of* General Telephone v. Falcon, 54 OHIO ST. L.J. 607 (1993). Thus, in the words of Professor Cooper, "Class actions often are lawyer actions. Adequacy of representation is measured first and foremost by the adequacy of counsel." Cooper, *supra*, at 927.

157. Ortiz v. Fibreboard Corp., 527 U.S. 815, 855-57 (1999).

158. *Id.* at 852 n.30.

plaintiffs, in the size and manner of their purchases, or in the nature of the purchaser, render certification inappropriate. Two recurring problems are conflicts between "in and out" shareholders and "retention" shareholders (who have differing interests with regard to the rate of inflation during the class period), and conflicts between "holders" and "sellers" (who have differing interests with regard to the effect of damages on the issuers).[159] Yet, the leading class action treatise notes that none of these objections will "render a claim atypical in most securities cases."[160] Indeed, few securities class actions consider such intraclass disputes,[161] and most of those that do dismiss them as not preclusive of certification.[162] The central objection to adequacy of representation in mass tort cases is simply excused in securities actions.

Challenges to the identity or status of the class representative and/or attorney have also had little success in the securities field. Only occasionally have courts precluded certification in securities cases because of the identity of the class representative, and only then in extreme cases, such as where an attorney attempts both to represent the class as its counsel and to be the named class representative.[163] Prior to Congress's enactment of the PSLRA, securities classes were routinely certified with representatives who had insignificant stakes in the controversy and little or no understanding of the securities markets.[164] At the same time, class counsel were rarely found inadequate, although they often

---

159. *See* Frederick C. Dunbar & Vinita M. Juneja, *Making Securities Class Actions More Responsive to the Modern Shareholder*, *in* SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES, *supra* note 15, at 181, 198, 207-09.

160. NEWBERG ON CLASS ACTIONS, *supra* note 81, § 22.18 at 22-67.

161. *But see In re* Clearly Canadian Sec. Litig., 875 F. Supp. 1410, 1422 (N.D. Cal. 1995) (requiring evidence that conflicts between class members did not preclude certification); *In re* Seagate Tech. II Sec. Litig., 843 F. Supp. 1341, 1354 (N.D. Cal. 1994) (same).

162. Indeed, the *Seagate* court's consideration of such conflict has been regularly rejected in subsequent litigation. *See, e.g.*, *In re* Oxford Health Plans, Inc., 191 F.R.D. 369, 377 (S.D.N.Y. 2000); *In re* Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 70 (S.D.N.Y. 1999); *In re* Arakis Energy Corp. Sec. Litig., 1999 WL 1021819, at *10 (E.D.N.Y. Apr. 27, 1999); *In re* Miller Indus., Inc. Sec. Litig., 186 F.R.D. 680, 687 (N.D. Ga. 1999); Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377, 395 (D.N.J. 1998); Picard Chem., Inc. Profit Sharing Plan v. Perrigo Co., 1996 WL 739170, at *5 (W.D. Mich. Sept. 27, 1996); Freedman v. La.-Pac. Corp., 922 F. Supp. 377, 400 (D. Or. 1996); *In re* Mutual Sav. Bank Sec. Litig., 166 F.R.D. 377, 383 (E.D. Mich. 1996); *In re* Intelcom Group, Inc. Sec. Litig., 169 F.R.D. 142, 151 (D. Colo. 1996); *In re* AST Research Sec. Litig., 1994 WL 722888 (C.D. Cal. Nov. 8, 1994); Yamner v. Boich, 1994 WL 514035, at *7 (N.D. Cal. Sept. 15, 1994); *In re* Scorpion Techs., Inc., 1994 WL 774029, at *4 (N.D. Cal. Aug. 10, 1994); *In re* Proxima Corp. Sec. Litig., 1994 WL 374306, at *18 (S.D. Cal. May 3, 1994); Welling v. Alexy, 155 F.R.D. 654, 658 (N.D. Cal. 1994).

163. *See, e.g.*, Lowenschuss v. Bluhdorn, 613 F.2d 18, 20 (2d Cir. 1980); Jaroslawicz v. Safety Kleen Corp., 151 F.R.D. 324, 328 (N.D. Ill. 1993); Seiden v. Nicholson, 69 F.R.D. 681, 686 (N.D. Ill. 1976); *see also In re* Discovery Zone Sec. Litig., 169 F.R.D. 104, 107-08 (N.D. Ill. 1996) (rejecting as inadequate proposed class representative who was class counsel's stockbroker). *See generally* NEWBERG ON CLASS ACTIONS, *supra* note 81, § 22.27.

164. *See, e.g.*, Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 727 (11th Cir. 1987). *See generally* NEWBERG ON CLASS ACTIONS, *supra* note 81, § 22.24 ("[I]nadequacy challenges based on personal qualifications of a representative plaintiff who is not required to have a detailed understanding of the securities field are generally unwarranted and serve only to burden unduly the class determination process.").

suffered from the type of inherent conflict for which the Court chastised the mass tort attorneys. In fact, as critics have noted for decades, class counsel is conventionally considered the real party in interest in securities class actions; because plaintiffs are thought to have scant damage claims, the attorney's fee far exceeds any interest of the class members.[165] Opportunities for class counsel to compromise the class's interests are obvious and abundant.[166] Though these particular concerns have long been the subject of scholarly criticism,[167] they rarely led courts to deny certification in securities classes.[168]

Enter Congress. Perhaps no disjuncture in class action law is more jarring than the alternative visions of the securities class action attorney provided, on the one hand, by Congress and, on the other, by the courts. Though courts had only infrequently declared class representatives inadequate in securities cases, Congress rewrote the rules for securities class actions precisely because it felt that the class representatives (and class attorneys) were inadequate and problematic.[169] The PSLRA totally reorients the adequacy analysis for securities class actions. It not only presumes that the largest intervening shareholder is the most adequate representative of the class, but it also authorizes this shareholder to select class counsel.[170] In so doing, the law attempts to insert within the class action form a traditional attorney-client relationship—a strong client controlling an attorney-agent.[171] The case for shifting authority to the institutional investor is summarized by Jill Fisch as follows:

> Substantial shareholders may . . . have litigation incentives that reflect general social welfare. To the extent that much securities litigation results merely in a shift of assets from one shareholder class to another, substantial shareholders who are broadly diversified will rationally reject such cases as producing no social gain. Weak cases that burden business through the imposition of litigation costs will similarly appear undesirable to institutions which benefit from a litigation structure that minimizes the burden on legitimate business activity. At the same time, substantial shareholders are likely to appreciate the deterrence value of securities fraud litigation as well as its capacity to

165. *See* Coffee, *supra* note 120, at 701-24 (modeling plaintiffs' attorneys' incentives to litigate); Macey & Miller, *supra* note 53, at 22-24.

166. *See* Coffee, *supra* note 108, at 236-61.

167. *See, e.g.*, John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985); Macey & Miller, *supra* note 53, at 21-22.

168. An empirical study demonstrated that adequacy is challenged quite often in securities cases, perhaps more than in other types of litigation, but that these challenges "were quite often overcome." Willging et al., *supra* note 14, at 90, 115.

169. *See supra* notes 116-26 and accompanying text.

170. *See* 15 U.S.C. § 77z-1(a)(3) (2000).

171. *See, e.g.*, *Joint Explanatory Statement of the Committee of Conference—The "Private Securities Litigation Reform Act of 1995"*, H.R. CONF. REP. No. 104-369 (1995), *reprinted in* 141 CONG. REC. H13692 (daily ed. Nov. 28, 1995). The scholarly basis of Congress's work was provided by Elliott J. Weiss and John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995) (proposing that investors with largest stakes serve as lead plaintiffs in securities fraud class actions).

> generate a monetary recovery in a particular case and may resist settlements that do not impose adequate accountability on wrongdoers. Thus the lead plaintiff provision offers the possibility of decreasing the control of plaintiffs' counsel over the litigation process and reducing the problems of too much litigation of weak cases and poor settlements in strong cases.[172]

Yet, as Fisch and other commentators have pointed out,[173] Congress's cheery presumptions are suspect for a series of reasons. First, the presumption that a large investor would be more interested than a small investor in a fight with a corporation, and hence more committed to the cause on behalf of absent plaintiffs, is dubious from the outset. In purely financial terms, the loss suffered by the large investor might be a minute portion of its portfolio, while the loss suffered by the small investor might be her life's savings. Of the two, who is typical? Who would be a more adequate pursuer of the class claim? Second, this concern is amplified because institutional investors are differently situated to the securities market. Large investors have diversified portfolios and thus much less to lose in an individual fraud situation.[174] They also often have unique access to information.[175] Moreover, some large investors provide pension fund services to the very corporations they might face in a securities class action. Such structural incentives have served to keep institutional investors on the sidelines in securities class actions for decades.[176] Third, it is odd to think that parties who never expressed interest in pursuing cases in court are now labeled the most adequate protectors of the interests of others. Fourth, if institutional investors do start appearing in securities cases, as they have, it seems only a short time until they might cease doing so as class representatives. Hence the securities class action might return to a group of small investors pursuing a separate action rather than one brought by an institutional investor.[177] Finally, large and small stakeholders might simply be interested in different forms of relief in a class case, thus rendering suspect the ability of one to speak for the other.[178] What is perhaps most ironic about Congress's extraordinary efforts to rearrange representation of securities classes is that even after enactment of the PSLRA, the same exact plaintiffs' law firms that so spurred Congress to act still appear to be representing securities classes.[179]

---

172. Fisch, *supra* note 129, at 539 (citations omitted).

173. *See id.* at 540-50; *see also* Grundfest & Perino, *supra* note 129, at 601-04 (describing costs that may deter institutional investors from seeking lead plaintiff role).

174. *See* Fisch, *supra* note 129, at 546.

175. *See id.* at 545 ("An investor who faces the prospect of the sophisticated investor defense may not meet the typicality requirement of Rule 23." (citing Grace v. Perception Tech. Corp., 128 F.R.D. 165, 169 (D. Mass. 1989); Zandman v. Joseph, 102 F.R.D. 924, 932 (N.D. Ind. 1984))).

176. *See* Coffee, *supra* note 16, at 1352 n.25; Fisch, *supra* note 129, at 542-43.

177. *Cf.* Fisch, *supra* note 129, at 547 (describing tensions between large and small investors).

178. *Cf.* Coffee, *Conflicts*, *supra* note 141, at 1555-56 (discussing conflicts between large and small tort claimants regarding allocation of settlement).

179. *See* Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year's Experience*, 1015 PLI/CORP. 955, 959, 976 (1997) (stating that "the dominant plaintiffs' class action law

While the presumptions upon which Congress based the PSLRA are therefore questionable, they highlight several aspects of the adequacy analysis that support the claims of this Article. First, the PSLRA's largest shareholder/lead plaintiff presumption creates potential for real conflicts among class members in securities cases. Second, the PSLRA explicitly evidences Congress's concern about how attorneys may act absent significant client monitoring of their behavior. Third, the PSLRA generally stands for the proposition that securities class actions may suffer from concerns regarding adequate representation that parallel those which courts have articulated in the mass tort context. Hence, the question at the heart of this Article—Why are mass tort class actions and securities class actions treated so differently?—is not resolved by an appeal to adequate representation. None of the three commonly accepted doctrinal distinctions—predominance, superiority, or adequacy—truly explain the courts' different handling of these large complex cases.

V. WHY AVAILABLE CONCEPTUAL MODELS FAIL TO ACCOUNT FOR THE DISTINCTION

If doctrine does not explain the Court's differing responses to securities and mass tort certifications, perhaps these attitudes can be explained by prevailing conceptions of courts' institutional functions and capacities. The following sections describe three dominant paradigms of our adjudicatory system[180]—the adversarial litigation model, the public law litigation model, and the managerial model—and consider the extent to which these models account for current complex litigation practice generally, or for the disparate treatment of securities and tort class actions specifically. This Part concludes that while conceptual assumptions about the judicial function probably do animate the courts' responses to these two sets of cases, these conceptual frameworks, like the existing doctrinal apparatus, fail to provide a convincing account of current practices.

A. THE FAILURE OF THE ADVERSARIAL MODEL

The traditional model of adversary litigation imagines a two-party dispute resolved by an impartial third-party judge; the parties develop the facts themselves and present them, along with their legal meaning, to the judge, who

---

firm . . . appears to have increased its significance nationally" since enactment of the PSLRA, based on rise in firm's appearance from thirty-one percent of cases prior to PSLRA to forty-seven percent postenactment); *see also* Fisch, *supra* note 129, at 549 ("If institutions choose among the traditional plaintiffs' counsel, as initial practice under the Reform Act suggests most are doing, substituting institutions for individual class representatives may have limited impact on the conduct of securities fraud litigation.").

180. For a rich description of available models of adjudication and their relationship to complex litigation, see generally Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992).

renders a decision adjudicating the dispute.[181] The adversary model accounts for both a concept of litigation and the tools that accompany it:

> The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society. This formulation is advantageous not only because it expresses the overarching adversarial concept, but also because it identifies the method to be utilized in adjudication (the sharp clash of proofs in a highly structured setting), the actors essential to the process (two adversaries and a decision maker), the nature of their functions (presentation of proofs and adjudication of disputes, respectively), and the goal of the entire endeavor (the resolution of disputes in a manner acceptable to the parties and to society).[182]

Adversary procedure is conventionally contrasted with inquisitorial procedural systems.[183] In the latter, judges are assigned the role of searching for truth, whereas the American judge is a passive resolver of disputes framed by party-advocates.[184]

The power that the adversary paradigm commands may help explain, to some extent, courts' differing responses to securities and tort actions. In particular, objections to mass tort settlement class actions are often framed in these terms. At the extreme, the settlement class action is said to provide no "case or controversy" for resolution by the court system.[185] The adversary model, as its name suggests, depends upon an active controversy. If there is no active controversy, courts are generally mystified by the role they are being asked to play. This institutional mystification, albeit framed in more traditional doctrinal terms, seems in fact to have contributed to the Supreme Court decisions in *Amchem* and *Ortiz*. By contrast, securities class actions appear to have a real case or controversy at their core when filed. Unlike the tort settlement class actions, securities class actions are generally initiated by the filing of unresolved

---

181. Though he is critical of this ideal type, Martin Shapiro defines the accepted general conception to involve: (1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981); *see also*, Fuller, *supra* note 1, *passim*; Lon Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34 (H. Berman ed. 1971).

182. READINGS ON ADVERSARIAL JUSTICE, *supra* note 1, at 2.

183. *See generally* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

184. *See* READINGS ON ADVERSARIAL JUSTICE, *supra* note 1, at 3; SHAPIRO, *supra* note 181, at 148 (describing civil law systems where judicial bureaucrats "gather and prepare evidence in written form and present it to judges of higher rank").

185. This formal claim was raised, but avoided by the Court in *Amchem*. *See Amchem III*, 521 U.S. 591, 612 (1997) (identifying argument that case was "nonadversarial" in nature but declining to reach the merits of this contention).

allegations of past, or ongoing, harm. The fact that most securities cases settle does not itself undermine the adversarial model.[186] One might conclude that, even if the legal doctrine itself is unsatisfying, the adversarial conception of American adjudication provides a theoretical explanation for the disparate results in these two types of cases.

There are several problems with this account, however. First, to announce that securities class actions are classically adversarial in nature does not make them truly so. The review in Part I of the Delaware portion of the *Matsushita* action demonstrated that often little traditional adversarial work takes place. Indeed, the Ninth Circuit panel initially expressed concern that the Delaware action was simply a convenient placeholder for resolution of the entire controversy, which had the effect of ending, not sustaining, the adversarial litigation in California.[187] Though some securities class actions are of a traditionally adversarial nature, to label them all so is to provide far too much explanatory power to the adversarial model of adjudication.

A second problem with the explanatory power of the adversarial model is that the Supreme Court has not gone so far as to renounce explicitly the forms of "adjudication" exemplified by *Amchem* and *Ortiz*, notwithstanding the Court's rejection of class certification in those cases. In rejecting the particular settlement and limited-fund class actions in those cases, the Court left open the possibility, and indeed in *Ortiz* even provided a road map,[188] for acceptance of such forms in future cases. The decisions cannot, therefore, be read to stand unambiguously for the proposition that these forms offend the Court's sense of "courtness."

A third problem with the explanatory power of the adversarial model is slightly more nuanced. These large, complex cases present a double anomaly to the prototype of adversarial adjudication—they are, simultaneously, settled "adjudication" and "representative" litigation. Perhaps standing alone, neither of these problems defies adversarial adjudication. Generally speaking, a strong adversary system can tolerate even high rates of settlement, as opposed to adjudication, so long as the adversarial nature of the system helps promote such settlements. Thus, live cases and controversies that are framed through pleading, and narrowed by adversarial factual discovery and preliminary judicial rulings, fit comfortably within any notion of adversarial justice.[189] Though the neutral arbiter is not called upon to render a final judgment, the other attributes of adversarialness are safeguarded. Similarly, representative litigation itself can

186. *See* READINGS ON ADVERSARIAL JUSTICE, *supra* note 1, at 22 ("It should be noted that settlement is not necessarily antithetical to the adversary process. In fact, a high percentage of settlements has long been a trait of adversary systems of justice.").

187. *See* Epstein v. MCA Inc., 126 F.3d 1235, 1255 (9th Cir. 1997), *withdrawn and superseded on reh'g*, 179 F.3d 641 (9th Cir. 1999).

188. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 863-64 (1999) (summarizing requirements for limited-fund settlement classes).

189. *See supra* note 186.

be adversarial in nature, albeit indirectly. Though each individual is deprived of her own day in court, so long as the parties otherwise respect the attributes of adversarialness and the neutral arbiter renders a judgment, class actions at least have the pretense of resembling a basic adversarial lawsuit.[190]

Combine both of these tenuous outliers, however, and a strange hybrid exists. In large, complex class actions, representative plaintiffs settle huge numbers of cases belonging to absent parties. The primary judicial activity that is often entailed is the fairness hearing that blesses the outcome.[191] Such judicial activity fits rather oddly into the adversarial framework.[192] The parties are no longer adverse to one another, but rather in accord on the settlement terms. Adversity may arise through intervening objectors. But even then, the judge is not being asked to resolve a legal claim according to traditional proofs and arguments. Rather, the judge is being asked to assess the legitimacy of a negotiating process and the fairness of its substantive outcome. Lon Fuller characterized such activity not as pure adjudication, but rather as "contract parasitic on adjudication,"[193] in that the parties are utilizing the court to "assure the legal effect of an agreement."[194] It is unnecessary for purposes of this Article to go so far as to disparage the legitimacy of fairness hearings, per se. Fuller's argument that such hearings lie, at best, at the periphery and not the core of adversarial procedure helps demonstrate that the adversarial model does not really explain why fairness hearings blessing securities settlements are more institutionally acceptable than fairness hearings blessing mass tort settlements.

Perhaps the strongest objection to the pretense that the adversarial model explains complex class actions though, is that it fails to account for most of what litigants, lawyers, and judges actually do in these cases. Litigant control is

---

190. The class action literature encompasses a rich debate about the extent to which our procedural ideals can be realized through representative litigation. *Compare, e.g.*, Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993), *and* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979), *with, e.g.*, Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69. For an interesting study of the general relationships between representative litigation and adversarial procedure, see generally COMPLEX LITIGATION AND THE ADVERSARY SYSTEM (Jay Tidmarsh & Roger H. Trangsrud eds., 1998).

191. Sometimes a judge is called upon to certify such cases earlier in the process, and/or to develop case management plans, and occasionally to resolve discovery disputes. But these roles are of marginal importance compared to the court's role in overseeing the entry of judgment that will bind absent parties.

192. *See* Wasserman, *supra* note 53, at 479-83. For an extended critique filtered through the lens of the *Amchem* fairness hearing, see Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1126-37 (1995).

193. Fuller, *supra* note 1, at 408-09.

194. *Id.* at 408. Fuller's examples of "contract parasitic on adjudication" involve more explicitly collusive adjudicative activity than most class action settlements, but as he noted, "the admixture of contractual elements in an adjudicative process is a matter of degree." *Id.* at 409. Thus, Fuller concluded that "the fact that all human relations are tinctured with a slight element of dissimulation is no reason to elevate dissimulation to the level of principle." *Id.* For a related critique of the hybrid nature of judicial activity in the context of consent decrees, see Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988).

minimal, if not nonexistent. Attorney activity often does not involve pleading, discovery, and legal research. The judicial function is rarely adjudicative in nature. Even if our devotion to adversarial justice helps explain the Court's revulsion at the *Amchem* and *Ortiz* deals, it does not begin to explain the practice of complex class actions in the field. For that, we must look elsewhere.

B. THE INAPPLICABILITY OF THE PUBLIC LAW LITIGATION MODEL

In 1976, Abram Chayes sketched a picture of public law litigation which demonstrated that a substantial amount of federal court litigation deviated significantly from the accepted model of the adversary system.[195] Focusing on large public cases like school desegregation and prison reform actions, Chayes outlined, and began to defend, a model of judicial action that imagined the judge as filling a void produced by legislative failure. Chayes began by ascribing several key premises to traditional adjudication: the lawsuit is bipolar; the litigation is retrospective; the right and remedy are interdependent; the lawsuit is a self-contained episode; and the process is party-initiated and party-controlled.[196] Public law cases differed in each respect:

> (1) The scope of the lawsuit is not exogenously given, but is shaped primarily by the court and parties.
>
> (2) The party structure is not rigidly bilateral, but sprawling and amorphous.
>
> (3) The fact inquiry is not historical and adjudicative, but predictive and legislative.
>
> (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking . . . .
>
> (5) The remedy is not imposed but negotiated.
>
> (6) The decree does not terminate judicial involvement in the affair; its administration requires the continuing participation of the court.
>
> (7) The judge is not passive. His function is limited to analysis and statement of governing legal rules. He is active, with responsibility not only for credible fact evaluation, but for organizing and shaping the litigation to ensure a just and viable outcome.
>
> (8) The subject matter of the lawsuit is not a dispute between private

195. *See* Chayes, *supra* note 3. For a contrary view of the relationship between traditional adversarial adjudication and public law litigation, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995).

196. *See* Chayes, *supra* note 3, at 1282-83.

> individuals about private rights, but a grievance about the operation of public policy.[197]

It would be expedient to dispense with the applicability of the public law litigation model to complex cases solely on the basis of the eighth criteria (as well as the name of the model itself!). Neither mass tort nor securities cases appear to have anything to do with the public law model since both involve private law issues. Alternatively, it is tempting to characterize sprawling complex cases as the private law equivalent of Chayes's public law case.[198] However, neither position is warranted upon closer review of the public law model's specifics.[199]

Both securities and mass tort class actions differ significantly from the public law cases. These private law cases do share some features with the public suit: the scope of the lawsuit is often planned by the parties and court, not exogenously given;[200] the remedy is typically negotiated, not imposed; and the judge, especially in mass tort actions, is not the traditional detached arbiter. But in several key ways, complex private cases differ significantly from public cases. First, while the party structure may be complicated by subclasses with differing interests, the parties in these private cases are easily identifiable as plaintiffs or defendants. Second, liability is premised upon rather traditional notions of intent, fault, and causation. Thus, unlike in public law cases, the fact inquiry in complex private cases (when undertaken) tends to be more historical and conventionally adjudicative than public law cases. Furthermore, relief is thought to be compensatory. Finally, judicial involvement is not required beyond the entry of judgment, indeed, it is barely required before that.[201]

The public law model attempted to capture the features of a unique type of adjudication—litigation meant to fill the gaps created by legislative failure. It assessed the institutional capacity of the judiciary as that branch reached out into areas more conventionally legislative and executive in nature. Complex

---

197. *Id.* at 1302.

198. This is especially true of the mass tort cases. *See generally* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) [hereinafter Rosenberg, *Causal Connection*]; David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1986) [hereinafter Rosenberg, *Collective Means*]; Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

199. For insightful commentary, see James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1017-21 (1995) (discussing the relationship between public law cases and mass tort cases, but arguing that the public law analogy "does not justify settlement class actions"); Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999) [hereinafter Mullenix, *Resolving Aggregate Mass Tort Litigation*].

200. Both *Amchem* and *Ortiz* are good examples of this as each attempted to carve out and solve specific aspects of asbestos litigation.

201. For a fuller recitation of these points, see Mullenix, *Resolving Aggregate Mass Tort Litigation*, *supra* note 199.

private cases generally do not seek to extend the judiciary beyond the judicial sphere. On the contrary, they utilize the judicial system for one primary and quite traditional reason—to gain finality.[202] The parties in these cases cannot be faulted for seeking too much extra-judicial judicial activity. They can be faulted, if at all, for wanting something from the judiciary with as little conventional judicial involvement as possible.

C. THE INCOMPLETENESS OF THE MANAGERIAL MODEL

The generation of scholars that has succeeded Chayes has been less interested in re-imagining public law litigation and more interested in producing theories of adjudication to account for developments in private law litigation. These newer accounts focus on two salient features of current adjudicatory practice. First, judges do not simply preside at trials following the development of a case by the attorneys; rather, judges "manage" lawsuits from filing to finish. Second, "finish" increasingly means settlement, not trial. In short, judges manage cases, rather than adjudicate trials.

Judith Resnik first conceptualized these developments as a new mode of judicial activity in the early 1980s.[203] Resnik began by characterizing Chayes's public law litigation model as focusing, in particular, on a judge's postrelief involvement with the parties and issues.[204] Of *private* adjudication, both complex and routine, she wrote that:

> The role of judges *before* adjudication is undergoing a change as substantial as has been recognized in the posttrial phase of public law cases. Today, federal district judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion. Judges have described their new tasks as "case management"—hence my term "managerial judges." As managers, judges learn more about cases much earlier than they did in the past. They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation. These managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.[205]

---

202. It is true that to gain such global finality, especially in mass tort cases, judges often have to act beyond what the traditional model assumes. However, judicial activity in mass tort cases is an attempt to manage the judicial system, not an attempt, as in public law cases, to manage societal institutions.

203. *See* Resnik, *Managerial Judges*, *supra* note 4. Resnik's concept of the managerial judge gathered and expanded upon earlier portrayals of the changing nature of the judicial function. *See, e.g.*, Stephen Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487, 503-07 (1980); Rubin, *supra* note 4; Stephen Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978); Hubert Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977); Will, *supra* note 4.

204. *See* Resnik, *Managerial Judges*, *supra* note 4, at 377-78.

205. *Id.* at 378.

While attributing this new judicial style to changes in the procedural rules concerning discovery (which worked to involve judges in cases earlier) and to an increase in the volume of federal litigation, Resnik was quite critical of the judiciary's attempts to deal with these changes through this new form of what she labeled "judicial activism."[206] Her concern was that the managerial aspects of judging concentrated enormous power in the hands of federal district court judges and threatened their impartiality should they be called upon to adjudicate.[207]

Like the adversarial model, the managerial model and Resnik's suggestions of its limitations somewhat account for the judicial response to complex class action practice. The managerial model might explain that securities class actions are either not in the universe of cases falling within that model's purview,[208] or are appropriately managed and settled by judges. By contrast, mass tort cases stretch the managerial function to its limits. While some lower federal district court judges are comfortable with this extension of managerial judging, a majority of the Justices are not, hence their rejection of the *Amchem* and *Ortiz* settlements. Seen through the managerial lens then, the securities cases are understandably certified and the mass tort cases properly decertified.

Yet, the explanatory value of the managerial model is not so straightforward. For one thing, it does not seem like the managerial model should be so accepting of securities class actions. The two primary impetuses for managerial judging were the greater involvement of federal judges in pretrial management encouraged by the 1938 Federal Rules of Civil Procedure and the desire of judges to curtail ever-growing dockets.[209] The former, pretrial steering, happened so poorly, or so infrequently, in securities class actions that Congress rewrote the securities laws to require federal judges to do more managing.[210]

---

206. *Id.* at 380 ("Management is a new form of 'judicial activism.' "). For a critique of Resnik's assessment, see E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 307 (1986).

207. *See* Resnik, *Managerial Judges*, *supra* note 4, at 424-31. This concern echoed earlier commentators. For example, Professor Landsman had written of the move toward managed settlement:

> The reformers have not only sought to reduce the number of cases tried by adversarial methods, they have attempted to alter the nature of the process itself. Basic components of the adversary system, such as judicial passivity, advocate responsibility for the development of cases, jury primacy, traditional rules of procedure and evidence, and thoroughgoing appellate review, have all been sharply criticized. Passivity has been challenged in a number of contexts. In the name of efficiency, judges have been admonished to take charge of settlement negotiations at the earliest moment, to supervise the bargaining process, to render opinions concerning issues not yet litigated, and to settle as many lawsuits as possible.

Landsman, *supra* note 203, at 506.

208. The *Matsushita* case described throughout arose in Delaware state court, whereas Resnik's focus is on federal courts. Moreover, the case, as with many securities class actions, required dramatically little judicial management.

209. *See* Resnik, *Managerial Judges*, *supra* note 4, at 378-80.

210. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1 to 78j-1 (2000) (requiring judges to appoint lead plaintiff in securities class actions and to approve of lead plaintiff's

Moreover, if the courts wanted to streamline dockets, an easier route would have been to deny certification in small claims class actions. Having conceptualized such classes as including no claimant with a large enough claim to file an individual lawsuit, the judiciary might have welcomed the fact that with a little more "management" and somewhat fewer certifications, it could have reduced its caseload significantly.

What is more unsatisfying about the managerial lens, however, is that it fails to capture several significant aspects of modern class action practice. The managerial model squares the outcome in the two sets of cases by distinguishing the judicial function in them; although this distinction is generally valid, it obscures the ways in which the two sets of cases share many important common features. As described above, the two cases are less doctrinally distinct than is generally believed.[211] Furthermore, as described more fully below, both sets of cases are more conceptually similar than the managerial account notices—both involve deals for res judicata, undertaken with little traditional legal work, by dealmaking attorneys.[212] Appreciation of the importance of these shared attributes requires a focus on aspects of the adjudicatory system that lie beyond the managerial model's emphasis of the judicial function.

Even with a focus on the judicial function, however, the 1980s-produced managerial model does not fully capture the existence of a current significant tension in that function. On the one hand, as Resnik describes, managerial judges are encouraged to manage cases to settlement. Yet, on the other hand, in at least some of the cases described herein, the need for such judicial management is secondary at best. Either the case has already been settled when filed (admittedly, sometimes with the help of prefiling managerial judging), or all of the parties and the judge know the case will settle (as with securities actions) absent any management from a judge whatsoever. Resnik's criticisms of 1980s practices presciently anticipated the direction away from adversarialness that adjudication was headed; if anything, they were too modest in predicting the distance that would so quickly be traveled.

As should be evident, these points are less criticisms of the managerial model, or of Resnik's own concerns with it, than they are lamentations of the model's limited focus. What was observed as a matter of judicial method can now be expanded into a broader model of adjudicative practice.

VI. TOWARD A TRANSACTIONAL MODEL OF ADJUDICATION

Viewed in tandem, these two types of class actions provide the basis of a new model of American adjudication—a "dealmaking" or "transactional" model.

---

choice of counsel). I suspect that the PSLRA had a political (antisecurities bar), more than managerial, impetus. Whatever Congress's motivation, however, its mandate was for greater judicial management. Thus, the law did help highlight the absence of meaningful judicial oversight of securities cases.

211. *See supra* Parts II-IV.

212. *See infra* Part VI.

Section A describes the attributes of the transactional model. Section B demonstrates how viewing adjudication through this lens explains the courts' disparate treatment of securities and mass tort cases. Section B also demonstrates that the transactional model has broad explanatory power beyond the specific contradiction analyzed in the earlier parts of this paper. Sections C and D consider normative concerns and limitations of the model, respectively.

A. DESCRIPTION OF THE MODEL

The transactional model challenges us to consider the extent to which what transpires when litigants, attorneys, and judges assemble in complex cases is best characterized as a transaction. Such a portrayal of the adjudicatory system rests upon four main attributes.

1. The Transactional Purpose of "Litigation"

The core premise of the transactional model is that complex multiparty litigation resembles a transaction more than it resembles a conventional adversarial lawsuit. What is bought and sold are rights-to-sue.[213] The underlying rights-to-sue might themselves, if not transacted, give rise to adversarial litigation. But the purpose of the complex class action is to ensure that this does not happen. The purpose is for the defendants to provide sufficient funds to plaintiffs' attorneys, who provide sufficient finality in return, so that the underlying lawsuits never have to be filed, much less tried. Like any other transaction, this type of deal theoretically benefits both sets of parties. Defendants gain certainty through finality and can go about their normal business activities. Plaintiffs gain whatever can be recouped from the present sale of their legal rights and are spared the transaction costs associated with individual adjudication.

If a complex transaction breaks down, it very rarely, if ever, leads to adversarial adjudication on the merits in its filed (if it even has been filed at all) form.[214] The purpose for coming together at the courthouse is to trade, not try. Perhaps because this dealmaking involves legal rights, takes place in a court-

---

213. Stephen Yeazell quotes John Frank as characterizing settlement class actions as "res judicata for sale at bargain basement rates." Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 704 n.58 (1997).

214. *See, e.g*, *Amchem II*, 83 F.3d 610, 632 (3d Cir. 1996) (noting that class action as large as *Amchem* "could not be tried"), *aff'd sub nom.*, *Amchem III*, 521 U.S. 591, 600-01 (1997) ("The class action [here] instituted was not intended to be litigated."); COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 342 (Richard L. Marcus & Edward F. Sherman eds., 3d ed. 1998) (noting that settlement class actions are cases in which courts certify for "purposes of settlement negotiation in cases [but] where certification might not be proper for trial"); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 854 (1995) (stating that the "critical fact" about settlement class actions is that "the dominant interpretation of Federal Rule of Civil Procedure 23 would probably prevent the same class action from being certified for purposes of trial").

In rejecting the *Amchem* settlement class action, the Court explicitly did *not* reject the concept of a class action that is certified for settlement purposes only. The Court stated that

house, or is blessed by a judge, we prefer to view it as having more to do with Warren Burger than Warren Buffett. But to insist that this is adjudication because legal rights are being bought and sold is a little bit like insisting that a corporate takeover of NBC is a television show because a television network is being bought and sold.

2. The Transactional Nature of the Attorneys' Work

A second reason that class actions are profitably conceptualized as "deals" is that this best describes what the attorneys do in such cases. Most of the action in the class action is in the transactional aspects of the deal—what is offered, what is accepted, on what terms, for what consideration. To be sure, some time is spent undertaking traditional legal work—writing complaints and answers, filing motions and briefs, arguing in court. However, as described below, this traditional adjudicative activity is often secondary.[215] The primary function that complex class action attorneys undertake is structuring large financial transactions.

That complex class action attorneys are essentially dealmakers, not trial attorneys, can be demonstrated in several ways. Recent scholarship illustrates that many plaintiffs' firms make economic, cost-benefit analyses of the types of mass claims they will undertake.[216] Just because attorneys calculate their risks in undertaking litigation does not mean that their litigation-related activities are therefore transactional in nature. However, a view of the transactional character of many of these attorneys' efforts does emerge from this new literature.[217] This is especially true given the fact that defendants increasingly seek class certification to gain finality.[218] In such instances, defendant attorneys are acting as "transactionally" as their plaintiff counterparts. With defendants in search of a

---

> [c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *for the proposal is that there be no trial.* But other specifications of the rule . . . demand undiluted, even heightened, attention in the settlement context.

Amchem III, 521 U.S. at 621-23 (citation omitted) (emphasis added).

215. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 20.22, at 26 (stating that "[t]raditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and conducts witness examinations, may result in waste of time and money, in confusion and indirection, and in unnecessary burden on the court").

216. *See, e.g.*, Coffee, *supra* note 120, at 701-20 (applying several economic models to the behavior of plaintiff firms).

217. *See, e.g.*, Coffee, *supra* note 16, at 1370-73; Coffee, *supra* note 108, at 250-52 (describing work of plaintiff attorneys who build counsel coalitions but who do not "engage . . . in the usual prepatory work of discovery or motion practice"); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1042-45 (1993) (describing "wholesal[ing]" law firms that "make substantial investments to obtain cases, but spend relatively little to develop individual cases for settlement or trial"); Koniak, *supra* note 192, *passim*.

218. *See* Coffee, *Rethinking*, *supra* note 141, at 647-49, 663 (stating that "those most likely to favor mandatory class certification today appear to be the major defendants in mass tort cases"); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997); Yeazell, *supra* note 213, at 699-704.

"deal," the incentives on plaintiff attorneys to become dealmakers in return is enormous.[219] Journalistic accounts of the big class action deals also confirm that dealmaking is a, if not the, central function of the attorneys in such cases.[220] Institutional factors also encourage counsel to act as dealmakers in certain large class actions. In such cases, the judge designates attorneys on the plaintiffs' legal team to perform certain specific functions; only a subset of the attorneys are assigned the role of being involved in adjudicative aspects of the case.[221]

This depiction of class action attorneys as transactional dealmakers can also be substantiated in two less direct ways. One is in a defense of their craft made by the plaintiffs' securities bar. Such lawyers are stereotypically thought to file "strike" lawsuits—a company's stock drops precipitously one day, and by the next morning, three class actions have been filed. In response to this charge, the securities law firms insist upon their market expertise.[222] The securities law firm is, in short, a first cousin of a securities house, a typical transactional establishment.

A second indirect manner of establishing the transactional nature of the class action bar is to look at its opponents. Significant opposition to mass tort class deals comes not, as traditionally assumed, from the defense bar, but rather from the plaintiffs' bar. Competing class action attorneys have perhaps the highest stake in opposing court approval of a class action settlement because settlement of one class action forecloses their ability to gain attorneys fees in a competing class action.[223] Moreover, plaintiffs' *trial* attorneys also mount significant opposition to mass tort deals, as they have a significant economic interest in the "rights to sue" that are being transacted. Thus, the *Amchem* appeals were funded by the trial bar.[224] Although the Court's decision in *Amchem* was framed in the doctrinal languages of predominance, adequacy, and due process, on a different level the case can be viewed as a financial skirmish between transactional attorneys and trial attorneys.

Law students are often counseled that two distinct career paths exist in the private bar: transactional work or litigation. The central point here is that the

---

219. For a good description of these incentives, see Wasserman, *supra* note 53, at 472-75.

220. *See, e.g.*, SOBOL, *supra* note 138, *passim*; Joseph Nocera, *Dow Corning Succumbs: Fatal Litigation: Part II*, FORTUNE, Oct. 30, 1995, at 137; Joe Nocera, *Fatal Litigation I*, FORTUNE, Oct. 16, 1995, at 60. Recent media portrayals of the tobacco litigation, such as the movie *The Insider*, also further this claim.

221. *See* MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 20.22 at 26.

222. *See, e.g.*, James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 916 (1996) (stating that "[p]laintiffs' attorneys use Quotrons and other information to monitor stock prices carefully"); William P. Barrett, *I Have No Clients*, FORBES, Oct. 13, 1993, at 52 (stating that plaintiffs' law firm invests in market research and retains securities experts).

223. *See* Wasserman, *supra* note 53, at 482 & n.97.

224. *See, e.g.*, Barry Meier, *Fund-Raiser May Be Achilles' Heel for Gore*, N.Y. TIMES, June 4, 2000, at 30 (describing how one Texas trial attorney invested four million dollars in seeking reversal of the *Amchem* settlement).

two are less distinct than imagined. A significant, if not predominant, aspect of a complex litigation practice is transactional in nature.

3. The Secondary Nature of Traditional Legal Signposts

Given the transactional nature of complex adjudication and the dealmaking function of attorneys, traditional adjudicative markers lack their conventional relationship to the underlying litigation. Pleadings do not serve the function they traditionally served in adjudication, that of defining the nature and scope of the controversy.[225] In settlement class actions a deal may well be cut and then pleadings filed, or amended, to conform to what could be agreed upon. This is what happened in both *Amchem* and *Ortiz*. Similarly, in securities class actions, the pleadings develop as the transaction unfolds. Consider *Matsushita* again. The Delaware class action was filed shortly after the announcement of the MCA-Matsushita talks. That complaint was something of a placeholder, identifying for the defendants' attorneys the plaintiffs' attorneys with whom to negotiate finality.[226] After announcement of the tender offer some months later, a new Delaware complaint was filed to reflect the specifics of that offer. The Delaware complaint was amended yet again after the filing of the federal class actions, as the Delaware action was to be used to dispose of the federal claims. Hence pleadings in *Matsushita* were used for transactional, not adjudicative, purposes. In the transactional model, pleadings do not dictate the structure of adjudication, they reflect the structure of the deal.

The *Matsushita* action also demonstrates how little discovery may take place in a transactional case. Conventional settlements follow fact development and are based upon the facts that are learned during that process. Some transactional cases, like *Matsushita*, simply do not rest upon adjudicative facts developed through discovery.[227] Others rely on discovery developed elsewhere, namely in traditional adversarial proceedings. For example, mass tort cases are often

---

225. *See* JAMES ET AL., *supra* note 108, at 557.

226. Professor Coffee describes this familiar scenario as follows:

> [T]he attorney who discovers an actionable legal violation may have to share the expected reward with those other attorneys who later file parallel class actions and are typically then consolidated into a single nationwide proceeding. The first attorney is thus like a prospector who cannot stake out a legally valid claim on his discovery, and thus his incentive is to exploit the newly discovered resource quickly by reaching an early settlement (if he can) before others intervene.

Coffee, *Rethinking*, *supra* note 141, at 640-41.

227. Rhonda Wasserman describes this situation as follows:

> Because class counsel in dueling class actions are under such enormous pressure to settle with the defendant quickly, they often begin negotiations before they have undertaken substantial discovery . . . . This informational deficiency is more severe in federal/state dueling class actions where the federal class action raises claims within the exclusive subject matter jurisdiction of the federal courts. In such cases, class counsel in the state litigation has no reason to perform a pretrial investigation of federal claims, has no incentive to take discovery on the facts underlying the federal claims, and yet is under pressure to settle the exclusively federal claims as part of a global settlement with the defendant.

proposed and settled after their "maturation." What this means is that the facts have been developed in individual actions such that the parties generally know the contours of the dispute.[228] In the Dalkon Shield cases, for instance, the primary facts were known to all parties by the early 1980s. The trial attorneys would have been happy to continue trying case after case on already developed facts, ad infinitum.[229] The concept of a global settlement was to turn that series of adjudications into one large transaction, but no new discovery was needed for such a deal. The final markers of adversarial adjudication—trial and adjudicated judgment—are exceedingly rare in large complex cases. So secondary are traditional adjudicative markers that the *Manual for Complex Litigation (Third)* cautions that service of the litigation papers on all of the attorneys is unnecessarily wasteful.[230]

What does pass for traditional adjudicative activity is primarily the two things that involve the judiciary—class certification and the fairness hearing on the one hand, and the development of some kind of claims structure on the other. Neither can take place without a judge and thus, both have the trappings of conventional adjudication: motions, briefs, arguments, et cetera. These aspects of the transaction might also be the most truly adversarial, and hence adjudicative, because they tend to be the sites that attract objecting trial attorneys, disgruntled dealmakers cut out of the deal, or advocates for those who are deal-losers.[231]

This account of the secondary nature of traditional adjudicative markers is surely a bit exaggerated. Many class actions proceed along familiar adversarial lines from pleading through discovery, occasionally even to trial, and to judgment. Nonetheless, the caricature offered here is familiar—legal forms are generally instrumental to a transaction, not productive of an adjudicative outcome. Indeed, the *Manual for Complex Litigation (Third)* itself captures the essence of the point: "The class action device may also be used as a *vehicle for settlement* of large-scale litigation."[232]

4. The Judicial Function

So far, I have argued that big class actions can be conceptualized as "transactions" because they involve the buying and selling of a commodity, because transactional work is the primary activity that the lawyers in these cases

---

Wasserman, *supra* note 53, at 474-75 (citations omitted).

228. Thus, the *Manual for Complex Litigation, Third* defines mature mass torts as those in which "discovery has been completed," noting that "in such litigation little or no new evidence is likely . . . ." MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 33.26 at 322 n.1057 (citing Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989)).

229. *See* SOBOL, *supra* note 138, at 23.

230. *See* MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 20.22 at 26.

231. *See, e.g.*, Coffee, *supra* note 167, at 54 (stating that "it is a common event" for an attorney previously involved in a piece of adjudication to seek to block a settlement reached by a competing attorney).

232. MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 30.4 at 236 (emphasis added).

undertake, and because the signposts of conventional adversarial adjudication lack their normal meaning. In making these points, I have not distinguished securities from tort transactions. Unlike these other facets of the transactional model, the judicial function varies more across these archetypes. The transactional jurist in mass tort cases has been the ultimate judicial manager. By contrast, the transactional jurist in securities cases has been a too-passive arbiter. However, Congress's recent amendments to the securities laws have changed the nature of the judicial function in securities cases.

Mass tort cases have challenged the outer limits of the managerial model of judging. In traditional adversarial adjudication, the judge rests peacefully on the bench, neutrally arbitrating the strengths and weaknesses of parties' factual proofs and legal contentions. From time to time, she might retreat to chambers to undertake research or write a legal decision, but these are the spatial bounds of her official duties. In the managerial model, a significant amount of a judge's work is also undertaken in the courtroom, though rarely at trial. The work is done "pretrial" through scheduling conferences and occasionally in adjudicating discovery disputes. Judges also work robeless, in chambers or conference rooms, settling cases.[233] Nonetheless, the judge is still an authority figure. Hence, the central concern of managerial judging expressed by Resnik nearly twenty years ago is the potential conflict between the settling function (and information and attitudes developed thereby) and the adjudicative function that must follow if settlement fails.[234]

Despite Resnik's warnings, the managerial judicial function seems only to have expanded in the succeeding years, rendering the hypothetical managerial examples she posed in 1982 tame in comparison to the real transactional examples available from the annals of the 1990s. The *Manual on Complex Litigation, Third* encourages jurists to be huge deal brokers, urging them to help parties in mass tort cases create " 'global' settlements, resolving not only the defendants' potential liability to the plaintiffs, but also their liability to one another for indemnification or contribution," and urging partial settlements only "if the entire litigation cannot be resolved through a single settlement."[235] Not surprisingly then, what the transactional jurists did in *Amchem*, and especially in *Ortiz*, and what they do in transactional cases far exceeds earlier managerial descriptions. For one, judges leave the courthouse. They fly around the country meeting with attorneys and with one another attempting to "coordinate" the

233. *See* Resnik, *Managerial Judges*, *supra* note 4, at 407 (describing the informal nature of managerial meetings as compared to the "highly stylized structure of courtroom interaction"). In describing the functions of the managerial judge, Resnik appreciated their relationship to transactional work, writing that "[b]ut for the title of one of the participants—'judge'—these conferences could be confused with ordinary business meetings." *Id.*

234. *See id.* at 425-31; *see also* MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 23.11 at 167, § 33.29 at 334.

235. MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 33.29 at 333 (notes omitted).

deal.[236] This coordination function not only crosses geographic districts within the federal court system,[237] but it is now commonly accepted that federal judges will coordinate their activities with state judges, and across states.[238] Second, as we have seen, the presence of an actually-filed case in their courtroom, on their docket, may be of only minor relevance to the scope of the function judges assume. In many transactional cases, judges receive their assignment from the Judicial Panel on Multidistrict Litigation or from another federal judge. Their legitimacy comes not through being the "adjudicator" of a filed lawsuit, but from being the judiciary's representative to the deal.[239] Third, judges' personalities help shape the deal.[240] They befriend the attorneys, form litigation committees, and carve out agreements. They meet in restaurants[241] and have attorneys to their homes.[242] An anthropological description of judicial activity in these large class actions demonstrates the similarity to transactional, not adjudicatory nor managerial, work.

By contrast, in a transactional case involving securities, the judge may be called upon to do very little. The *Matsushita* case is again instructive. The multiplicity of class actions essentially enabled the defendants to have a reverse auction, buying the plaintiffs' rights to sue at a discount from the Delaware class action attorneys, at the expense of the California class action attorneys.[243] All of this transpired without any needed assistance from the Delaware chancellor. His efforts in the matter essentially amounted to two fairness hearings, the work duplicated only by the fact that he rejected the initial settlement. The case can be characterized as transactional in nature as it satisfied the other aspects of the model—the selling of res judicata, an absence of conventional legal work, and

---

236. *See, e.g.*, SOBOL, *supra* note 138, at 45 (describing meeting of thirteen state and federal judges handling Dalkon Shield cases). *See generally* MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 31.14 at 256 (noting that 28 U.S.C. §§ 292-293, 296 authorize federal judges to sit outside their own circuits under special assignment).

237. *See* 28 U.S.C. § 1407 (1994).

238. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 31.31 at 259-61, § 33.23 at 315-17; Schwarzer et al., *supra* note 4, at 1531-32. For an appraisal, see Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Cases*, 44 U.C.L.A. L. REV. 1851 (1997).

239. *Cf.* Resnik, *Trial as Error*, *supra* note 4, at 1029 (describing the institutionalization of the judiciary as an entity with its own "interests").

240. The *Manual for Complex Litigation, Third*, acknowledges as much. Section 23.11 sets forth General Principles for judicially mediated settlement negotiations. In so doing, the Manual urges judges to use their personal characteristics, as well as their institutional power, to urge settlement. Moreover, the Manual less explicitly acknowledges the varying capabilities of judicial personalities:

> [S]ettlement efforts [should not] be permitted to impair the parties' perceptions of the assigned judge's fairness and impartiality. *Some judges* are able to participate actively in settlement discussion as well as pretrial activity and trial if necessary. Occasionally, the parties request the assigned judge's direct participation, waiving the right to seek recusal . . . .

MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 7, § 3.11 at 167 (emphasis added).

241. *See In re* Asbestos Litig., 90 F.3d 963, 993 n.3 (5th Cir. 1996) (Smith, J., dissenting).

242. *See* SOBOL, *supra* note 138, at 42; Will et al., *supra* note 203, at 213.

243. *Cf.* Coffee, *supra* note 167, at 77-80; Macey & Miller, *supra* note 53, at 105-18 (arguing for auctioning of class rights in certain small claim situations).

dealmaking efforts by the attorneys—even though the judicial function was minimal.

Recent changes in federal securities laws have altered the judicial function in securities cases, suggesting that the judicial function in these cases might take on more dealmaking attributes as well. Most securities actions are now removable from state to federal court, so fewer will be arbitrated by a state judge.[244] As discussed above, securities class actions require judges to designate lead plaintiffs and to approve of lead counsel.[245] These measures were intended, in part, to offset some of the transactional nature of securities cases by bringing certain dealmaking methods within the purview of federal judges. Yet, in other ways, these measures have empowered federal judges to bring transactional methods to bear in the securities arena. Thus, an important current topic in securities litigation is the extent to which a federal judge can "auction off" the lead counsel role, thereby effectively replacing the lead plaintiffs' choice with a court-appointed choice.[246]

A more critical distinction between transactional tort jurists and transactional securities jurists concerns the level of their own interest in the res judicata transaction. In mass tort actions, the judge's activities are not strictly managerial because they are not neutral "managers" of outsiders' lawsuits—they have a distinct, and hardly minor, stake in the outcome of the transaction. This is because a, if not the, central rationale for aggregative treatment of mass tort actions is efficiency, and in particular, cost savings for courts throughout the country.[247] This is a nonjudgmental way of saying that what is really at stake in efficiency class actions is judicial time, or judges' interests.[248] What the deal means to the judges is that they can utilize their resources in other ways. Their opportunity costs are a driving force in the mass tort settlement. Commentators have tended to focus on the conflict that arises between a settlement developed by a judge and that same judge's oversight of the fairness of that settlement.[249] However, my point here is that there is a far more inherent conflict, regardless

244. *See* Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78(a) (2000).

245. *See supra* notes 117-28, 169-79 and accompanying text.

246. *See, e.g.*, Raferty v. Mercury Fin. Co., 1997 WL 529553 (N.D. Ill. 1997); *see also* Ralph Blumenthal, *Lawyer Auction in an Auction Suit*, N.Y. TIMES, Apr. 22, 2000, at A15 (describing federal judge's auction of lead counsel role in antitrust class actions filed against Christie's and Sotheby's auction houses); *see generally Developments—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1827-51 (discussing class actions); Andrew K. Niebler, *In Search of Bargained-For Fees for Class Action Plaintiffs' Lawyers: The Promise and Pitfalls of Auctioning the Position of Lead Counsel*, 54 BUS. LAW. 763 (1999).

247. *See generally* FRIEDENTHAL ET AL., *supra* note 81, at 749-52 (describing "judicial economy" and "litigation efficiency" as conceptual bases for (b)(3) class actions and stating that such a class should be certified "only when it is the most efficient means of proceeding").

248. *See, e.g.*, Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 937-38 (1995) (stating that "judges see themselves as a limited fund, a finite resource" with a "fear of multiple, redundant, related actions overwhelming the courts" and noting that "[j]udicial interest thus flows not only towards aggregation but also towards settlement").

249. *See supra* text accompanying note 207. *But see* Henderson, *supra* note 199, at 1020 (emphasizing the direct benefit judges derive from mass tort settlements).

of who within the judiciary is handling the fairness hearing. Everyone in the judiciary gains by the settlement of the mass tort case; no judge is a fully neutral arbiter.[250] Securities class actions, by contrast, will rarely lead to multiple litigations if not settled. As discussed above, securities classes consist of individual interests too small to sustain separate litigations or of large interests (institutional investors) not particularly eager to litigate.

In sum, the mass tort transactional jurist is a judge "for the situation,"[251] neither an adjudicator of litigation nor simply a case manager. The transactional securities jurist has not, thus far, shared all of these attributes. I will return to this distinction below.

The characteristic features of the transactional model are distinct from both the traditional adjudication model and the management model. In the transactional model, the courthouse has become the site for a large financial transaction. The attorneys' actions are primarily business, not litigation, oriented. They negotiate and structure large financial arrangements. Only after the structure of such arrangements is in place are meaningful legal papers filed. The legal proceedings are meant to confirm the pre-existing deal, much like SEC approval is required for a large-scale securities transaction. Traditional adjudicatory work—pleadings, discovery, trial—is of secondary importance. The proceedings primarily involve ensuring public approval of the transaction. The judicial function can precede the filing of a precise complaint identifying the contours of the dispute. It may be called into being by the judicial branch through appointment from the multi-district litigation (MDL) panel. The judge for the situation brokers the deal among the parties, but he is not impartial—he is there to serve the interests of the judicial institution that sent him.

B. EXPLANATORY VALUE

The transactional model captures the reality of what happens in many complex class actions better than any of the existing models of adjudication. However, the transactional model's value is not only descriptive. It is also explanatory. The transactional model provides some straightforward explanations for the central inquiry in this Article—the judiciary's comfort with the securities class action and its discomfort with the mass tort class action. The transactional model also has value beyond that inquiry, as it helps to make sense of a series of other Supreme Court decisions and lower court practices.

There are several reasons that conceptualizing large complex class actions as transactional and not adjudicative in nature can help explain judges' varying

250. James Henderson has written: "If one truth emerges from all of the debate and discussion of mass tort class actions it is that judges dread the prospect of spending the remainders of their careers trying, seriatim, factual variations on the same mass tort fact pattern." Henderson, *supra* note 199, at 1020 n.39.

251. *Cf.* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1502 (1996) (discussing the ethical implications of Brandeis acting as a "lawyer for the situation").

reactions to securities and tort cases. The first concerns the nature of the rights at issue in each type of case. The underlying rights in a securities fraud case are themselves transactional in nature; plaintiffs are alleging that fraud has been perpetuated through a market transaction. Thus, according to the transactional model, the class action becomes a "transaction about a transaction." By contrast, the underlying issues in mass tort cases are personal injuries; plaintiffs are alleging that a tort has harmed a large diffuse class of individuals. The class action is thus a "transaction about a personal injury." Hence, the insight of the transactional model: Large transactions that buy and sell rights-to-sue about market transactions do not seem inappropriate, but large transactions that buy and sell rights-to-sue in personal injury cases are instinctually resisted.

To be sure, the resistance is classically framed in more recognizable, doctrinal terms. Thus, judges opine that tort plaintiffs cannot be deprived of their "day in court" because: (1) individual issues "predominate" in tort but not securities cases; (2) securities classes are comprised of small stakeholders and tort classes large; or (3) tort plaintiffs are not adequately represented while securities plaintiffs are. Yet, as set forth above, none of these distinctions is entirely convincing. Individual issues are subordinated in securities cases only through adoption of the fraud-on-the-market doctrine. Individual issues could similarly be subordinated in mass tort cases either through a comparable economic concept internalizing the costs of personal injuries, or simply through an aggregative resolution mechanism.[252] The courts' willingness to accept the doctrine in fraud but not personal injury cases is not a function of the presence or absence of predominance, per se. Indeed, all of the doctrinal explanations (predominance, superiority, and adequacy) are more symptom than cause. They are symptoms of the fact that fraud cases are impersonal and thus, can be settled transactionally, while personal injury cases defy such transactional resolution.

The simplicity of the conclusion that courts are comfortable with transactional litigation about transactional cases, but not with transactional litigation about personal injury cases, may obscure the strength of this insight, but comparison to the other institutional models helps bring home the point. There is nothing about the differing nature of the underlying cases that has any meaning for the other adjudicatory models. Most importantly, both impersonal business cases and very personal, personal injury cases are normally susceptible to adversarial adjudication. Similarly, the managerial judge can apply her array of techniques to any type of lawsuit. Thus, neither of these adjudicatory models has an immediate or easy explanation for the courts' differing reactions to these sets of cases. The transactional model reorients us to appreciate that large class action lawsuits are business deals. It immediately triggers an instinctual re-

252. David Rosenberg, who has written most comprehensively and most compellingly about these options, indeed even goes so far as to argue that individual justice may be promoted, not deterred, by collective solutions. *See, e.g.*, Rosenberg, *Collective Means*, *supra* note 198; *see also* Rosenberg, *Causal Connection*, *supra* note 198; Rosenberg, *supra* note 141, *passim*.

sponse, one shared, no doubt, by the Justices, about the illegitimacy of business deals concerning personal injuries.[253]

Lastly, examining the differing judicial function in each type of class action through the lens of the transactional model helps to explain the Justices' varying reactions to the securities and tort cases. As set forth above, although securities cases fit within the transactional model, the judicial function in such cases has been relatively limited. The buying and selling of legal rights takes place outside the judicial realm and the judge's impartiality can be maintained at a standard fairness hearing. By contrast, lower court judges were active dealmakers in the bargains that culminated in the *Amchem* and *Ortiz* settlements. The transactional work they undertook stretched the limits of their judicial capacity. Moreover, as noted above, the judges were beneficiaries of the deals that were cut in that their workload was thereby reduced significantly. The Court's rejection of certification did not dwell on the judicial function, or its inherent conflict, in either case. However, having seen how poorly the Court's doctrinal arguments fare in the tort cases when placed side-by-side with the securities cases, it is now fair to conclude that the Justices were motivated by these institutional factors, absent in securities cases, as well. This assumption about the Court's institutional anxiety is furthered by its cry for a nonjudicial solution to the mass tort cases.

The transactional, nonadjudicative nature of complex class actions casts in a new light other recent Supreme Court decisions, such as *Phillips Petroleum Co. v. Shutts*.[254] *Shutts* can now be read in tandem with *Matsushita* as a "transaction-enabling" case. The Court's decision in *Shutts* assisted the prosecution of nationwide class actions in state courts by acknowledging a low threshold for personal jurisdiction over absent plaintiffs. The Court's decision in *Matsushita*, requiring federal courts to respect judgments issuing from state courts that settle claims which, due to their exclusively federal nature, could not be tried in state courts, also had a transaction-enabling effect. The outcome of neither case was obvious as both cases confronted familiar barriers to nationwide adjudication

253. This conclusion is similar to Robert Bone's analysis of eighteenth- and nineteenth-century representative litigation. *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990). Professor Bone explains the situations in which representative litigation was historically accepted as those in which "the remedy acted on something impersonal, such as the legal incidents of an impersonal status or rights in an impersonal piece of property . . . ." *Id.* at 263. By contrast, courts were more hesitant to replace litigant autonomy in circumstances "when the remedy acted directly on rights or duties, such as those derived from contract, that were thought to be closely linked to the individual person of the [absentee]." *Id.* He argues that "litigant autonomy and individual participation make their strongest normative claims when state adjudicative power focuses directly on personal attributes of an individual rather than on aggregative characteristics of a group." *Id.* at 292-93.

Professor Bone applies this historical lesson to modern class jurisprudence primarily in an attempt to explain the distinct notice and opt-out requirements in (b)(3) as opposed to (b)(2) class actions, *see id.* at 287-304, but offers no thoughts about its utility in distinguishing *among* (b)(3) cases, other than to suggest that such inquiry exceeded the scope of his endeavor. *See id.* at 300 n.207.

254. 472 U.S. 797 (1985).

inherent in a federalist court system. Moveover, it may seem odd that the Court would be so forgiving of these conventional sovereign boundaries, yet so hard-nosed in its transaction-disabling rejections of the carefully crafted settlements in the mass tort cases. Yet, viewed through the transactional model, *Amchem* and *Ortiz* are quite distinct from *Shutts* and *Matsushita*. The latter cases were both class actions about transactions,[255] while the mass tort cases produced transactions about personal injuries. Thus, where transactions about transactions are concerned, the Court seems willing to relax familiar spatial boundaries on adjudication and enable nationwide dealmaking.[256]

Perhaps the most important explanatory value of the transactional model is that it challenges the reflexive assumption that these large cases are better resolved by the legislature than the judiciary. It is commonplace to assume that when the judiciary is doing something that deviates from the traditional adjudicatory model, it has stepped into the legislative arena. The basis of this assumption is comprehensible when public law litigation is at issue. A judge running a school district or a prison is performing what are regarded as traditional public functions, the contours of which are customarily established by the people through their elected representatives. It is the failure of these representatives that legitimates judicial involvement in the first place.[257] However, the problems being addressed by large private class actions do not end up in court because of legislative failure and do not involve functions commonly ascribed to legislative bodies.[258] The problem of the securities class action is one of addressing fraud in a small-claim, large-number collective action setting. A public attorney is surely one means for overcoming the collective action problem, but the private attorney general is an equally acceptable one. Similarly, the problem in the torts field is not a problem of legislative failure but one of judicial overload.[259] It is not immediately obvious that in the presence of too many lawsuits, legislative action is more appropriate than an aggregated judicial solution. If in fact these "deals" more closely resemble a corporate transaction than the enactment of legislation, it might be worth contemplating whether perfecting the deal makes more sense than dumping the problem into the legislative arena.

---

255. *Shutts* was a class action seeking to recover for underpayment of royalties due on oil drilling contracts. *See id.* at 799.

256. This analysis also contributes to an understanding of the Court's willingness to relax subject matter jurisdiction requirements in Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921). Like *Matsushita* and *Shutts*, *Supreme Tribe* was representative litigation about a transaction, in this instance an insurance-related transaction. In validating a judgment that appeared to lack complete diversity, the Court lessened jurisdictional boundaries so as to enable representative litigation concerning such transactions. *See id.* at 366-67.

257. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

258. *See* Mullenix, *Resolving Aggregate Mass Tort Litigation*, *supra* note 199, at 426-28.

259. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 867 (1999) (Breyer, J., dissenting) ("[A]n individual asbestos case is a tort case, of a kind that courts, not legislatures, ordinarily will resolve. It is the number of these cases, not their nature, that creates the special judicial problem.").

In fact, the large class action settlements do more closely resemble transactions than lawmaking, indicating the final explanatory value of this model. In drawing his new model of public law litigation, Professor Chayes invoked Holmes's famous adage calling attention to "what the courts will do in fact, and nothing more pretentious."[260] If we are to teach our students what federal and state courts do "in fact" in large, protracted litigation, and how best to do it, we would do better to focus their attention on negotiating business transactions than on making appellate legal arguments. The existing conceptions of litigation, and the assumptions upon which they are based, do less well at describing what happens in practice. They are based upon either romantic notions of truth emerging from the adversary process or on pragmatic ideas about agreement emerging from the work of our efficient managers. In fact, what really happens is that a business deal is cut in which individuals' rights to sue are bought and sold—and blessed by the relieved judiciary.

C. NORMATIVE CONCERNS

The transactional model is an explanatory device and pedagogical tool, not a normative proposal. The model does not suggest that this is what lawyers and judges should be doing, so much as it characterizes what they are doing in certain large, important cases. Nonetheless, by accurately describing what is happening, the transactional model does help clarify some of the normative concerns that courts and commentators have been struggling with in complex cases.

Should lawyers and judges engage in activities that are best characterized as transactional, not adjudicative, in nature? Should they trade rights-to-sue? The answers to these questions require difficult choices among the competing values that civil adjudication promotes. In a prior article, I utilized three familiar conceptual ideals—individualism (or liberty), democracy (or equality), and expertise (or efficiency)—to explore intraclass conflicts in class actions.[261] Though the issues in this Article are distinct, these concepts are nonetheless helpful lenses through which to assess the normative implications of transactional adjudication.[262]

---

260. Chayes, *supra* note 3, at 1281-82 n.1 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)).

261. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1644-68 (1997).

262. These values track the purposes of the Federal Rules of Civil Procedure. Rule 1 of the Federal Rules mandates that procedures should be "construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Justice surely encompasses individuality and equality, while speed and expense speak to efficiency. Similarly, most scholars who have attempted to divine procedural norms have settled on a similar set of values. *See generally* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (describing the values that underlie due process as utilitarianism, individual dignity, equality, and tradition); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J.

1. Individual Liberty

If civil litigation is meant to be an expression of individual autonomy, then representative litigation is itself problematic. Class action lawsuits deprive individuals of their own day in court. They wrest from each class member her own freedom in undertaking, or avoiding, litigation. Furthermore, class actions deprive individuals of control over lawsuits that are, ostensibly, filed in their name.

Transactional adjudication seems only to deepen the injury to these individual values. From an individualistic perspective, transactional adjudication has all of the vices of class actions themselves, and then some. A class action lawsuit that will be tried preserves some participatory opportunities for some class members. While most class members will not be a part of any courtroom activities, some will. Moreover, absent class members may feel that their personhood is somewhat preserved by the participation of their representatives in the courtroom drama that will determine their rights. All of this is sacrificed in transacted cases. The point of the transaction is to ensure that there is no courtroom activity, much less courtroom drama. Thus, transactional cases not only deprive class members of individuality; the dealmaking involved in these cases also deprives class representatives of the remaining sliver of participatory opportunity that a tried class case promises.

But transactional adjudication's affront to individual dignity may be even greater. Regarding adjudication as transaction seems peculiar because dealmaking appears to contradict a fundamental premise of adjudication—namely, that the substantive outcome of cases should depend upon the application of preexisting legal norms. The contours of the business deal do not necessarily evolve out of the substantive results that would emerge from conventional adjudication. This is a blow to individualism, as inherent in the "day in court" ideal is the notion that the court will decide the outcome of each case on its own merits.[263] The outcome of transacted cases may be predicated as much on the costs and benefits of dealmaking to the various agents involved as it is on the outcome of prior similar cases.

These two affronts to individualism should not be exaggerated. In many class actions, individuals can opt out and thereby preserve their own litigative autonomy. Moreover, the disassociation of transactional compensation from predicted recovery is not universal. It is most evident in situations like securities cases, which can settle quickly and without significant factual development, and in the breast implant litigation, which appears to have settled before causation

---

1153 (identifying the four reasons for "making litigation possible" as dignitary values, participation values, deterrence values, and effectuation values).

263. *See Developments*, *supra* note 246, at 1808-09 ("Procedural fairness encompasses litigants' access to the courts as well as assurances that, within the context of such adjudication, courts will evaluate claims and defenses solely on their merits."); *cf.* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2341-43 (1999) (discussing extent to which vote trading by appellate judges across cases undermines individualist values).

was truly established. However, many transactional cases, such as those settling "mature" mass torts, construct deals based on the outcomes of prior cases. Thus, transactional adjudication's deviance from conventional settlement reference points may not be as profound as suggested. Nonetheless, it is fair to conclude that transactional adjudication primarily compromises individualist values and that the offense can be significant. Does transactional adjudication promote any values that outweigh these harms to conventional adjudicative ideals?

2. Equality

Deprivations of individual liberty are often justified on grounds of equality, and class actions are no exception. Representative litigation generally, and transactional litigation specifically, promote equality in two ways: between the plaintiffs and defendants and among the plaintiffs.

a. Leveling the Playing Field Between Plaintiffs and Defendants. Class actions can reduce disparities in bargaining power between plaintiffs and defendants. Absent class treatment, each individual class member must face a large defendant, one at a time. In small claims situations, defendants simply win by default. In large claims situations, the repeat-playing defendant has significant procedural advantages.[264] Traditionally, defendants embraced these advantages through adjudicative strategies of divide and conquer. Class actions are a conventional device for flattening these inequities.[265]

Transactional adjudication similarly enhances equality, and thus, procedural fairness, with several caveats. First, absent a real threat of conventional adjudication, the plaintiff class might lose some of the benefits that aggregation promises. Commentators have suggested that in *Matsushita*, for instance, the fact that the Delaware attorneys could not litigate the federal claims in that state's courts created a situation in which the defendants were able to obtain a settlement for a lower value than the plaintiffs might have recovered elsewhere.[266] Second, to the extent that defendants can create a reverse auction, pitting class attorneys against one another, plaintiffs might also lose some of the trading power that they could otherwise utilize in a traditional class case. Nonetheless, when compared to individual adjudications, transactional adjudication generally shares the equalizing benefits of aggregation that characterize conventional class actions.

---

264. *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y. REV. 95 (1974).

265. *See Developments*, *supra* note 246, at 1809 (arguing that class actions "bridg[e] the gap between wealthy defendants, often corporations, and individual plaintiffs, whether or not they have claims large enough to finance a separate action"); Galanter, *supra* note 264, at 143 (suggesting class certification as a means of equalizing repeat players and single-shotters).

266. This point was emphasized in the initial panel decision following remand of the *Matsushita* action to the Ninth Circuit. *See* Epstein v. MCA, 126 F.3d 1235, 1248-51 (9th Cir. 1997); *see also* Wasserman, *supra* note 53, at 474.

b. Intra-Class Equality. Representative litigation also enhances equality, procedural and substantive, *among* class members. Absent aggregative treatment, the adjudicative procedures that individuals actually receive vary significantly. Some have full trials. Others wait in line for trials. Others settle, for reasons of necessity or preference. And, of course, small claimants have no court access. In a class action, all class members (except the few class representatives and those who opt out) follow the same procedure. Granted, class members have fewer participatory opportunities, and far less individual control, but no class members enjoy the procedural windfall of full trials while others are shut out. Representative litigation can also equalize substantive outcomes. Absent class treatment, cases are decided in a race to the courthouse. Individual litigants who cross the finish line first, or have the most generous juries or the best attorneys, may collect judgments far exceeding their own injuries and far exceeding the recoveries of other litigants. Separate actions preserve individualism, but they foster inequality. Representative litigation replaces the race with an equitable distribution among claimholders, especially in limited-fund situations. Class treatment strips individuality, but furthers equality.

Just as transactional adjudication probably deepens the wound that class actions inflict on individualism, transactions can augment the equity that representative litigation promises. This is so because transactions are often meant to be global settlements, guaranteeing complete finality to the defendants. As such, they put *all* class members' claims in play in one action and attempt to rationalize an outcome in one fell swoop. Adjudicated class actions may be less encompassing. For one, adjudicated class actions may take on less than the entire situation from the outset. Moreover, the process of adjudication may narrow the scope of those eligible for recovery. Finally, judges and juries may produce judgments that benefit some class members at the expense of others. A global transaction affords the same civil procedures (albeit very little participatory procedure) to a greater range of plaintiffs and attempts substantively to divide returns among all class members. The strongest argument in support of transactional adjudication may be that it alone truly treats like cases alike.

3. Efficiency

Efficiency provides another normative basis for transactional adjudication. Representative litigation is efficient because it resolves many individuals' lawsuits at once. While class actions are more procedurally cumbersome than individual lawsuits, one class action is far less burdensome to the legal system than tens of thousands of individual lawsuits. Hence, the primary argument for aggregation in mass tort cases has been one of efficiency.[267]

267. Efficiency is a lesser value in securities cases. Absent class treatment, there would probably be no securities class actions. It is difficult to say that a procedural device that itself enables adjudication is efficient for the legal system. However, private enforcement of the securities laws through class treatment is considered so important that its substantive value has long been thought to outweigh the

Transactional adjudication augments the efficiency gains of traditional class actions. At the extreme, transacted cases are settled before filing. Such cases employ only the judicial resources necessary to analyze the fairness of the deal. Transactional cases that are not settled when filed also have efficiency advantages. Settlement of the Delaware *Matsushita* action involved scant discovery. And no transactional cases are meant to go to trial; the purpose of transaction is to avoid trial. More generally, the intent of transactional work is to minimize adjudicative costs. Defendants are buying rights-to-sue precisely so there will be no judicial proceedings.

The efficiency gains are not only realized by the legal system itself, but also by the parties. Defendants obtain quick finality, sparing themselves the direct (legal) and indirect (business) costs of protracted litigation. Plaintiffs secure recovery more expeditiously than they would in conventional litigation.[268] It is fair to conclude that transactional cases streamline the already efficient procedures of class actions.

4. Assessing the Tradeoffs

Do the efficiency and equality advantages of transactional adjudication justify this trend in complex litigation? Or do the costs to individuality, particularly to the individual ideal that cases should be determined by reference to pre-existing *legal* norms, outweigh these advantages? While the transactional model cannot itself provide responses to these questions, it forwards this normative inquiry in several ways.

First, the transactional model helps highlight a particular deficiency in the traditional balance of these values—the claim that but for class action treatment, each individual would enjoy her own day in court. This is not the case in transactional situations. For a variety of reasons canvassed above, securities cases are unlikely to be filed if not in a class form. Similarly, in large-number mass tort situations, a minute fraction of the class will ever have a real day in court.[269] Transactions occur in these situations, in part, because absolute individualism is impossible to secure. Thus, the virtues of transactional adjudication must be measured by weighing its value in promoting efficient and equitable justice against the real, not imagined, harm it poses to individualism.

---

excess load it places upon the legal system. *See supra* notes 108 & 113. If securities class actions are inevitable, we may therefore inquire into whether a transactional approach to them has efficiency gains.

268. Large claimholding plaintiffs probably sacrifice some substantive recovery for the benefit of such expeditious proceedings. Some may welcome the tradeoff, though obviously others will not.

269. As Justice Breyer stated in his *Ortiz* dissent:

> [T]he alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her own day in court. Unusually high litigation costs, unusually long delays, and limitations upon the total amount of resources available for payment, together mean that most potential plaintiffs may not have a realistic alternative.

Ortiz v. Fibreboard Corp., 527 U.S.. 815, 867-68 (1999) (Breyer, J., dissenting).

The real harm transactional adjudication threatens is the damage it will inflict upon the ideal that substantive outcomes should emerge from pre-existing legal norms and not from available market deals. If a deal closely approximates what plaintiffs might recover in traditional litigation, its substance is no less fair than such an alternative. However, because the outcome emerges from a transaction, and not from traditional adjudicatory activity, its content may always have the *appearance* of impropriety. In *Amchem* and *Ortiz*, the federal district judges did their best to ensure the legitimacy of the deals that were cut. I suspect that these judges truly believed that the deals were substantively just, and procedurally legitimate, arms-length transactions. However, precisely because they were deals, the higher courts saw these settlements as tainted, and tainted in ways that exceeded the reparative capacities of courts. Thus, for some judges, the virtues of transactional adjudication will never outweigh the suspicions it inevitably raises about how a deal was cut.

For others, though, the values of the transactional model may be tolerated, perhaps even celebrated, but only if the fairness hearing process can develop surer methods of analysis. The fairness hearing is critical because it is the point at which the transaction is put to a public test, where the judiciary lends its moral force to the deal. Given that so much rides on the fairness hearing, it remains a relatively underdeveloped and undertheorized aspect of civil adjudication.[270] Rule 23 does not literally even require fairness hearings. Moreover, as is evident from the *Matsushita* case, fairness hearings are often pro forma in nature. Yet simultaneously, the hearings in *Amchem* and *Ortiz* had the tone of appearing to protest too much. The transactional model demonstrates that the adjudicatory system needs a richer discourse through which courts can ascertain what is fair, procedurally, in the context of *transacted* class action settlements. What makes an adequate class representative for a large class-wide negotiation? What makes an adequate attorney for such purposes? What constitutes an arms-length transaction? Can a judge be involved in the transaction and mediate its fairness? Can a judge with no prior involvement really have a sense of the fairness of what has transpired?

These are the questions that truly confounded the Court in *Amchem* and *Ortiz*, as well as the dissenters in *Matsushita*. Instead of confronting them head on, however, the Court took refuge in doctrine. The transactional model helps clarify what is really at issue. It directs attention away from doctrinal categories (predominance, superiority, adequacy) and an adjudicative ideal (the adversary

270. *See, e.g.*, William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 CORNELL L. REV. 837, 841, 842 (1995) (noting that "Rule 23 contains no standards at all governing judicial approval of class action settlements," and arguing that this "leaves the parties operating in the dark and the court unable to define either the measure of its responsibility or the limit of its power"). There are notable exceptions to the otherwise deficient literature on fairness hearings. *See, e.g.*, Coffee, *supra* note 16 (on attorney conflicts); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1 (1993) (on intraclass conflicts); Schwarzer, *supra*, at 843-44 (on judge's role); S. Arthur Spiegel, *Settling Class Actions*, 62 U. CIN. L. REV. 1565 (1994) (on judge's role).

system) that lack continuing explanatory power. By characterizing complex cases in a more realistic fashion, the transactional model assists in elucidating the values in play. It encourages courts to recognize that oversight of these deals entails hard choices between certain individualist ideals on the one hand, and values of equality and efficiency on the other. Whether transactional work is what lawyers and judges should be doing is a question that can only be addressed if it is asked.

D. SOME LIMITATIONS OF THE TRANSACTIONAL MODEL

The transactional model I have begun to sketch is no doubt both underdrawn and overdrawn. It is underdrawn because it is just a sketch that needs further elucidation, application, and refinement. It is overdrawn because it is meant to be a model—crass, reductive, simplistic—but nonetheless recognizable. Surely all litigation has aspects of adjudication, management, and dealmaking. None of these models is clean, nor ever entirely explanatory or perfectly predictive of judicial behavior. Yet, each model focuses our thinking and re-orients our imagination. All models are, "of course, human creations,"[271] and thus, are not meant perfectly to reflect the real world, but rather to "invite conversation and to appeal to the reader in a search for understanding."[272]

Some aspects of the transactional model are also already familiar. The managerial model itself has slouched toward the transactional model for some time. The managerial model recognizes the nonadjudicative nature of judicial behavior. Moreover, some commentators have talked more directly about the commodification of class action lawsuits. For example, nearly a decade ago Jonathan Macey and Geoffrey Miller proposed auctioning off plaintiffs' interests in securities class actions to the highest-bidding plaintiffs' law firm so as to overcome the agency problems in such cases.[273] Similarly, scholars have modeled the incentives of plaintiff class action attorneys, considering the attorneys' actions in terms of their "investments" in the outcome of lawsuits.[274] Scholars have also noted the absence of a relationship between the merits of class cases and case outcomes, implying that complex cases were trades, not trials.[275] These earlier works acknowledged the transacted, as opposed to adjudicated, nature of the class action settlement. While the roots of the transactional model

271. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1663 (1985).

272. *Id.*

273. *See* Macey & Miller, *supra* note 53, *passim*; *see also* Coffee, *supra* note 167, at 77-79; Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 NW. L. REV. 458, 459 (1993); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423, 427 (1993).

274. This is true of much of John Coffee's work. *See e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Coffee, *Rethinking*, *supra* note 141.

275. *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 502 (1991).

are evident in earlier works, no free-standing model along the lines proposed here has previously existed.

Finally, the transactional model explains only a slice of federal and state adjudication. It is not meant to be an explanatory device for the vast bulk of individual lawsuits, nor for most public law cases. The value of the model is that it explains what really happens in large, protracted class action lawsuits. While this is not the universe, it does capture an increasingly large portion of judicial dockets.

CONCLUSION

Class action jurisprudence has developed within a doctrinal framework established in 1966 and based on the experiences of the prior twenty-five years. It has been housed uneasily in an adjudicatory system devoted to a two-party model of adversarial litigation. The efforts of trial judges and scholars to accommodate expanding private law cases within the existing doctrinal apparatus has given rise to new sets of managerial techniques, each with its own benefits and costs.

The current doctrinal and conceptual framework fails to account for what courts do in large protracted cases. The judiciary's primary approach to these cases for the past few decades has been to disfavor mass tort certification, while breezily approving securities certification. This Article has demonstrated that the supposed doctrinal and conceptual explanations for this disparity do not provide a satisfactory explanation. Indeed, the Supreme Court's doctrinal discussion in the two recent mass tort cases tends to mask its more global concern—that what courts are doing in these cases feels somehow illegitimate.

What courts are doing in these cases is brokering business deals. This Article has described that process and, in so doing, has forwarded a new conception of American adjudication—the transactional model. This new model has descriptive and explanatory value in certain limited, but important, areas. The details of the model and the normative concerns it raises are left for further elaboration.

What seems immediately clear is that the inherited methods and adopted conceptions concerning class action litigation need to be re-imagined. Our distance from the days of equity's bill of peace can be measured by our proximity to 2001. "Everybody knows," Professor Bickel wrote, "that the lifetime of applied principle is often no longer than one or two generations. Principle may endure beyond that, of course, but not necessarily as formulated in the application; if it does endure, it will often be through a process of renewal."[276] The dual presumptions of the 1966 rule endured for a generation, going on two. It is time for renewal.

276. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 244 (1962).