THE SALE AND SETTLEMENT OF MASS TORT CLAIMS: ALTERNATIVE LITIGATION FINANCE AND A POSSIBLE FUTURE OF MASS TORT RESOLUTION

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I. INTRODUCTION

In recent decades, resolution of mass torts has focused on the use of class actions and non-class mass settlement in a struggle between, on the one side, defense counsel and one or more corporate defendants, and on the other side, numerous plaintiffs' firms and their rosters of client claimants. The use of class actions perhaps reached its apex in the attempt in *Amchem Products, Inc. v. Windsor*[1] to reach a wide-reaching asbestos class settlement affecting hundreds of thousands, or even perhaps millions of claimants.[2] The non-class mass settlement, though also widespread

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[1] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 591 (1997).

[2] *Id.* at 597.

in asbestos cases,[3] was perhaps most boldly used by the lawyers in $4.85 billion Vioxx mass settlement by Merck.[4]

Both of these routes to mass tort resolution have been subject to continuing problems of both procedure and ethics.[5] The Supreme Court of the United States reversed the *Amchem* class settlement,[6] and appellate courts have largely rejected the certification for trial of mass tort class actions for personal injuries.[7] Similarly, commentators criticized the Merck Vioxx mass settlement for compromising the independent advice of counsel, who were bound by the settlement to recommend the settlement to all of their clients, or withdraw from representing clients who declined to participate.[8]

Amid the problems attending class or non-class routes to mass tort closure, a new promising path for mass tort management and settlement might be found in an unusual place: alternative litigation finance and the sale and settlement of mass tort claims. In recent years, alternative litigation finance, which involves third-party financing of litigation, has expanded markedly in the United States and around the world.[9] If legal and ethical rules continue to evolve to accommodate litigation finance, the trend toward greater involvement of financiers in mass tort litigation might lead not just

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[3] *See id.* at 599-600 (referring to the Center for Claims Resolution in the asbestos litigation).

[4] *See Vioxx Settlement Update,* OFFICIAL VIOXX SETTLEMENT, http://www.officialvioxxsettlement.com/ (last visited Oct. 11, 2013).

[5] *See infra* Part II.

[6] *Amchem*, 521 U.S. at 597.

[7] *See, e.g.*, *id.*; *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1074, 1083 (6th Cir. 1996); Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 740-41 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294, 1297 (7th Cir. 1995).

[8] *See, e.g.*, Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure,* 96 CORNELL L. REV. 265, 280 (2011) (noting that with regard to the Merck Vioxx mass settlement, "[t]he mandatory-recommendation provision and the mandatory-withdrawal provision . . . were the two most controversial aspects of the Vioxx settlement").

[9] *See* Steven Garber, *Alternative Litigation Financing In the United States: Issues, Knowns and Unknowns*, RAND at 1 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf.

to more widespread legal loans to plaintiffs and their counsel, but also to the outright sale of mass tort claims to financial entities.[10] These new entities would then prosecute the claims against defendants, with continuing good faith involvement of injured claimants in discovery and trial testimony. In addition to providing quick and certain compensation to claimants, financiers' purchase of mass tort claims would also greatly ameliorate the problem of adequate representation and conflicts of interest in mass tort settlement, as the likely emergence of one, or a few, financiers with large numbers of claims would enable lawyers who directly represent them to negotiate far-reaching mass settlements that would bring closure to a defendant in a mass tort.[11]

Part II of this article recounts prior moves in mass tort litigation toward class actions and non-class mass settlement and sets forth the continuing problems accompanying those approaches to mass tort resolution. Part III then examines the contribution that alternative litigation offers in the processing of mass torts, addressing ethical and legal obstacles to greater tort financing, sketching the potential functioning of sale of mass tort claims, and cataloguing the general benefits from such an approach. Part IV then returns to the problem of mass tort resolution, and suggests that the sale of mass tort claims could facilitate efficient and wide-reaching settlements and aid in avoiding procedural and ethical issues that have plagued prior class and non-class attempts at mass settlement. Finally, in Part V, I conclude that the sale and settlement of mass tort claims to third-party financiers would provide a new, beneficial path for mass tort management and should be permitted.

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[10] *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 62, 74, 82-83 (2011) (noting that assignment of personal injury claims is currently prohibited across the United States, but arguing for permitting assignment of such claims).

[11] *Cf.* Garber, *supra* note 9, at 34 (discussing the effect of alternative litigation financing on litigants' bargaining ability).

II. PRIOR PATHS FOR RESOLVING MASS TORTS

A. Class Actions

Perhaps the fundamental question of mass tort litigation is how the claims of numerous, often dispersed individuals may be both justly and efficiently tried or settled. Mass torts may involve dispersed harm to many persons stemming from products liability or harm to a more closely situated group stemming from a single-incident tort, such as a toxic exposure, explosion, fire, or crash.[12] In the United States, prior mass torts have involved asbestos,[13] tobacco,[14] pharmaceuticals,[15] and medical devices,[16] among many others.[17] Such widespread mass torts may involve thousands of claimants and pose challenges to procedural goals of just, efficient, and speedy claim resolution,[18] as well as tort goals of corrective justice, deterrence, and compensation as caretaking.[19]

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[12] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1 (2004) (discussing single incident and dispersed mass torts).

[13] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597, 600 (1997).

[14] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

[15] *See* Monica Langley, *Courtroom Triage: Bayer, Pressed to Settle a Flood of Suits Over Drug, Fights Back*, WALL ST. J. (May 3, 2004) http://webreprints.djreprints.com/2739391193359.html (discussing settlement of claims relating to Baycol).

[16] *See In re* Inter-op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 335, 342, 348-49 (N.D. Ohio 2001) (approving class settlement of class pertaining to Sulzer hip and knee implants).

[17] *See, e.g.*, *In re* San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 200, 222-23 (1st Cir. 1997) (discussing mass tort litigation resulting from a hotel fire).

[18] *See* FED. R. CIV. P. 1 (noting that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

[19] *See, e.g.*, Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 139 (1999) ("[W]e would extend the mixed theory of tort law beyond deterrence and corrective justice to include compensation. We argue compensation is not only a plausible goal of the tort system, it is a desirable–and indeed an essential–goal."); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (noting

One potential route, in vogue particularly during the 1980s and the 1990s in the United States, was the use of class actions for both trial and settlement purposes.[20] Under Rule 23 of the Federal Rules of Civil Procedure, a court may certify a class action if plaintiffs satisfy all of the requirements of Rule 23(a): that the class representatives be adequate and typical representatives of the class, that there be common issues of fact or law among the class, and that "the class [be] so numerous that joinder of [claims] is impracticable;"[21] and if plaintiffs satisfy at least one subsection of Rule 23(b).[22] In mass torts, although plaintiffs have sought class certification under each subsection of Rule 23(b), plaintiffs have largely focused on certification under Rule 23(b)(3), which requires that common issues predominate over individual issues and that the class treatment be superior to other procedural options.[23]

In the 1980s, for example, plaintiffs successfully settled for an estimated $180 million in a class action against various manufacturers of Agent Orange, in connection with claims of toxic injury by United States soldiers during the Vietnam War.[24] At that time, the *Agent Orange* settlement was the largest civil suit settlement in the history of the United States, and the settlement class was estimated to include ten million people.[25] Interestingly, no verdicts in individual cases appear to have preceded the class

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that the major division between tort scholars is between corrective-justice scholars and deterrence-oriented economics scholars).

[20] *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 148, 154, 167 (2d Cir. 1987) (affirming certification of class and approving class settlement).

[21] FED. R. CIV. P. 23(a).

[22] FED. R. CIV. P. 23(b).

[23] FED. R. CIV. P. 23(b)(3); *see* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 874 (2005).

[24] *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 148, 155, 158 (approving class settlement).

[25] *See Agent Orange Settlement Fund*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/COMPENSATION/claims-postservice-agent_orange-settlement-settlementFund.asp (last visited Oct. 11, 2013); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 341 & n.17 (1986).

litigation and settlement.[26] Before the *Agent Orange* class settlement fund was ordered closed by a court in 1997, the fund distributed approximately $194 million to approximately 52,000 Vietnam veterans, and $74 million to 83 social services organizations that served more than 239,000 Vietnam veterans and their families.[27]

However, in a series of decisions that echoed across the federal appellate courts beginning mainly in the 1990s, courts highlighted the individual issues that rendered such actions unsuitable for trial class certification under Rule 23.[28] Over time, courts determined that each proposed mass tort class might implicate individual issues of medical causation; affirmative defenses such as comparative fault, assumption of risk, and statutes of limitations; damages; choice of law; and product defect if multiple product designs are implicated.[29] Such individual issues might undermine the adequacy and typicality of class representatives under Rule 23(a).[30] In addition, the individual issues may lead to findings under Rule 23(b)(3) that common issues did not predominate over individual issues, and that class treatment was not superior to alternative methods for adjudicating the controversy.[31]

Perhaps the most notable rejection of class treatment of mass torts was the decision by the Supreme Court of the United States in *Amchem Products, Inc. v. Windsor* in 1997.[32] In *Amchem,* the trial court had certified a nationwide asbestos settlement class under Rule 23(b)(3) and approved a class settlement involving possibly millions of claimants and twenty corporate defendants.[33] On

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[26] *See generally* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 143 (1987) (noting that all earlier settlement attempts had failed).

[27] *See Agent Orange Settlement Fund*, *supra* note 25.

[28] *See* FED. R. CIV. P. 23; Stier, *supra* note 23, at 871-72 & n.46.

[29] *See* Stier, *supra* note 23, at 879-84.

[30] *See id.* at 878; FED. R. CIV. P. 23(a).

[31] *See* Stier, *supra* note 23, at 875-76; FED. R. CIV. P. 23(b)(3).

[32] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[33] *Id.* at 597, 605; *see also* FED. R. CIV. P. 23(e)(2) (stating that "the court may approve [the settlement] only after a hearing and on finding that it is fair, reasonable, and adequate").

appeal, the Third Circuit reversed the class settlement, noting that the rigorous requirements of class certification applied to settlement classes as well as classes certified for trial purposes.[34] Though affirming the Third Circuit's reversal of the settlement, the Supreme Court of the United States stated that a court reviewing a class settlement need not consider the manageability of a trial under Rule 23(b)(3), since the class settlement would obviate the need for trial.[35] In addition, the Supreme Court urged that other aspects of Rule 23 designed to protect absent class members "demand undiluted, even heightened, attention in the settlement context."[36] Turning to the asbestos settlement before the Court, the Supreme Court echoed the Third Circuit's assessment of the widespread individual issues within the "sprawling" class[37]:

> 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 that complicates the causation inquiry.
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> 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

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[34] *Amchem*, 521 U.S. at 609, 611.

[35] *Id.* at 597, 620.

[36] *Id.* at 620 (noting also that a court reviewing a class settlement will not have an opportunity to review class certification as trial proceedings unfold).

[37] *Id.* at 624 (noting that "[n]o settlement class called to our attention is as sprawling as this one").

> depend on singular circumstances and individual medical histories.[38]

The Supreme Court noted that, "[d]ifferences in state law . . . compound these disparities."[39] Generally speaking of mass tort cases and class certification, the Court urged "caution when individual stakes are high and disparities among class members great."[40]

Moreover, the Supreme Court in *Amchem* emphasized that these individual variations created conflicting interests between class representatives and absent class members, undermining adequacy of representation under Rule 23(a)(4).[41] Noting that Rule 23(a)(4) "serves to uncover conflicts of interest between named parties and the class they seek to represent,"[42] the Court highlighted differences in the proposed settlement class between currently injured plaintiffs and exposure-only plaintiffs, as well as "the diversity within each category."[43] The Court also observed that, "[a]lthough the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency."[44]

In light of these obstacles to class certification set forth by the Supreme Court of the United States, as well as numerous appellate courts,[45] plaintiffs' counsel continued to develop creative new

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[38] *Id.* (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996)).

[39] *Id.* (citing *Georgine*, 83 F.3d at 627).

[40] *Amchem*, 521 U.S. at 625.

[41] *Id*.

[42] *Id*.

[43] *Id.* at 626.

[44] *Id.* at 627.

[45] *See supra* notes 35-44 and accompanying text; *see, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1074, 1078-79 (6th Cir. 1996) (vacating certification of nationwide penile prostheses class); Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 746 (5th Cir. 1996) (reversing certification of nationwide nicotine-dependent class); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294, 1304 (7th Cir. 1995) (granting writ of mandamus to decertify nationwide blood products class).

approaches to class certification.[46] Plaintiffs sometimes proposed statistical sampling of the class as a way to grapple with individual issues.[47] Court reception was mixed, with the Ninth Circuit accepting statistical sampling in one case, but the Fifth Circuit rejecting sampling as violative of constitutional rights of due process and jury trial, as well as state substantive law requiring individualized causation.[48] In *Ortiz v. Fibreboard Corp.*, plaintiffs sought another asbestos class settlement under Rule 23(b)(1)(B) pertaining to limited fund classes.[49] But the Supreme Court of the United States reversed the Fifth Circuit's affirmance of the class settlement, and the Court imposed rigorous requirements on limited fund classes.[50] Plaintiffs also proposed a punitive-damages-only class under Rule 23(b)(1)(B), premised on the risk of individual litigation exceeding the constitutional limit of overall punitive damages for a defendant's actions, but the Second Circuit reversed certification, noting that the limited fund was merely "theoretical."[51] Finally, plaintiffs narrowed the proposed class certification to only include medical monitoring claims under Rule

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[46] *See infra* notes 47-52 and accompanying text.

[47] *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297, 300 (5th Cir. 1998); Hilao v. Estate of Marcos, 103 F.3d 767, 782, 786 (9th Cir. 1996).

[48] *Compare Hilao*, 103 F.3d at 771, 774 (accepting sampling in human rights class action), *with Cimino*, 151 F.3d at 299, 311 (rejecting sampling in asbestos class action).

[49] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

[50] *Id.* at 838-41, 865 (requiring that the fund is adequate to pay all claims, the whole of the fund is paid to the claims, and that claimants are treated equitably).

[51] *In re* Simon II Litig., 407 F.3d 125, 127, 138 (2d Cir. 2005) (stating that the fund proposed was "in essence–postulated, and for that reason it is not easily susceptible to proof, definition, or even estimation, by any precise figure"). By clarifying that each claimant in a tort case should only receive the claimant's share of a total punitive award for the wrongdoing, the Supreme Court of the United States' recent opinion in *Philip Morris USA v. Williams* undercuts the limited-punishment-theory concern that individual claimants might be given punitive damages for harm to others and that such cases might together exceed the constitutionally permissible punitive award. Phillip Morris USA v. Williams, 549 U.S. 346, 349, 356-57 (2007) ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now."); *see also* Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams,* 2 CHARLESTON L. REV. 433, 457 (2008).

23(b)(2), but court reception was again mixed, raising questions as to whether such claims might still involve individual issues or might be considered injunctive relief.[52]

Notwithstanding these ongoing attempts for class certification of mass torts, class actions as a way to resolve an entire mass tort, including personal injury claims, have largely been rejected.[53] Even though class settlements in certain limited areas remain significant, such as the recently approved economic loss class settlement of more than $1 billion in the Toyota unintended acceleration litigation,[54] or the $7 billion proposed BP Gulf Oil spill class action (which is also largely economic and property oriented),[55] the trial and settlement class action bubble of the 1980s

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[52] *See* FED. R. CIV. P. 23(b)(2) (providing for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"); Barnes v. Am. Tobacco Co., 161 F.3d 127, 130, 143 (3d Cir. 1998) (affirming decertification of medical-monitoring class previously certified under Rule 23(b)(2)).

[53] *See* Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56 (2012).

[54] *See* Jessica Dye, *Toyota Gets Final OK for Settlement of U.S. Class Action,* REUTERS (Jul. 19, 2013), http://www.reuters.com/article/2013/07/19/us-toyota-acceleration-settlement-idUSBRE96I15P20130719 (stating that the federal district court granted final approval to the settlement).

[55] *See Judge OKs Settlement in BP Class-Action Suit*, CNN (Dec. 22, 2012, 1:50 PM), http://www.cnn.com/2012/12/22/us/bp-spill-settlement/index.html. In connection with the BP Gulf Coast oil spill class settlement, the Eastern District of Louisiana approved two separate classes: one involving economic and property claims and another pertaining to medical claims. *In re:* Oil Spill by the Oil Rig "Deepwater Horizon", No. MDL 2179, 2013 WL 144042, at *1 (E.D. La. 2013); *In re* Oil Spill by the Oil Rig "Deepwater Horizon", 910 F. Supp. 2d 891, 900-01 (E.D. La. 2012). The medical-benefits class settlements remain on appeal to the Fifth Circuit by objectors. *See Alerts*, DEEPWATER HORIZON MED. BENEFITS CLAIMS ADM'R, https://deepwaterhorizonmedicalsettlement.com/alerts.aspx (last visited Oct. 12, 2013). Separately, BP has sought relief from the Fifth Circuit with regard to the class settlement claim administrator's allegedly expansive interpretations of the settlement agreement, which subsequently caused BP to raise its estimate of the cost of the class settlement from $7.8 billion to $8.5 billion, and then to state that "no reliable estimate can be made of any business economic loss claims." Richard Thompson, *BP, Plaintiffs' Lawyers Argue Before 5th Circuit on Challenge Over Oil Spill Payments*, NOLA.COM

and 1990s has largely burst, at least in personal injury mass tort litigation.[56]

B. Non-Class Mass Settlement

With the decline in mass tort class actions, a defendant seeking closure in a mass tort needed to obtain an agreement to settle the case and waive claims from each plaintiff.[57] Defendants in asbestos litigation had previously sought to settle large groups of claims through the Center for Claims Resolution and its predecessor, the Asbestos Claims Facility.[58] More recently, at the urging of President Obama, following the BP Gulf Coast oil spill involving Deepwater Horizon, BP created a $20 billion non-class claims fund to compensate fishermen and businesses in the Gulf Coast.[59] In connection with compensation by such funds, plaintiffs agree to waive future legal claims.[60]

While such claims funds are focused on settling large numbers of claims, the funds' attempts to locate and determine each claimant's settlement are laborious, time-consuming, and uncertain; as a result, defendants may not have confidence in obtaining closure in the mass tort.[61] To increase efficiency and move toward closure more quickly, defendants sometimes sought

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(Jul. 8, 2013, 10:36 PM), http://www.nola.com/news/gulf-oilspill/index.ssf/2013/07/bp_plaintiffs_lawyers_argue_be.html.

[56] *See* Hensler, *supra* note 53, at 56 (discussing the decline of class actions due to court decisions and the Class Action Fairness Act of 2005).

[57] *See* Adam J. Levitt, *Sticky Situations in Mass Tort Settlements*, 48 TRIAL 31, 31-32 (Nov. 2012), http://www.whafh.com/modules/publication/docs/672_cid_7_Trial_2012_11Nov_Levitt_Reprint.pdf.

[58] *See* Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13, 13 (1990); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1608 (1995).

[59] *See* KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 129 (2012).

[60] *See* Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES (Aug. 20, 2010), http://www.nytimes.com/2010/08/20/us/20spill.html?pagewanted=all&_r=0.

[61] *See generally id.* (explaining who will be eligible for reimbursement and how it will be determined).

to strike package settlement deals with particular plaintiffs' counsel, settling groups of claims at once.[62] For example, in *Amchem*, the Supreme Court of the United States noted that once a class settlement seemed within reach, the Center for Claims Resolution agreed to more than $200 million to settle with plaintiffs' counsel the inventory claims of certain plaintiffs that had already filed lawsuits.[63] Similarly, in the proposed *Ortiz* class action, the Supreme Court of the United States stated that counsel had negotiated a side settlement of 45,000 pending claims from one plaintiffs' firm outside the proposed class settlement.[64] But even these more expansive potential deals with particular firms remained piecemeal in the context of an asbestos mass tort that may have involved millions of claimants.[65]

The $4.85 billion Merck Vioxx settlement in 2007 presented an innovative approach to increasing efficiency and closure from a non-class mass settlement: a fund negotiated by defendants with leading plaintiffs' lawyers, and then offered to all claimants nationwide, with a required high threshold of plaintiff participation before the settlement was binding as to anyone.[66] Merck removed Vioxx pain medication from the market in 2004 because of concerns that Vioxx might cause heart attacks and strokes.[67] The Judicial Panel on Multidistrict Litigation then agreed to transfer federal cases involving Vioxx to a single court for pretrial

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[62] *See* Orlyn Lockard III & Meaghan Goodwin Boyd, *Settling With Thousands? Ethical Issues in Mass Tort Settlements*, 21 ENVTL. LITIGATOR 1, 1 (Fall 2009) (discussing the desirability of group settlements).

[63] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 601 (1997).

[64] Ortiz v. Fibreboard Corp., 527 U.S. 815, 824 (1999).

[65] *Amchem*, 521 U.S. at 597 ("The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies.").

[66] *See* Lewis Krauskopf*, Merck Agrees to Pay $4.85 Billion in Vioxx Settlement*, REUTERS (Nov. 9, 2007), http://www.reuters.com/article/2007/11/10/businesspro-merck-vioxx-settlement-dc-idUSL0929726620071110.

[67] *See* Alex Berenson, *Analysts See Merck Victory in Vioxx Settlement,* N.Y. TIMES (Nov. 10, 2007), http://www.nytimes.com/2007/11/10/business/10merck.html?pagewanted=all&_r=0.

management.[68] In the ensuing individual litigation, Merck won eleven of eighteen cases at trial, and two of the eighteen were declared mistrials.[69] Of the remaining plaintiff verdicts, appellate courts reversed two, and reduced compensatory or punitive damages in another two verdicts.[70] After the judges involved in federal and state cases in Louisiana, New Jersey, and California asked plaintiffs' and defense lawyers to try to negotiate a settlement, the lawyers met periodically in secret for over a year.[71] The plaintiffs' side was led by Russ Herman, a plaintiffs' lawyer and former president of the Association of Trial Lawyers of America, and other plaintiffs' lawyers, such as Christopher Seeger, who was on the lead plaintiffs' lawyer committee for cases in the federal multidistrict litigation transferee court.[72] After the generally applicable three-year statute of limitations had lapsed following the removal of Vioxx from the market, Merck and certain plaintiffs' lawyers announced a nationwide proposed settlement in 2007,[73] which capped total Merck payments at not more than $4.85 billion and provided additional mechanisms to assess plaintiffs' claims and determine individual valuation.[74] In addition, the Vioxx settlement stated that it was only effective if 85% of Vioxx

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[68] *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1353-54 (J.P.M.L. 2005).

[69] *See* Erichson & Zipursky, *supra* note 8, at 278; Heather Won Tesoriero, *Vioxx Rulings Raise Bar for Suits Against Drug Firms-Decisions by Courts in Texas, New Jersey Boost Merck's Strategy in Liability Cases*, WALL ST. J. (May 30, 2008), http://online.wsj.com/news/articles/SB121207060977129293.

[70] *See* Erichson & Zipursky, *supra* note 8, at 278.

[71] *See* Berenson, *supra* note 67.

[72] *See id*.

[73] *See In re* Vioxx Prods. Liab. Litig., 522 F. Supp. 2d 799, 801 (E.D. La. 2007) (discussing the "withdrawal of Vioxx from the market" in 2004 and the court's potential need to apply each individual "state's statute[s] of limitations"); Berenson, *supra* note 67.

[74] *See* Berenson, *supra* note 67 (stating that each plaintiff would need to show that they experienced a heart attack or stroke within 14 days of taking Vioxx, and that the plaintiff had been taking Vioxx for at least 30 days). The size of each plaintiff's payment varied according to the plaintiff's risk factors, length of use of Vioxx, and severity of injury. *See id.* Plaintiffs could expect to receive, on average, $120,000 per claim, but plaintiffs' lawyers might deduct up to 40% from each plaintiff's settlement for legal fees. *See id.*

plaintiffs signed on to the settlement within one year.[75] Although the $4.85 billion settlement might appear high, analysts had earlier projected liability exceeding $25 billion, and the announced settlement amount therefore represented a manageable figure for Merck.[76] In addition, Merck was able to curtail its legal expenses, which had surpassed $1 billion for the three years of mass tort defense of the Vioxx cases.[77] Indeed, Merck's share price rose following the settlement announcement.[78] A year after the settlement announcement, 99.79% of claimants had enrolled.[79]

Controversially, the Vioxx settlement provided that plaintiffs' law firms participating in the settlement agreed to recommend the settlement to all of their clients who alleged myocardial infarction or ischemic stroke;[80] moreover, if a client refused to participate, the settlement provided that participating plaintiffs' firms would not continue to represent that client.[81] In response, academic commentators and plaintiffs' law firms criticized the provision as compromising the independent advice due to each client, as well as the client's right to decide whether to settle a case.[82] Responding to

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[75] *Vioxx Settlement Update*, *supra* note 4.

[76] *See* Berenson, *supra* note 67 (stating that "$4.85 billion[] represents only about nine months of profit for Merck").

[77] *See id.*

[78] *Id.*

[79] *See* Erichson & Zipursky, *supra* note 8, at 266.

[80] *See Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto*, § 1.2.8.1 (Nov. 9, 2007), http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf (explaining that by enrolling, counsel is affirming that they have recommended the settlement to "100% of the [e]ligible [c]laimants represented by such [e]nrolling [c]ounsel").

[81] *See id.* at § 1.2.8.2.

[82] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) ("A lawyer shall abide by a client's decision whether to settle a matter."); MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); MODEL RULES OF PROF'L CONDUCT R. 5.6 (2009) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."); MODEL RULES OF PROF'L CONDUCT R. 1.16 (2009) (setting forth permissible grounds for attorney withdrawal); Erichson & Zipursky, *supra* note 8, at 283; Alex Berenson, *Some*

the growing criticism, Merck and plaintiffs' counsel amended the Vioxx settlement agreement to state that prior participating plaintiffs' counsel affirmed that they had exercised their independent judgment in concluding that the settlement is appropriate for all of their clients.[83] Commentators, however, remained unsatisfied with the provision, given the financial incentive for plaintiffs' counsel to participate in the settlement, as well as the litigation risks of not participating for any of one's clients.[84]

To resolve such problems, the American Law Institute, in its subsequently drafted *Principles of the Law of Aggregate Litigation*, proposed that plaintiffs be allowed to consent to be bound by a substantial majority vote of all clients of a lawyer in approving a mass settlement.[85] The American Law Institute also provided for court review of such non-class settlements to ensure a fair deal for claimants.[86] Professors Howard Erichson and Benjamin Zipursky, however, criticized the American Law Institute's proposal for being in conflict with traditional deference to clients' wishes for settlement.[87] Despite engendering spirited academic discussion, the American Law Institute proposal for advance consent to a mass settlement has not, so far, been adopted by any jurisdiction.[88]

Even with counsel's best intentions of independent judgment in evaluating a proposed mass settlement for one's clients, non-class mass settlements seeking complete closure involve concerns

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Lawyers Seek Changes in Vioxx Settlement, N.Y. TIMES (Dec. 21, 2007), http://www.nytimes.com/2007/12/20/business/20cnd-vioxx.html.

[83] *See Amendment to Settlement Agreement*, §1.2.2 (Jan. 17, 2008), http://www.officialvioxxsettlement.com/documents/Amendments%20to%20Master%20Settlement%20Agreement.pdf.

[84] *See, e.g.*, Erichson & Zipursky, *supra* note 8, at 281 & n.71; *see also Amendment to Settlement Agreement*, *supra* note 83, at §1.2.2 (amending settlement agreement to affirm that enrolled counsel will exercise independent judgment when advising clients).

[85] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b)-(f) (2010).

[86] *See id.* at § 3.18.

[87] *See* Erichson & Zipursky, *supra* note 8, at 293.

[88] *Id.* at 296.

of adequate representation.[89] In such settlements, plaintiffs' counsel for many claimants must assess the mass-settlement deal from afar, without the benefit of participating in the negotiations that were, in fact, completed by other plaintiffs' counsel, who might have had clients with somewhat different interests than those of the counsel who did partake in the settlement negotiations.[90] Analogously, in class actions, courts may not approve a proposed class settlement solely because the settlement appears fair, reasonable, and adequate under Rule 23(e),[91] but instead must also ensure that the requirements of Rule 23(a) and (b) are met, including adequacy of representation.[92] The Supreme Court of the United States in *Amchem* rejected assessments of the "chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."[93] Instead, the Court held that the fairness of a negotiated settlement might be better assessed by also determining whether the persons who did the negotiating were adequately incentivized to negotiate well.[94] Plaintiffs' counsel who do not take part in negotiating the proffered non-class mass settlement are pushed into making just the type of distant, overarching judgment that the *Amchem* Court condemned in the context of class settlements.

In addition, with regard to negotiation incentives, mass settlements may be subject to conflicts of interest that might call

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[89] *See id.* at 283 (explaining the concern with plaintiffs' counsel being able to exercise independent judgment for all clients and the conflict that settlement recommendations have with the legal ethics).

[90] *See id*. at 281, 284.

[91] FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the courts approval . . . . If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

[92] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621-22 (1997) (explaining that "[s]ubdivisions (a) and (b) [of Fed. R. Civ. P. 23] focus court attention on whether a proposed class has sufficient unity" and adequate representation is "an additional requirement").

[93] *Id.* at 621.

[94] *See id.* (suggesting that "if a fairness inquiry under Rule 23(e) controlled certification" lawyers might not have any incentive to try to negotiate for the best settlement).

into question the advisability of a particular claimant's signing on.[95] Plaintiffs' counsel negotiating such a mass settlement might represent hundreds or thousands of claimants, including current claimants with varying medical injuries and conditions, as well as future claimants with latent problems.[96] The many varying interests might raise formal conflicts of interest for the attorneys under Model Rule of Professional Conduct 1.7.[97] Under Rule 1.7, a lawyer may not represent a client if there is a concurrent conflict of interest, which arises *inter alia* when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[98] Although such a conflict might be overcome for a mass tort settlement if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and "each affected client gives informed consent, confirmed in writing[,]"[99] a lawyer might not be able to provide such representation to clients if, for example, the defendant in a mass settlement negotiation proposes to raise one group of clients' settlement value only if another group's settlement value is reduced. The *Amchem* Court did not focus on the extent to which such adequacy of representation requirements were also required under ethics rules, such as Model Rule 1.7 of the Model Rules of Professional Conduct, though such a conflicts analysis is appropriate in both class and non-class settings.[100] Furthermore, any mass settlement must comport with Rule 1.8(g), the aggregate

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[95] *See* Erichson & Zipursky, *supra* note 8, at 284.

[96] *See id.* at 284 (expressing the fact that not all plaintiffs will be well served by a mass settlement due to their differing circumstances and conditions).

[97] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

[98] *Id.* A conflict of interest may also occur when "the representation of one client will be directly adverse to another client." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2009).

[99] MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

[100] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (explaining that conflict of interest may exist if representing one client materially limits representing another client); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 637-38 (1997) (Breyer, J., concurring in part, dissenting in part) (stating that with regard to adequacy of representation, "this Court cannot easily safeguard such interests through review of a cold record").

settlement rule, which has been sensibly interpreted to require that each plaintiff to a mass settlement be not only informed of his or her own settlement amount (or process for determining settlement amount in a mass settlement), but also told the amounts to be obtained by other plaintiffs.[101]

In sum, the non-class mass settlement method initiated by the Merck Vioxx litigation presented a new route to closure for mass torts, but one with certain continued drawbacks.[102] Under this approach, individual trials could result in verdicts that would help determine claim values for pending claims. As claim values become more detailed through a trial verdict track record, plaintiffs and litigants would likely have more common ground on which to negotiate a mass settlement. Settlement might then be negotiated by defense counsel and certain leading plaintiffs' counsel, who represent some, but not all, claimants. As in the Vioxx settlement,[103] the resulting agreement might be effective only if a high percentage of plaintiffs agreed to settle their claims in the agreement, so as to obtain closure for defendants. But as with class actions, problems of adequacy of representation could occur, as not all plaintiffs' counsel would likely participate in settlement negotiations, and those undertaking the negotiations may have clients with interests that differ not only from each other, but also from the plaintiffs represented by plaintiffs' counsel not present in the negotiations.[104] Future mass settlement agreements might remove the criticized provisions of the Vioxx settlement, requiring participating plaintiffs' counsel to recommend uniformly the settlement to all clients and to withdraw from further representing

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[101] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009). For aggregate settlements, Rule 1.8(g) provides the following requirements:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Id.

[102] *See* Levitt, *supra* note 57, at 32-33.

[103] *See* Berenson, *supra* note 67.

[104] *See* Lockard & Boyd, *supra* note 62, at 14.

any client who refuses to take part in the settlement.[105] But the removal of such provisions may lead to fewer plaintiffs participating in the mass settlement, and the defendant may need to have its lawyers find and negotiate additional settlements with plaintiffs, rendering the pursuit of closure on the mass tort more difficult and costly.[106] Accordingly, while the non-class settlement offers an additional route to mass tort closure in the wake of the general demise of mass tort class actions, significant problems of adequacy in representation and efficiency in seeking closure remain.

III. THE SALE OF MASS TORT CLAIMS

One potential area for assistance with the problems of mass tort resolution comes from an increasingly important area, not from the Federal Rules of Civil Procedure, but from alternative litigation finance and the possibility of the sale of tort claims.[107] While the sale of tort claims involving personal injuries is currently generally prohibited, that ban should be reassessed in light of the benefits of such sales for tort litigation generally and mass tort litigation in particular.[108] Globally and domestically, in recent years, alternative litigation finance has increased markedly, including not only loans to law firms and litigants with pending claims, but also, in some instances, company investment in commercial litigation in return for a share of the upside of the verdict.[109]

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[105] *See* Berenson, *supra* note 82.

[106] *See id.*

[107] *See Creative Investing Through Alternative Litigation Funding*, MIM REPORTER (Litig. Mgmt. Inc., Mayfield Heights, Ohio), Spring 2012 at 3, http://www.medicineforthedefense.com/Portals/0/LMI_MIM_Spring_2012.pdf.

[108] *See* Sebok, *supra* note 10, at 62 (noting that assignment of personal injury claims is currently prohibited across the United States).

[109] *See* ABA Comm'n on Ethics 20/20, White Paper on Alternative Litigation Finance 1 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf [hereinafter White Paper]; Garber, *supra* note 9, at 13 (noting that the most commonly financed commercial disputes appear to involve antitrust, intellectual property, and contract law); Elizabeth Chamblee Burch,

In mass torts, various companies have made loans to plaintiffs' firms.[110] Some of these loans have been recourse loans, in which the borrowing law firm must repay the loan regardless of the results of a case.[111] For example, Napoli Bern borrowed, on a recourse basis, $35 million from Counsel Financial in connection with 9/11 litigation.[112] Moreover, Burford Capital has lent money in connection with Ecuadoran personal injury cases brought against Chevron.[113] Such loans might exceed 20% per year in interest.[114]

In addition, finance companies have made loans to injured plaintiffs, and the loans have been made on a nonrecourse basis, so companies cannot seek any repayment of the loan beyond the proceeds of the lawsuit.[115] Such loans assist injured plaintiffs with medical bills and lost wages during the pendency of the suit.[116] Perhaps because lenders are unable to seek repayment outside the

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Financiers as Monitors in Aggregate Litigation, 87 N.Y.U. L. REV. 1273, 1303 (2012).

[110] *See* White Paper, *supra* note 109, at 8; Garber, *supra* note 9, at 13.

[111] *See* Garber, *supra* note 9, at 13; Burch, *supra* note 109, at 1278 n.17; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 98, 100-01 (2010).

[112] *See* Binyamin Appelbaum, *Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES (Nov. 15, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all; Joseph Goldstein & Susan Edelman, *Assembly Speaker Sheldon Silver's Firm Gets Cut of 9/11-Suit Payouts*, N.Y. POST (Aug. 22, 2010), http://nypost.com/2010/08/22/assembly-speaker-sheldon-silvers-firm-gets-cut-of-911-suit-payouts/.

[113] *See* Lawrence Hurley, *'Master of Disaster' Dons New Guise as Plaintiffs' Attorney in Pollution Case*, N.Y. TIMES (Feb. 1, 2011), http://www.nytimes.com/gwire/2011/02/01/01greenwire-master-of-disaster-dons-new-guise-as-plaintiff-74496.html?pagewanted=all; Roger Parloff, *Have You Got a Piece of This Lawsuit?*, CNN MONEY (June 28, 2011, 2:06 PM), http://features.blogs.fortune.cnn.com/2011/05/31/have-you-got-a-piece-of-this-lawsuit/.

[114] *See* Garber, *supra* note 9, at 13; Alison Frankel, *Helping Underfunded Plaintiffs Lawyers–At a Price*, 4 LEGAL INTELLIGENCER 1104 (Feb. 14, 2006).

[115] *See* White Paper, *supra* note 109, at 6-7; Garber, *supra* note 9, at 9-10; Burch, *supra* note 109, at 1301-02 (discussing consumer legal funding); Molot, *supra* note 111, at 93.

[116] *See* White Paper, *supra* note 109, at 7-8.

lawsuit proceeds, the loan interest rates have been high, with rates between 36% and 150% per year.[117] But because the loans are nonrecourse, they have been viewed as not subject to state usury laws.[118]

While alternative litigation finance arrangements provide useful capital to plaintiffs' firms and early compensation to plaintiffs, alternative litigation finance companies do not currently control the conduct of the lawsuit.[119] Injured plaintiffs remain the clients, and lawyers must ethically follow the client's interests and objectives, not those of third-party funders.[120] Accordingly, third-party funders have no right to decide whether to settle or on what terms.[121]

While the theoretical and practical aspects of the alternative finance revolution continue to be mapped, if one steps beyond current debates on litigation finance and looks to where litigation finance is heading, an intriguing new approach appears that has interesting, helpful implications for mass tort settlement: the sale of mass tort claims. If permitted to do so, various institutional investors might purchase tort claims from claimants, perhaps using

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[117] Burch, *supra* note 109, at 1302.

[118] *See* Garber, *supra* note 9, at 10; Burch, *supra* note 109, at 1302. *But see* White Paper, *supra* note 109, at 13-14 (noting recent arguments that usury laws might also apply to nonrecourse loans).

[119] *See* J. Burton LeBlanc and S. Ann Saucer, *All About Alternative Litigation Financing*, TRIAL (Law Office Mgmt.), Jan. 2013, *available at* http://www.justice.org/cps/rde/justice/hs.xsl/19869.htm.

[120] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . . . A lawyer shall abide by a client's decision whether to settle a matter."); MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2009) ("A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client gives informed consent; [and] there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); Burch, *supra* note 109, at 1320-21 (discussing third-party litigation funders' lack of decision-making control).

[121] *See* The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2011-2: Third Party Litigation Financing, *available at* http://www.nycbar.org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02.

intake personnel functioning like insurance adjusters in talking to the injured persons, or perhaps to claimants' attorneys who may have already done initial intake of the claims. As multiple bidders enter the market for such claims, likely utilizing expertise on claim valuation from lawyer staffed departments specializing in such matters, the growing market for sale of mass tort claims might develop claim values quickly and accurately.[122] Moreover, the price of claims might vary over time in accordance with significant developments in the litigation, such as verdicts in individual trials.[123] Claimants who agree to sell their claims to financiers might then be incentivized to continue to participate in the lawsuit in good faith, perhaps by the financiers' making periodic payments to the client (rather than a lump-sum), providing claimants a continued financial stake in the claims, or offering a bonus payment to claimants upon winning the lawsuit.[124]

Permitting the sale of tort claims would have significant benefits for mass tort claims overall.[125] Plaintiffs may be seriously injured and in need of swift funds for medical bills and lost wages.[126] The sale of the plaintiff's tort claim might bring early

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[122] *See* Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 444-45 (1995) (predicting an "expanded number of bidders competing for a victim's claim" and that the emerging bidder market will develop tort claims more quickly than plaintiffs' lawyers can do so presently). Choharis also predicted that "tort investors will be able to employ or hire more experts in various technical areas, such as actuarial sciences, pharmacology, and even specialized legal fields, and to develop more sophisticated databases regarding various kinds of torts and tortfeasors." *Id.* at 486.

[123] *See* Choharis, *supra* note 122, at 484.

[124] *See id.* at 482 (suggesting additional payments based upon litigation contingencies to ensure participation of the tort victim after the sale of the claim); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 340 (1987) (discussing methods to incentivize continued participation by the injured victim after the sale of a tort claim).

[125] *See infra* notes 125-137 and accompanying text.

[126] *See* Shukaitis, *supra* note 124, at 334. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2009) (providing that generally "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation"); O'Connell & Robinette, *supra* note 19, at 139 (discussing compensation as a tort goal).

compensation for the tort claimant, rather than waiting years for trial and appeal or for a settlement to be offered to the plaintiff by the defendant.[127] Moreover, the injured plaintiff might be particularly risk-averse in light of the injury's potentially devastating effect on its finances, and therefore welcome the opportunity to trade the uncertainty of a jury trial for a set payment on an offer to sell the tort claim to a financier.[128] Indeed, the claim values received by the injured plaintiff from financiers might allow the plaintiff to avoid the verdict variability of juries and thereby quickly obtain an averaged figure without the objections under constitutional and state law that have troubled jury sampling in class actions.[129]

Moreover, the amount that mass tort claimants might receive may be bolstered by the likely superior position financier plaintiffs would have in prosecuting such claims against defendants.[130] For example, claim purchasers might obtain economies of scale as they more easily coordinate prosecution of claims and perhaps hire larger firms that might be able to manage the litigation more

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[127] *See* Michael Abramowicz, *On the Alienability of Legal Claims*, Yale L.J. 697, 735 (2005); Shukaitis, *supra* note 124, at 334-35.

[128] *See* Abramowicz, *supra* note 127, at 736 (discussing a claim seller's ability to avoid risk); *cf.* Molot, *supra* note 111, at 72-73 (arguing that litigation finance markets lead to more accurate settlements by reducing risk-averse bias among litigants).

[129] *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 335 (5th Cir. 1998) (rejecting class action jury sampling); Abramowicz, *supra* note 127, at 737; Choharis, *supra* note 122, at 444 (arguing that tort claimants will obtain more equitable payments from the sale of their claim, avoiding idiosyncratic jury awards, and that the tort claim purchase price would "derive from the average jury award, not atypically high or low awards, thereby eliminating the 'lottery' aspect of bringing a lawsuit for individual plaintiffs"). *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 786-87 (9th Cir. 1996) (approving sampling); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833 (1992) (arguing for class action sampling and contending that "[a]ggregation, properly conducted, will provide awards that are more accurate, not less"). One commentator has also argued that the alienation of tort claims is not problematic as a matter of corrective justice. *See* Abramowicz, *supra* note 127, at 717.

[130] *See* Choharis, *supra* note 122, at 486.

efficiently.[131] In addition, financiers would have the option of paying their plaintiffs' firms via the billable hour or flat fees;[132] at present, of course, plaintiffs' counsel generally bring mass tort cases via the contingency fee and receive nothing if they lose the case.[133] Without having the distraction and potential bias that comes from bearing final responsibility and risk exposure for the determination of the appropriate resources to be invested in a case, plaintiffs' lawyers would be able to focus more directly on litigation strategy.[134] Mass torts, in particular, are expensive to bring because of the frequently complicated scientific issues necessitating expert witness testimony and the document-intensive corporate factual background of such cases.[135] Furthermore,

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[131] *See* Burch, *supra* note 109, at 1336; Choharis, *supra* note 122, at 475 (arguing that a tort claims market would allow for "closer monitoring of legal representation").

[132] *See* Burch, *supra* note 109, at 1278 (arguing that financiers should choose to pay plaintiffs' firms via the billable hour). In addition, the billable hour or flat fee, combined with the larger size of plaintiffs' firms, might increase the likelihood of ethical litigation behavior generally by plaintiffs' lawyers, as plaintiffs' counsel are insulated from the complete downside risk of receiving nothing in a litigation, and the institutional-preservation instincts of larger firms seek to avoid malpractice claims and enhance reputation for future clients by creating and perpetuating a culture of ethical conduct. *See id.* (noting that the billable hour reduces lawyer pressure on the client to settle).

[133] *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009) (permitting contingent fees); Molot, *supra* note 111, at 90 (stating that "[t]he principal market for litigation claims in this country is found in the contingent fee system"). A multidistrict litigation court may also authorize a common benefit fund to compensate lead plaintiffs' lawyers in the MDL process, whose work on common issues, such as discovery, generates substantial benefits for plaintiffs' counsel nationwide. *See, e.g.*, Stier, *supra* note 23, at 926 & n.397 (discussing assessment for the common benefit fund in the phenylpropanolamine multidistrict litigation). The common benefit fund may be generated through an assessment on the settlements or verdicts of plaintiffs' attorneys who use work-product generated by lead MDL plaintiffs' lawyers. *See id.* at 926.

[134] *See* Burch, *supra* note 109, at 1275 ("The problem, in part, is that plaintiffs' attorneys play two, often conflicting roles: They serve as both financiers and agents. These dual roles can pull attorneys in divergent directions.").

[135] *See id.* at 1287 (suggesting that initial investment in mass torts may be millions of dollars, but that later cases may be brought for low hundreds of thousands of dollars).

financier plaintiffs might be able to obtain cheaper capital to fund mass tort, resource-intensive suits compared to plaintiffs' firms because institutional claimholders may assemble wider, better risk-diversified portfolios.[136] Deep-pocketed financier plaintiffs would likely match more equally the resources of defendants and defense counsel, thus reducing the David-versus-Goliath concern that plaintiffs' counsel might be potentially overmatched by defense counsel in mass tort litigation.[137] In addition, in any mass settlement negotiation, financier claim purchasers might receive more because they could negotiate with relatively less risk-averseness than injured plaintiffs.[138]

The sale and settlement of mass tort claims faces several obstacles, however. Some states follow the traditional prohibitions on investing in litigation, including barratry, the stirring up of suits; maintenance, the supporting a litigant by bankrolling a suit; and champerty, the making money off investing in a lawsuit.[139] Moreover, unlike many legal claims, the sale or assignment of an injured plaintiff's tort claim to a purchasing investor is generally not permitted.[140]

But prohibitions on lawsuit investing generally, and the sale of personal injury claims in particular, have been undermined by

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[136] *See* Abramowicz, *supra* note 127, at 739; Choharis, *supra* note 122, at 480 (arguing that the lower capital costs of some tort purchasers compared to plaintiffs' counsel would lead to higher compensation for injured plaintiffs).

[137] *See* Choharis, *supra* note 122, at 489 (stating that because of near equality in resources between tort investors and defendant, defendant "will not be able to wear down plaintiffs as easily"). *But see* Stier, *supra* note 23, at 899 (discussing the strength and development of wide-reaching plaintiffs' counsel networks).

[138] *See* Molot, *supra* note 111, at 88; Shukaitis, *supra* note 124, at 336.

[139] *See* White Paper, *supra* note 109, at 10 (quoting Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000)); BLACK'S LAW DICTIONARY 262, 1039 (9th ed. 2009); Choharis, *supra* note 122, at 460-61; Sebok, *supra* note 10, at 72-73; Shukaitis, *supra* note 124, at 330.

[140] *See* Sebok, *supra* note 10, at 74-75 (noting that personal injury claims may not generally be assigned or sold in the United States, except for Texas and Mississippi).

trends of increasingly similar conduct in the law.[141] For example, lawyers in the United States have long been able to use the contingency fee, which is a form of plaintiffs' counsel's investment in the suit.[142] Moreover, state survivorship statutes permit others to bring tort claims on behalf of deceased claimants.[143] In addition, insurance subrogation agreements function much like the sale of a claim, with the insurer's payment to the claimant at the outset, in return for the ability to recover payments in litigation.[144] Furthermore, a bare majority of states have already changed their laws to allow some form of champerty.[145] And academic commentators, including Professors Elizabeth Chamblee Burch, Jonathan Molot, and Anthony Sebok, have urged further changes to allow third-party funders to operate free from concern about common law doctrines prohibiting investment in lawsuits.[146]

An additional concern in the sale of mass tort claims is the preservation of attorney-client privilege and work-product protection, in light of the potential need to have claimants' attorneys provide information to potential financier claim purchasers.[147] While an attorney would be permitted to share such otherwise confidential information, as long as the client agreed, courts would need to make clear that providing such information would not waive attorney-client privilege.[148]

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[141] *See* Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all.

[142] *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009) (permitting contingency fees and setting forth requirements for contingency fee agreements).

[143] *See* Sebok, *supra* note 10, at 77.

[144] *See id.* at 83.

[145] *See* Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011) ("The consistent trend across the country is toward limiting, not expanding, champerty's reach."); White Paper, *supra* note 109, at 12; Burch, *supra* note 109, at 1328 & n.267; Sebok, *supra* note 10, at 98-99 & n.162.

[146] *See* Burch, *supra* note 109, at 1328; Sebok, *supra* note 10, at 133; Molot, *supra* note 111, at 105.

[147] *See* FED. R. CIV. P. 26(b)(3) (setting forth the work-product protection); White Paper, *supra* note 109, at 33.

[148] *See* White Paper, *supra* note 109, at 32 (discussing potential for privilege waiver in context of alternative litigation finance); Burch, *supra* note

Outside of ethics-specific concerns, some may also be concerned about consumer protection.[149] Injured claimants might be seen as subject to exploitation by sophisticated financiers, who might undercompensate claimants in purchasing claims.[150] But emerging markets of claim values in mass torts, with claim valuations spread via information technology and media, might help inform claimants about the value of their claims prior to the sale to a financier.[151]

An additional recurring concern about litigation financing is that it would subsidize the bringing of unmeritorious or even frivolous litigation.[152] While the bringing of baseless litigation remains a serious concern, the response should not be an overbroad limitation of litigation financing of all claims, regardless of their merits.[153] Instead, lawsuit reform should focus on proper procedures to root out only unmeritorious claims. At present, before reaching a jury, a civil suit must pass various procedural and ethical tests, including the plaintiffs' attorneys' ethical obligation to not bring a frivolous action;[154] procedural rules providing court-imposed penalties for bringing frivolous claims,

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109, at 1326 (arguing that sharing information with potential third-party funders should not waive attorney-client privilege or work-product protection).

[149] *See* Tatyana Taubman, *Access to Justice with Protection: Improving Alternative Litigation Financing with Consumer Protections* 26 (unpublished note for George Washington University Law School conference entitled Alternative Litigation Funding: A Roundtable Discussion Among Experts), *available at* http://www.law.gwu.edu/News/20112012events/Documents/ALF_ConferenceNote.pdf.

[150] *See generally* Garber, *supra* note 9, at 12 (discussing the ethical concerns of alternative litigation financing).

[151] *See* Choharis, *supra* note 122, at 486.

[152] *See, e.g.*, JOHN BEISNER ET AL., SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 4 (2009).

[153] *See* Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 591 (2010) (arguing financiers will pursue meritorious claims to maximize return).

[154] *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

such as Rule 11 of the Federal Rules of Civil Procedure;[155] and defendants' motions for summary judgment,[156] directed verdict,[157] and judgment notwithstanding the verdict.[158] In addition, a jury verdict's damage award which is deemed by the judge to shock the conscience may be reduced through remittitur,[159] and any punitive damages award is also reviewed for compliance with the growing punitive damages guidelines from the Supreme Court of the United States.[160] I have elsewhere argued that for mass torts, concern

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[155] *See* FED. R. CIV. P. 11. Under Rule 11, every pleading and written motion must be signed by an attorney, who represents that the paper is not being used to harass or cause needless delay; that the "legal contentions are warranted by existing law or by a non-frivolous argument for extending [the law]"; and that "the factual contentions [either] have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for [additional] investigation or discovery." *Id.* Rule 11 also empowers the court to impose sanctions for violations, although one is offered a twenty-one day safe harbor period to retract without sanction the potentially offending paper after an opposing litigant has brought the issue to the attorney's attention. FED. R. CIV. P. 11(c).

[156] *See* FED. R. CIV. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[157] *See* FED. R. CIV. P. 50(a). Rule 50(a) provides as follows:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

FED. R. CIV. P. 50(a).

[158] *See* FED. R. CIV. P. 50(b). Rule 50(b) states:

> No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.

FED. R. CIV. P. 50(b).

[159] *See* Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1025-26 (2007) (discussing remittitur).

[160] *See* Philip Morris USA v. Williams, 549 U.S. 346, 352-53 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 418-19, 422-24, 426-

about verdict variability recommends against the use of trial class actions[161] and the use of issue preclusion,[162] and additional safeguards to prevent against abusive litigation may also be warranted.[163] For example, a loser-pays system in which the losing litigant must reimburse the legal fees of the prevailing party is used by much of the world and might be helpfully grafted into procedure in the United States to prevent the pursuit of nuisance-value settlements.[164] Indeed, perhaps the chief objection to a loser-pays system in mass torts is that impecunious injured plaintiffs might fear to bring meritorious litigation because of the prospect of having to pay defendant's legal fees.[165] But that concern does not apply to financier claim purchasers who might manageably bear the risk of loser-pays in suing the defendant.[166] In sum, while lawsuit reform remains worthy of serious study and proposal, litigation finance and the sale of mass tort claims should not be rejected because they enable the bringing of lawsuits, particularly in light of the broad potential benefits of the sale of mass tort

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27 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 568, 572, 574-75 (1996); Stier, *supra* note 159, at 1027-28.

[161] *See* Stier, *supra* note 159, at 1016.

[162] *See* Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 716-17 (2009).

[163] *See id.* at 717.

[164] *See* Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice,* 76 TEX. L. REV. 1863, 1863 (1998) (noting that the American rule, in which both sides bear their own attorneys' fees, "stands in sharp contrast to the 'English rule,' long followed in Great Britain and most European nations, that the loser must pay the successful party's attorneys' fees"). To continue to encourage settlement, a loser-pays rule could be integrated with the offer-of-judgment rule, which penalizes parties who receive a verdict that is less than a previous rejected settlement offer. *Cf.* FED. R. CIV. P. 68 (requiring that the party who later obtains less than the offer reimburse the opposing litigant's costs but not the opposing litigant's attorneys' fees).

[165] *See* Sherman, *supra* note 164, at 1863-64 (discussing the access-to-courts concern).

[166] *See* Choharis, *supra* note 122, at 474-75.

claims, not only for mass tort litigation, but also for mass tort settlement.[167]

IV. MASS TORT CLAIM MARKETS AND MASS SETTLEMENT

The sale of mass tort claims would also improve the use of mass tort settlement, rendering such settlements more efficient and offering a new solution for adequacy of representation concerns that have troubled both class and non-class settlements.[168] Initially, as discussed above, the presence of financiers and claim purchasing would likely develop claim values.[169] In that claim valuation process, financiers would likely employ sophisticated mass tort counsel who might better and more quickly value claims than the many dispersed plaintiffs' counsel, some of whom lack broad knowledge about mass tort litigation.[170] In addition, as cases progress through trial and juries deliver verdicts, additional information about claim values could be factored into claim estimates.[171] These claim values might serve as a touchstone for settlement discussions between financiers and defendants, although, of course, financiers would seek a premium from the defendants from the price the financiers paid to purchase the claims from injured plaintiffs.[172] The resulting mass settlements would also reduce public resources tied up in judicial management and trial of the cases.[173]

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[167] *See* Lyon, *supra* note 153, at 609 (arguing that third-party funding promotes access to justice).

[168] *See* Choharis, *supra* note 122, at 445; *see generally* FED. R. CIV. P. 23(g)(1)(B) (noting that that fair and adequate representation of class interests is a concern).

[169] *See* Choharis, *supra* note 122, at 519 (arguing that a tort claims market will approximate claim values).

[170] *Id.* at 486.

[171] *See* Stier, *supra* note 159, at 1056-57 (discussing the use of individual jury verdicts in pricing claims for mass tort settlements).

[172] *See* Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J. L. ECON. POL. 593, 595 (2012).

[173] *See* Choharis, *supra* note 122, at 445 (noting that settlements becoming more common will promote efficiency and relieve court dockets).

Moreover, the sale of mass tort claims to financiers would improve the problem of representation in mass settlement.[174] If litigants in mass torts sell their claims to a financial investor, who might indeed compile hundreds or thousands of claims against a defendant, then the financial entity would have its own individual counsel in negotiating mass settlements.[175] With one client selling its claims, the lawyer would not have conflicting loyalties to various claimants, as would class counsel, thus avoiding problems of Rule 23(a) adequacy and conflicts of interest.[176] Rather, the attorney representing the financier would seek only to maximize the aggregate monetary return to the financier.[177] In addition, the attorney would be negotiating a settlement for the claims for which the financier has access to the factual details and circumstances of all the claims affected.[178] The approach, therefore, improves upon the Vioxx model, in which select plaintiffs' counsel negotiate a settlement that is offered to vast numbers of injured claimants, many of whom are not represented by the select plaintiffs' attorneys involved in the negotiations.[179]

Furthermore, even if several financier entities joined together to negotiate a mass settlement, their individual counsel might be able to manageably meet with that defendant in a single

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[174] *See id*. at 474-75 (arguing that a market for the purchase of tort claims leads to closer monitoring of legal representation).

[175] *See id.* at 494 (noting that investors that purchase claims from individual victims retain separate counsel).

[176] *See* FED. R. CIV. P. 23(a); MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (concurrent conflicts of interest); MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009) (aggregate settlement rule); Choharis, *supra* note 122, at 497 (discussing interclass rivalries and conflicts of interest); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 982-83 (1995).

[177] *See* Choharis, *supra* note 122, at 498 (noting that tort investors with diversified claim portfolios would have aligned interests).

[178] *See generally* Bruce Patsner, *The Vioxx Settlement: Salvation or Sell-Out?*, UNIV. OF HOUS. LAW CTR. HEALTH LAW PERSPECTIVES 3 (Feb. 26, 2008), http://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20vioxx.pdf (noting that six plaintiffs' attorneys represented approximately 95% of all plaintiffs during the secret Vioxx negotiations).

[179] *See generally supra* note 66 and accompanying text (explaining the Vioxx approach).

negotiation and assemble a single, far-reaching deal.[180] With likely superior access to capital than plaintiffs' firms, these financial entities might obtain broader inventories of claims than well-funded plaintiffs' firms might be able to maintain.[181] Accordingly, a mass settlement negotiation between a defendant and the perhaps several financier claim holders widely invested in the mass tort might be able to bring substantial closure to a mass tort defendant, as was sought by Merck in the Vioxx mass settlement.[182] Moreover, investor-entity claim holders also might be able to exact from defendants a more significant closure premium because of the delivery of multiple claims for settlement, compared to dispersed settlements, which await the agreement of individual injured plaintiffs.[183] Again, each financier would be represented by an attorney without conflict of interest,[184] as the attorney would, in the group negotiations, simply maximize the aggregate monetary return for the lawyer's financier client. The result would be mass settlements negotiated without alienation of representation concerns, and claimants would receive quicker compensation.[185]

Although any one financier and its lawyer would, of course, be interested in maximizing overall return for claims, one might object that the injured plaintiffs, whose continued participation might have been purchased not only for an initial lump-sum payment, but also for a residual percentage of any judgment or

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[180] *See generally* Choharis, *supra* note 122, at 498 (noting that the defendant's interest can still be met through "faster and fairer mass tort settlements").

[181] *See generally id.* at 445 (arguing that investors will be able to outbid plaintiffs' firms).

[182] *See generally* Molot, *supra* note 111, at 97 (arguing that one lump settlement is more efficient than several individual settlements).

[183] *See generally supra* note 75 and accompanying text (noting that the Vioxx settlement would be effective only if 85% of the plaintiffs agreed to the settlement).

[184] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009); Choharis, *supra* note 122, at 445 (suggesting that a tort claims market would "avoid the inter-class rivalries which currently beset mass tort litigation").

[185] *See generally* Choharis, *supra* note 122, at 480, 482-83 (noting swifter compensation for claimants from sale of tort claims and the issue of alienation).

settlement, do not have the same interest.[186] Any injured claimant would likely want to maximize his or her own settlement value in connection with any back-end payout, not the aggregate settlement value. And indeed, variation in settlement values among groups of claimants was part of the problem of class settlements affected by individual issues and inadequate representation,[187] and raises concerns of conflicts of interest that may affect both class and non-class settlements.[188] If mass tort claims are sold to the financier, however, the claim holder's initial payment and any supplemental payment after trial or settlement would be determined by contract between the injured claimant and the financier.[189] The financier's lawyer negotiating a mass settlement between the financier and the defendant would have no client relationship with injured claimants and owe them no duty of loyalty, thus raising no conflicts of interest.[190] Indeed, the defendant might wish to settle all of the claims held by the financier for a lump sum without any formal breakdown connecting portions of the payment with individual cases. Accordingly, in buying a claim from an injured claimant, a financier might wish to set forth the way in which injured claimants would be paid, such as a fixed lump sum or a percentage of the settlement (based on the overall number claims settled), in the event of a mass settlement not tied to particular claims. If the injured claimant does not want to take that deal, he or she need not consent to the contractual payment offered; unlike the American Law Institute proposal, the injured plaintiff would not problematically delegate his or her consent to settlement of the

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[186] *See generally* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 581 (2003) (noting that conflict among class members is common).

[187] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624-25 (1997) (citing Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996)) (noting individual issues in a proposed "sprawling" asbestos class settlement).

[188] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

[189] *See* Choharis, *supra* note 122, at 511 (noting that a contract is an option between plaintiffs and financiers).

[190] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

claim to his attorney,[191] but rather would be selling the claim to the financier.

An additional objection might be that if claimants' attorneys assisted in selling the claims of numerous clients to financiers, the sale of tort claims would effectively duplicate the conflict of interest problem previously present in non-class mass settlements. Of course, tort claimants could sell their claims directly to financiers without plaintiffs' counsel,[192] but claimants might lack understanding of how much their claim is worth or might have already contacted plaintiffs' counsel to sue the defendant. As a result, claimants may enter the financial stream through plaintiffs' lawyers who might then counsel the claimants about their sale of claim to the financiers.[193]

While certain aspects of the plaintiff-counsel-to-financier claim transfer could raise concerns of conflicts of interest in aggregate settlement,[194] the approach nevertheless improves upon the Vioxx settlement. In the Vioxx litigation, distant plaintiffs' lawyers negotiated a settlement that would apply to all claimants, including those with whom the negotiating attorneys had no client

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[191] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b)-(f) (2010).

[192] Comment 2 to Rule 4.3 of the Model Rules of Professional Conduct provides as follows:

> This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2 (2009).

[193] *See* Choharis, *supra* note 122, at 443 (opining that attorneys may help tort victims "package and market" their claim to tort purchasers to maximize sale price).

[194] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (concurrent conflict of interest); MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009) (aggregate settlement rule).

relationship.[195] The plaintiffs' lawyers who undertook such negotiations also presumably had limited data about the non-represented claimants suing Merck.[196] In the sale-of-torts-claim setting, however, any piecemeal sale of multiple claims to financiers would likely be negotiated by lawyers who actually represented the claimants and who, therefore, had superior access to claimants' information in negotiations. Financial investors likely would not need to negotiate a mass offer for all claimants, as a defendant, such as Merck, would, in order to move forward to obtain closure; unlike the mass tort defendant, the financier does not have the prospect of a mass tort's unpredictable liability lowering its share price, limiting its ability to raise capital and make strategic acquisitions, and tainting its public image and advertising.[197] In addition, multiple financiers might likely appear, perhaps leading to more flexible and personally tailored claim payments, allowing the injured plaintiff more than one option to sell a claim and reducing the likelihood of a mass offer of claim purchase by the financier to all claimants.[198] All of these differences suggest that even the sale of multiple claims by plaintiffs' counsel to a financier would be superior to a non-class mass settlement negotiated by select plaintiffs' counsel and the defendant in the Vioxx litigation.

V. CONCLUSION

The sale and settlement of mass tort claims holds the promise for more efficient processing of tort claims, speeding compensation to claimants and easing concerns of adequate representation or conflicts of interest in mass settlement.[199] The

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[195] *See* Patsner, *supra* note 178, at 3.

[196] *See id.* (noting that many petitioners were not part of the settlement negotiations).

[197] *See generally* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 838 (1995) ("[T]he full measure of claims against a defendant may force it into bankruptcy.").

[198] *See* Choharis, *supra* note 122, at 490 (suggesting that a market for the selling of mass tort claims will offer multiple purchasers for the claims).

[199] *Id.* at 498.

approach, thereby, may improve upon both mass tort class actions and recent non-class mass tort settlement. Sale and settlement of mass tort claims, however, would not cure all procedural problems in connection with mass torts.[200] Left unaddressed, for example, is the continuing problem of representing future claimants who are presently uninjured and unaware of their exposure and risk.[201] In addition, policymakers may resist greater involvement of financiers in mass tort claims following the financial crisis of 2008.[202] But while the sale and settlement of tort claims may not solve all mass tort problems or may not currently be politically palatable to all, I argue that the approach offers a step forward for mass tort litigation and mass tort settlement.

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[200] *See generally* Choharis, *supra* note 122, at 514 (noting that the sale of mass torts will not eliminate the problem of "tort victims' claims exceeding tortfeasors' assets").

[201] *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (stating that for future claimants, "the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous").

[202] *See* Molot, *supra* note 111, at 102 n.122.