

Fordham Law Review

Volume 78 | Issue 3

Article 1

2009

Foreword: Reflections on the Adjudication-Settlement Divide

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Recommended Citation

Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 Fordham L. Rev. 1117 (2009).

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Foreword: Reflections on the Adjudication-Settlement Divide

Cover Page Footnote

* This symposium, held at Fordham Law School on April 3, 2009, was organized by the Fordham Law Review and cosponsored by the Fordham Conflict Resolution and ADR Program. John Bronsteen, Amy Cohen, Kenneth Feinberg, Owen Fiss, Jacqueline Nolan-Haley, Samuel Issacharoff, Michael Moffitt, Susan Sturm, and Jack Weinstein spoke; Matthew Diller, Michael M. Martin, Beth Schwartz, William Treanor, and I served as moderators; and Helen Herman and symposium editor Anu Sawkar handled much of the organizational work. Thanks to all of the participants, organizers, and attendees for a superb program. ** Professor of Law, Fordham University School of Law.

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SYMPOSIUM

AGAINST SETTLEMENT: TWENTY-FIVE YEARS LATER*

FOREWORD: REFLECTIONS ON THE ADJUDICATION-SETTLEMENT DIVIDE

*Howard M. Erichson***

Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.¹

Whenever I catch myself thinking of litigation solely as a means of dispute resolution, or whenever I get too enamored of market mechanisms as litigation endgames, the words of Owen Fiss echo in my head and force me to take a broader view.

The first time I read *Against Settlement*,² I confess I was a bit horrified. Litigation is often winner-take-all; settlement is satisfaction. Litigation is war; settlement is peace. Who could be anti-*satisfaction*? Who could be anti-*peace*? But Owen Fiss asks us to think of justice as a value beyond satisfaction and peace. Rejecting the view that civil litigation is all about resolving disputes, Fiss insists that we consider litigation in grander terms:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials . . . possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts

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1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).
2. 93 YALE L.J. 1073.

such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.³

If the point of adjudication is not merely to resolve private disputes, but to bring reality closer to our ideals through decision making by officials charged with public responsibilities, then private settlement comes at a public price. While we need not be altogether *against* settlement, at least we should not celebrate it indiscriminately. Twenty-five years later, Fiss's core argument may be more important than ever as a caution against freewheeling encouragement of settlement.

For this symposium, the Fordham Law Review invited some of the nation's leading experts in procedure and dispute resolution to consider the arguments in *Against Settlement* in light of litigation and negotiation developments of the past twenty-five years. The result is a remarkable series of papers reflecting on a broad array of issues concerning adjudication, settlement, and the relative advantages of each. This Foreword highlights two themes from among the many suggested by these papers. First, it looks at views on whether settlement can in fact advance the values Fiss espouses. Second, to help define what is at stake in the debate, it looks at the sometimes fuzzy line between adjudication and settlement.

I. AGAINST SETTLEMENT?

A dominant question running through the papers is whether Fiss's core point is really *anti-settlement* or whether it instead reflects a broader set of concerns about public values in a democracy. The argument goes something like this: Despite his provocative title, Fiss is not really *against settlement*. Or, at least, he need not be. Rather than ask what he is against, we might ask what he is for. Fiss favors public values and principled deliberation. Settlement, on this argument, should be attractive if it has the capacity to advance public values and to achieve outcomes based on principle.

Amy Cohen develops this idea most explicitly and comprehensively.⁴ "For Fiss," she suggests, "the more salient (and universalizing) distinction [is] between moral deliberation and interest satisfaction" rather than between adjudication and alternative dispute resolution.⁵ Cohen contextualizes *Against Settlement* both by reading it against the backdrop of Fiss's other work and by placing the article in the historical context of the 1970s and early 1980s. Fiss's point, on Cohen's reading, is not so much about settlement versus adjudication, but rather about moral deliberation and the advancement of public values. Negotiated dispute resolution, she

3. *Id.* at 1085.

4. Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

5. *Id.* at 1147.

suggests, has the capacity to advance public values through moral deliberation in ways that are fundamentally consistent with Fiss's vision.⁶

Kenneth Feinberg, an experienced mediator of complex disputes, similarly suggests that Fiss's main objective is the vindication of norms and values and that settlement is consistent with that objective in certain types of cases.⁷ Feinberg cautions that an anti-settlement view runs up against the "hard, practical realities" of the political inertia of the legislative and executive branches and the inefficiency and unpredictability of the civil justice system.⁸ Using a word that surely captures what Fiss is against, Feinberg reports that the "consumers" of the civil justice system simply do not want to go to trial.⁹ Treating Fiss's call for adjudication as "aspirational,"¹⁰ Feinberg concludes that the "best recipe for vindicating what [Fiss] really wants vindicated" is a proactive trial judge who will manage the litigation to ensure broad participation, perhaps leading to settlement.¹¹

Michael Moffitt offers that perhaps Fiss "was merely urging us to dampen our enthusiasm for settlement" rather than presenting a binary choice.¹² He notes, however, that "the title Fiss chose and the language he uses in [the] article make more nuanced readings like these difficult."¹³ Instead of accepting the choice as binary, Moffitt offers "three things to be against" that are suggested by Fiss's article but that need not lead to an anti-settlement position. Power imbalances, agency costs, and barriers to access can occur in both litigation and settlement, he points out.¹⁴ According to Moffitt, proponents of litigation and proponents of settlement embrace the same values of efficiency, justice, truth, and stability, and both litigation and settlement advance those values imperfectly.¹⁵

Susan Sturm, in her presentation at the symposium, urged a broader understanding of the judge's legitimate role. The judge, Sturm explained, can facilitate the elaboration of norms by relevant actors. By creating contexts within which stakeholders intervene, and by facilitating participation, judges can help the parties and communities involved in disputes elaborate the values that should determine how the dispute is resolved. Sturm approached the settlement-adjudication question from the perspective of one who has written that "rule-of-law principles can be realized using non-adjudicative processes that integrate individual and

6. *Id.* at 1167–68.

7. Kenneth R. Feinberg, *Reexamining the Arguments in Owen Fiss, Against Settlement*, 78 *FORDHAM L. REV.* 1171, 1173 (2009).

8. *Id.* at 1171–72.

9. *Id.* at 1172.

10. *Id.* at 1171.

11. *Id.* at 1176.

12. Michael Moffitt, *Three Things To Be Against ("Settlement" Not Included)*, 78 *FORDHAM L. REV.* 1203, 1245 (2009).

13. *Id.*

14. *Id.* at 1218–32.

15. *Id.* at 1245.

systemic issues”¹⁶ and that “formal and informal systems are mutually constitutive, with capacities to generate public values for conflicts of different types.”¹⁷ From this perspective, negotiated dispute resolution need not be antithetical to the elaboration of public values.

Other contributors take the *Against Settlement* argument at something closer to face value but argue that Fiss reaches the wrong conclusion because he undervalues settlement. Samuel Issacharoff and Robert Klonoff, focusing on class actions and aggregate litigation, argue that “the ability of a legal system to resolve the repeat harms associated with mass society is itself an important justice value, one that brings recompense to the many, deters untoward behavior, and provides a critical private lever to prevent state regulatory monopoly.”¹⁸ Issacharoff and Klonoff recently completed their work as Reporter and one of the Associate Reporters for the American Law Institute’s (ALI) *Principles of the Law of Aggregate Litigation*, in which the ALI endorsed several proposals that would significantly facilitate mass settlements in both class and nonclass litigation.¹⁹ Turning to the components of Fiss’s anti-settlement argument, they point out that plaintiffs’ law firms in mass litigation now battle on a level field with large corporate defendants.²⁰ They also take issue with Fiss’s assertions that plaintiffs in mass settlements cannot give meaningful consent²¹ and that settlements foreclose ongoing judicial supervision.²² Finally, they turn to Fiss’s primary concern—that settlements achieve peace but not justice.²³ Issacharoff and Klonoff use the massive Vioxx product liability settlement and other examples to argue that “the trial route has no monopoly on justice.”²⁴

Judge Jack Weinstein weighs in on the side of settlement, at least in certain types of cases.²⁵ Having played a central role in litigation over Agent Orange, asbestos, DES, tobacco, breast implants, handguns, and Zyprexa, Judge Weinstein has seen his share of complex disputes. Noting that “[s]ettlements may be even more desirable in the mass commercial age in which we now live,”²⁶ he distinguishes between cases that require

16. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 52.

17. *Id.* at 57.

18. Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1179 (2009).

19. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.06 (Proposed Final Draft 2009) (proposing that settlement class actions be certifiable even if they could not be certified for litigation); *id.* § 3.14 (opposing collateral attacks on class settlements); *id.* § 3.17(b) (proposing that clients be permitted to give advance consent to aggregate settlements with a supermajority voting provision).

20. Issacharoff & Klonoff, *supra* note 18, at 1179–84.

21. *Id.* at 1184–88.

22. *Id.* at 1190–95.

23. *Id.* at 1195.

24. *Id.* at 1199.

25. Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement (1984)*, 78 FORDHAM L. REV. 1265 (2009).

26. *Id.* at 1266.

adjudication and those in which settlement is desirable or even essential. He cites *Brown v. Board of Education*,²⁷ in which he participated as a litigator, as an example of the former, a case in which “settlement[] [was] not possible.”²⁸ He contrasts this with cases in which settlement is not only possible, but possibly the only way to achieve a just outcome.²⁹ In the *Agent Orange* class action,³⁰ Weinstein says, settlement was essential.³¹ Despite some evidence of negligence and causation in that case, “[l]itigation would likely have resulted in the rejection of veterans’ claims”; under the circumstances, Weinstein saw settlement as achieving greater justice than would have been accomplished by adjudication.³²

Jacqueline Nolan-Haley, in a comparative study of mediation in the United States and the United Kingdom, begins with Fiss’s objection to the quality of consent in many settlements.³³ While sharing his concern about the importance of consent, Nolan-Haley points out that the nature of consent—not only consent to settlement but even consent to the mediation process itself—varies considerably across legal systems.³⁴

John Bronsteen, in contrast to most of the symposium participants, counts himself as a supporter of Fiss’s broader position on settlement and offers support for the anti-settlement view based on recent literature in psychology and economic analysis.³⁵ Although most of the economic literature takes a pro-settlement position, Bronsteen advances an alternative view based on benefits provided by trials. These benefits include reducing disputes through law articulation and satisfying human preferences for fairness and participation.³⁶

Despite all the urging that Fissian ideals can be achieved not only through adjudication but also through well-crafted alternative dispute resolution mechanisms, Owen Fiss himself stands firm. In *The History of an Idea*,³⁷ Fiss affirms that he meant what he said—he really is against settlement. Fiss recounts what led him as a lawyer and scholar to take a strong stance in favor of adjudication. His description of Judge Frank M. Johnson, Jr., whom Fiss encountered during the 1960s in school desegregation litigation, could equally serve as a description of Fiss’s adjudication ideal: “He patiently listened to all the grievances that were presented to him, heard from all the affected parties, tried the law and facts

27. 347 U.S. 483 (1954).

28. Weinstein, *supra* note 25, at 1268.

29. *Id.* at 1265, 1268–70.

30. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (approving class action settlement), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

31. Weinstein, *supra* note 25, at 1268–69.

32. *Id.*

33. Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1249 (2009).

34. *Id.* at 1250–51.

35. John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1129–30 (2009).

36. *Id.* at 1133–41.

37. Owen Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273 (2009).

in open court, and then publicly justified his decision on the basis of principle."³⁸ As the ADR movement gathered steam in the early 1980s, Fiss saw the goals of that movement as antithetical to the goal of justice.³⁹ Picking up on ideas he had developed in *Foreword: The Forms of Justice*,⁴⁰ Fiss drew a contrast between the structural reform litigation that had been his focus and "the dispute resolution model" that he saw emerging.⁴¹

Against Settlement offered two lines of argument. The first was based on concerns about the settlement process itself, in particular the problem of unequal bargaining power⁴² and the problem of questionable consent.⁴³ The second was more fundamental, the idea that adjudication serves a different and greater purpose than peace.⁴⁴ In his paper for this symposium, Fiss backs off from the first line of argument⁴⁵ and emphasizes the more fundamental point that "the purpose of adjudication is not the resolution of a dispute, not to produce peace, but rather justice."⁴⁶ As to that second line of argument, Fiss shows no sign of mellowing. "The bargaining that normally takes place between litigants," he writes, "has no connection to justice whatsoever."⁴⁷

Much of Fiss's reasoning lends support to the view advanced by Amy Cohen and others that, at bottom, Fiss does not so much reject settlement as insist upon principled deliberation and the elaboration of public values. Indeed, in *The History of an Idea*, Fiss's strongest attachment appears to be to "the strictures of public reason," a phrase that appears five times.⁴⁸ Several of the symposium participants suggest that settlement can be guided by public reason and can even help shape public values. To Fiss, however, the strictures of public reason are linked to adjudication, not settlement: "The strictures of public reason not only confer authority, but also limit it, and thus ban the use of judicial power to insist upon, or even promote, settlement [through judicial strong-arming]."⁴⁹

We are left with enduring questions about what can be achieved by adjudication and settlement. Is there something about adjudication—decision making by public officials based on articulated norms—that cannot be replicated by negotiated resolutions? And even if settlement can achieve not merely peace but justice, is it illegitimate for judges to participate in its promotion?

38. *Id.* at 1274.

39. *Id.* at 1276.

40. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

41. Fiss, *supra* note 37, at 1275.

42. Fiss, *supra* note 1, at 1076–78.

43. *Id.* at 1078–82.

44. *Id.* at 1085–87.

45. Fiss, *supra* note 37, at 1276 ("On reflection, this portion of the essay seems labored . . .").

46. *Id.*

47. *Id.* at 1277.

48. *Id.* at 1276, 1277, 1278, 1279.

49. *Id.* at 1278.

I do not share Fiss's antipathy toward settlement, nor do I share the strength of his faith in adjudication. Increasingly, however, I have been critical of certain approaches to achieving comprehensive resolutions through settlement.⁵⁰ In thinking about settlement structures, I have benefited from Fiss's broadside on the dispute resolution model. By encouraging us to ignore the dogmatic version of the "settlement is good" mantra, Fiss opened the door to more careful consideration of settlement approaches and invited us to consider more clearly what is gained and what is lost when parties forsake adjudication.

II. DEFINING ADJUDICATION AND SETTLEMENT

Thinking about *Against Settlement* today, I am struck by one of the most basic assumptions underlying the argument that adjudication is superior to settlement. It is the assumption that one can tell the difference between adjudication and settlement. In some contexts, the line between adjudication and settlement is exceedingly blurry and has become more so in recent years. As we think about the arguments against settlement, it is worth pausing over this development to ask which way it cuts. Perhaps the infusion of adjudicatory elements into settlement should allay some of Fiss's concerns because a judge's involvement provides a safeguard against unjust settlements. Or perhaps it is the opposite: that the infusion of negotiation into adjudication, and the cooption of judicial processes for purposes of reaching negotiated resolutions, confirm Fiss's fear that negotiation eviscerates genuine public decision making.

The most obvious point of obscurity along the adjudication-settlement border is the class action settlement. A class settlement does not become binding unless the court approves it.⁵¹ Federal Rule of Civil Procedure 23(e) requires that the court hold a hearing to determine whether the settlement is "fair, reasonable, and adequate."⁵² With the court's approval, the negotiated class settlement becomes a judgment of the court, binding upon all of the class members who did not opt out.⁵³ Is a class action settlement better understood as settlement or adjudication?

50. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1798, 1802 (2005); Howard M. Erichson, *Public and Private Law Perspectives: Transcript of Professor Howard Erichson*, 37 SW. U. L. REV. 665, 665-68 (2008); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. (forthcoming May 2010).

51. 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 court's approval."). Settlements in shareholder derivative suits similarly require judicial approval. FED. R. CIV. P. 23.1(c) ("A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval.").

52. FED. R. CIV. P. 23(e)(2).

53. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 378 (1996) (treating a judicially approved state court class action settlement as a judgment entitled to full preclusive effect under the full faith and credit statute).

On the one hand, it is a judgment of the court entered after a hearing, binding on every class member regardless of their consent. That looks a lot like adjudication. The approval process bears at least a resemblance to the adversary system inasmuch as Rule 23 requires notice and a hearing and permits class members to present objections to the proposed settlement.⁵⁴ Moreover, the effect of an approved class settlement supports defining it as a type of adjudication. As a matter of claim preclusion and full faith and credit, the “settlement judgment” in a class action binds the class members no less powerfully than a class action judgment entered after trial.⁵⁵

On the other hand, in a class action settlement, the court does not actually determine the merits of the claims and defenses, the remedies are not limited to those prescribed by law, and the outcome is whatever the parties negotiated. That looks a lot like settlement. A judge reviewing a class settlement has an important but distinctly limited role evaluating the fairness and adequacy of the settlement that the parties themselves negotiated. The judge may not dictate terms that the parties have not agreed to.⁵⁶ When a dispute is resolved by a class settlement, the result is not a resolution according to a judge’s determination of what the law requires but rather a resolution based on negotiation, albeit one that the judge has found reasonable.

A class action settlement, in sum, does not fall neatly on one side of the adjudication-settlement divide.⁵⁷ Indeed, it is neither. Or, more accurately, it is both. It is an adjudication giving effect to a negotiated resolution, and it is a settlement effectuated by the court’s judgment.

Nonclass settlements, too, raise questions along the adjudication-settlement divide. Some judges overseeing mass litigation have used the term “quasi-class action” to justify judicial supervision of settlements and fees.⁵⁸ In the product liability litigation concerning the antipsychotic drug Zyprexa, Judge Weinstein oversaw a settlement resolving the claims of

54. FED. R. CIV. P. 23(e)(1), (2), (5) (covering notice, hearing, and objectors, respectively).

55. See *Matsushita*, 516 U.S. at 378–79.

56. *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) (“Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed.”). The same is true of shareholder derivative actions. See *United Founders Life Ins. Co. v. Consumers Nat’l Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971) (“[T]he business judgment of the court is not to be substituted for that of the parties . . .”). This does not mean, of course, that judges lack the ability to influence the terms of class action and derivative action settlements. Among other things, judges may indicate terms that they would find acceptable. Ultimately, however, the terms of the deal belong to the negotiating parties and are submitted to the judge for approval or rejection.

57. Indeed, in *Matsushita*, the U.S. Supreme Court referred repeatedly to the “settlement judgment” in the prior class action. *Matsushita*, 516 U.S. at 372, 374, 375, 376, 377, 380, 386.

58. See generally Charles Silver & Geoffrey P. Miller, *The Quasi-class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. (forthcoming Jan. 2010).

about 8000 individual plaintiffs.⁵⁹ Although the litigation was not certified as a class action and thus the aggregate settlement was a private agreement between the defendant and the individual claimants, Judge Weinstein “approved” the settlement.⁶⁰ Did he have the power to disapprove it? The judge reasoned that the settlement of such a complex case required significant judicial involvement and oversight:

While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court. The large number of plaintiffs subject to the same settlement matrix approved by the court, the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement, the court’s order approving and controlling a huge escrow fund, [and] other interventions by the court in controlling discovery for all claimants . . . reflect a degree of court control that supports the imposition of fiduciary standards to ensure fair treatment to all parties and counsel regarding issues such as settlement procedures.⁶¹

Similarly, when Merck negotiated a settlement to resolve about 50,000 individual plaintiffs’ claims in the litigation over its painkiller Vioxx, Judge Eldon Fallon claimed substantial power over the settlement even while referring to it as a “private” settlement agreement.⁶² Judge Fallon deployed the “quasi-class action” concept to justify the court’s oversight over fees and other matters: “[T]his Court found that ‘the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness.’”⁶³ Interestingly, judicial power over the Vioxx settlement comes not only from the judge’s assertion of equitable authority but from the settlement agreement itself:

The Settlement Agreement is a voluntary opt in agreement and expressly contemplates that this Court shall oversee various aspects of the administration of settlement proceedings, including appointing a Fee Allocation Committee, allocating a percentage of the settlement proceeds to a Common Benefit Fund, approving a cost assessment, and modifying any provisions of the Settlement Agreement that are otherwise

59. See *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-2592 (JBW), 2009 WL 2425983, at *2 (E.D.N.Y. July 31, 2009) (“In November 2005, Lilly, without conceding liability, entered into a settlement covering some 8,000 individual plaintiffs. The settlement resolved virtually all cases then pending in the MDL, along with some state cases.” (citation omitted)).

60. See *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596 (JBW), 2005 WL 3117302 (E.D.N.Y. Nov. 22, 2005).

61. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (citations omitted).

62. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2009 WL 2408884, at *2 (E.D. La. Aug. 3, 2009).

63. *Id.* at *3 (quoting *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 612 (E.D. La. 2008)).

unenforceable. Accordingly, this Court has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner.⁶⁴

The Vioxx settlement agreement named Judge Fallon the “Chief Administrator” of the settlement.⁶⁵

The Zyprexa and Vioxx aggregate settlements were negotiated resolutions; they were not adjudications of the claims and defenses on the merits. Moreover, unlike settlement judgments in class actions, the Zyprexa and Vioxx settlements were binding because of the agreement of the parties and the releases provided by the claimants, not because a court entered a judgment. Thus, these are quite clearly settlements. The element of judicial involvement, however, is powerful. The judges in these mass torts served as settlement facilitators, reviewers, and supervisors.

Cases involving judicial examination of settlements are a constant in the civil justice system. When the Securities and Exchange Commission reached a settlement with Bank of America for a multimillion dollar civil penalty in a dispute concerning bonuses paid in connection with Bank of America’s acquisition of Merrill Lynch, the consent judgment required the court’s approval.⁶⁶ District Judge Jed Rakoff noted that “[s]ociety greatly benefits when lawsuits are amicably resolved,” but a consent judgment that “seeks to prospectively invoke the Court’s own contempt power by having the Court impose injunctive prohibitions . . . has aspects of a judicial decree” and requires the court “to review the proposal a little more closely, to ascertain whether it is within the bounds of fairness, reasonableness, and adequacy.”⁶⁷ He proceeded to reject the settlement, finding that “[e]ven under the most deferential review, this proposed Consent Judgment cannot remotely be called fair.”⁶⁸

Against Settlement treated class action settlements, consent judgments, and other judicially sanctioned deals as settlements rather than adjudications.⁶⁹ Fiss considered and rejected the idea that judicial

64. *Id.* at *2 (footnote omitted).

65. Vioxx Master Settlement Agreement § 6.1.1 (Nov. 9, 2007), available at <http://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement%20-%20With%20Exhibits.pdf> (“This is a private agreement. At the request of the Parties, The Honorable Eldon E. Fallon has agreed to preside over the Program in the capacities specified herein. For convenience, Judge Fallon will be referred to herein as the ‘Chief Administrator.’”).

66. Mark Hamblett, *Judge Seeks Further Briefing in Bank of America Bonus Case*, N.Y. L.J., Aug. 11, 2009, at 1.

67. SEC v. Bank of Am. Corp., No. 09 Civ. 6829(JSR), 2009 WL 2916822, at *1 (S.D.N.Y. Sept. 14, 2009).

68. *Id.* at *3.

69. See Fiss, *supra* note 1, at 1079–82 (discussing the role of class representatives and the judge’s role in class settlements).

supervision should remove his objections to settlements.⁷⁰ In *The History of an Idea*, Fiss states his position on judicially approved settlements more strongly than ever:

I also believe that it is impermissible for judges to approve settlements and lend their authority to them as when a consent decree is entered or a class action is settled. This is true not only in the institutional reform or civil rights cases that have been at the center of my concern, but also to the mass tort cases that dominate the contemporary docket.⁷¹

To Fiss, determinations of whether negotiated settlement agreements are “within the ballpark” fall outside of the judicial role, properly conceived.⁷² Fiss also notes that “the judgment of reasonableness is often made without the benefit of a truly adversarial process.”⁷³

The divide between adjudication and settlement has become increasingly blurry in the world of class and “quasi-class” litigation. Moreover, as many of the symposium participants emphasized, even where adjudication and settlement are neatly separable, the divide between them is not so stark as Fiss suggests in terms of the values they serve. Adjudication and settlement offer some of the same benefits and entail some of the same risks. So much depends upon the circumstances under which they are used and the way in which they are deployed. The papers in this symposium stand not only as a testament to the importance of Fiss’s argument and the enduring controversy surrounding it, but also as an invitation to continue exploring the divide between adjudication and settlement.

70. *See id.* at 1082 (“The basis for approving a settlement . . . [is] the settlement’s approximation to judgment. This might appear to remove my objection to settlement, except that the judgment being used as a measure of the settlement is very odd indeed: It has never in fact been entered, but only imagined.”).

71. Fiss, *supra* note 37, at 1278.

72. *Id.*

73. *Id.*

Notes & Observations