

## From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After *Ortiz*

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### I. INTRODUCTION

In 1997 the Supreme Court held, in *Amchem Products, Inc. v. Windsor*,<sup>1</sup> that a proposed class of present and future asbestos claimants could not be certified as an opt-out class under Federal Rule of Civil Procedure 23(b)(3). The *Amchem* Court concluded that the claims were too disparate and “sprawling” to be joined in a single representative class action.<sup>2</sup> Two years later, the Court decided *Ortiz v. Fibreboard Corp.*,<sup>3</sup> again rejecting an asbestos class settlement. In *Ortiz*, the Court held that the settlement failed to satisfy Rule 23(b)(1)(B) standards for certification of asbestos claims against a single corporate defendant.<sup>4</sup> Specifically, the settling parties had failed to show, as required under Rule 23, that the defendant had limited funds to pay the aggregated claims.<sup>5</sup> After these decisions, commentators predicted that products-liability plaintiffs would file fewer class actions in federal court, perhaps moving such filings to state courts whenever possible.<sup>6</sup>

*Ortiz* was decided ten years ago; enough time, one would hope, to enable us to begin to gauge the impact of *Amchem* and *Ortiz* on class action activity in the federal courts. Most telling would be any impact on class certification. Information on filings and removals does not address,

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1. 521 U.S. 591, 622–25 (1997).

2. *Id.* at 624–28.

3. 527 U.S. 815, 864–65 (1999).

4. *Id.* at 851.

5. *Id.*

6. See, e.g., Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Water?*, 74 TUL. L. REV. 1709, 1709 (2000) (asserting that “many class counsel have abandoned the federal courts in favor of what are perceived to be more receptive state court forums”).

directly, the decisions' likely impact on federal class action practice. Even with respect to filings and removals, however, time has not stood still. Since 1999, passage of the Class Action Fairness Act of 2005 (CAFA)<sup>7</sup> has further roiled the class action waters. In other work, we have documented the impact of CAFA on diversity filings and removals to federal court.<sup>8</sup> In this Article, we present additional, preliminary evidence on class certification drawn from the ongoing CAFA study and other empirical studies.

Moreover, the last decade has seen a substantial increase in aggregate litigation in products-liability cases in multidistrict litigation (MDL) proceedings.<sup>9</sup> This increase has led some to ask whether one consequence of *Amchem* and *Ortiz* has been a shift away from class action aggregation of mass-tort and product-liability claims and a shift toward MDL aggregation of such claims in the federal courts.<sup>10</sup> Assuming such a shift is under way, one thing is certain: civil proceduralists have a great deal to keep them occupied. MDL aggregation—and particularly the settlement of mass-tort claims in the MDL context, without class certification—raises a host of important questions.<sup>11</sup>

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7. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

8. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS* (2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf) (reporting data through June 30, 2007); see also Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723 (2008) (reporting data through June 30, 2006).

9. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal* 3 (Univ. of Texas Sch. of Law, Law and Econ. Research Paper No. 147 & NYU Sch. of Law, Law and Econ. Research Paper No. 09-09, 2009), available at <http://ssrn.com/abstract=1352646> (citing Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L. L. 179 (2001) [hereinafter Hensler, *Revisiting the Monster*]; Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001) [hereinafter Hensler, *Mass Tort Litigation*]).

10. See, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 [hereinafter Erichson, *Beyond the Class Action*] (describing the forms of nonclass mass-tort litigation and showing their functional similarity to class actions); Hensler, *Mass Tort Litigation*, *supra* note 9, at 900-06 (comparing the roles of MDL consolidation and class actions in mass torts); Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 893-926 (2007) [hereinafter Hensler, *Fat Lady*] (tracing the role of MDL action on past and present mass-tort litigation); see also RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 260 (2007) ("As a practical matter, consolidated pretrial proceedings at the behest of the MDL Panel already form a setting ripe for plaintiffs' lawyers and defendants to begin discussions about a comprehensive peace.").

11. See generally Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889 (2010) (addressing the difficulty of knowing whether the "procedurally

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This Article examines the extent to which available empirical research supports the impressions of scholars that a shift has occurred from using class action procedures to using multidistrict-litigation procedures to manage and resolve tort litigation in the federal courts. This shift would transform the management of aggregate litigation from a system in which a judge presides over a case filed by a class representative in a district in which the parties have filed or removed a class action into one in which a judge selected by the Judicial Panel on Multidistrict Litigation presides over cases consolidated in a multidistrict litigation in which all (or most) parties are represented by counsel. This shift would further transform the resolution of the litigation from a process in which a judge decides whether a proposed settlement is fair, reasonable, and adequate for the class into one in which counsel for the parties, without judicial review of the settlement, make a binding determination that the settlement is fair, reasonable, and adequate for their clients.

Part II focuses on the class action side of the equation, examining filings and removals of class actions in personal-injury products-liability cases. Part II then narrows the focus to the class certification mechanism. It begins by summarizing the empirical studies of interlocutory appeals under Rule 23(f). Early indications are that Rule 23(f) has also led to fewer classes being certified. Part II continues with an overview of changes since *Ortiz*, in case law, procedural rules, and the Manual for Complex Litigation, that have generally raised class certification hurdles for litigants. Part II then examines the existing empirical studies of class certification. Although not conclusive on the question, these studies certainly suggest a declining rate of class certification in the years before and after *Ortiz*. Without class certifications, parties are forced to look to other procedures for managing and resolving mass litigation.

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aggregated individuals form a sufficiently cohesive group”); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 1 (2009) [hereinafter Burch, *Procedural Justice*] (stating that “[n]onclass aggregate litigation is risky for plaintiffs [because] it falls into the gray area between individual litigation and certified class actions”); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010) [hereinafter Erichson, *The Trouble*] (discussing the problems with all-or-nothing settlements); Erichson, *Beyond the Class Action*, *supra* note 10, at 519 (stating that, “outside of class actions, the profession’s failure to recognize the collective nature of much litigation has left clients unprotected, and has engendered an ethical murkiness that leaves lawyers unsure whether they owe their loyalty to the individual or to the collective”); *see also* Silver & Miller, *supra* note 9 (tracing MDL organization of counsel and management in the Guidant, Vioxx, and Zyprexa litigations).

Part III changes the focus to MDL aggregation in products-liability proceedings, reporting first on the number of cases involved in aggregate-MDL proceedings in the years before and after *Amchem* and *Ortiz*—culminating, perhaps coincidentally, in a greater number of products-liability cases and MDL proceedings in recent years. Part III ends with a brief overview of the size of three recent MDL nonclass settlements. Based on their similarity to pre-*Ortiz* class settlements, these settlements manifest the shifting form of products-liability aggregation from class to nonclass settlements and raise important questions of procedural fairness and justice that commentators and the American Law Institute (ALI) have begun to address.

## II. CLASS ACTIONS

### A. *Filings and Removals: 1994–2007*

In the wake of *Amchem* and *Ortiz*, the Judicial Conference Advisory Committee on Civil Rules (“Committee”) asked the Federal Judicial Center (FJC) to conduct a study of federal-court class action filings and removals before and after those decisions.<sup>12</sup> The Committee was interested in whether products-liability and other class action plaintiffs were avoiding the federal courts when filing class actions because of the perception that class certification and approval of class settlements would be more difficult as a result of the two decisions.

The *Amchem–Ortiz* study, published in September 2002,<sup>13</sup> did not conclude that parties were avoiding federal court in the wake of the decisions. Specifically, it found that nonsecurities class action filings and removals in federal court increased steadily from 1994 to 1996, leveled off for six months, then increased and leveled off just before *Amchem* was decided in 1997.<sup>14</sup> In the six-month period immediately following *Amchem*, filings and removals declined to the 1996 level and leveled off until *Ortiz* was decided.<sup>15</sup> Then, contrary to expectations, nonsecurities class action filings and removals increased to 1000 per six-month period and leveled off, with a slight dip at the end of the study

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12. Memorandum from Bob Niemic & Tom Willging of the Fed. Judicial Ctr. to the Advisory Comm. on Civil Rules 1 (Sept. 9, 2002), [http://www.fjc.gov/public/pdf.nsf/lookup/amchem.pdf/\\$file/amchem.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/amchem.pdf/$file/amchem.pdf).

13. *Id.*

14. *Id.* at 8 chart 1.

15. *Id.*

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period.<sup>16</sup> With respect to personal-injury class actions—the type of claims at issue in *Amchem* and *Ortiz*—the study found that “filings of personal injury class actions more than doubled from 1994 through June 2001, including an increase during the two years or so following the *Ortiz* decision.”<sup>17</sup> The study also found that “removals of personal injury and property damage class actions decreased briefly after the *Amchem* decision and increased during 2000–2001.”<sup>18</sup> Overall, removals of such cases quadrupled from 1994 through June 2001.<sup>19</sup> Not only did *Amchem* and *Ortiz* not have the expected effect, class action filings and removals appeared to move in the opposite direction by increasing after the *Ortiz* decision.<sup>20</sup>

Since 2002, the FJC has updated its class actions research in a long-term study of the impact of CAFA on the federal courts.<sup>21</sup> The CAFA study found that, overall, diversity class action filings increased in the immediate aftermath of the Act’s effective date (February 18, 2005) and appeared to continue to increase over the post-CAFA period (through June 2007).<sup>22</sup> Diversity class action removals also increased, post-CAFA, but then followed a downward trend over the post-CAFA period.<sup>23</sup> With respect to personal injury class actions, specifically, the CAFA study found that monthly filings and removals of diversity personal-injury class actions had declined, slightly, in the post-CAFA period, but that the decrease was not statistically significant.<sup>24</sup> Just as with the *Amchem–Ortiz* study, the empirical results were contrary to expectations. CAFA did lead to increases in other categories of diversity class actions in the federal courts,<sup>25</sup> but personal-injury class actions did not conform to expectations.

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16. *Id.*

17. *Id.* at 2.

18. *Id.* Note that removals were also expected to decline after *Amchem* and *Ortiz* because defendants would not want to subject their settlements to the standards articulated in the two decisions. *Id.* at 4.

19. *Id.* at 2.

20. The FJC research found “a statistically significant, but short-lived, change in filings after the *Amchem* decision . . . [that] lasted through just after the *Ortiz* decision,” but that finding seems overshadowed by the post-*Ortiz* increase in filings that exceed the pre-*Amchem* trend line levels. *Id.* at 11.

21. For the most recent report on filings and removals, see LEE & WILLGING, *supra* note 8.

22. *Id.* at 7, 21 fig.3. The CAFA study focused on diversity class actions because the Act expanded the diversity jurisdiction of the federal courts.

23. *Id.*

24. *Id.* at 12 (“The average number of personal injury class actions initiated in the federal courts has actually dropped slightly in the post-CAFA period . . .”).

25. *Id.* at 11–12 (describing increases in diversity contracts, consumer protection–fraud, and property-damage class actions in the post-CAFA period).

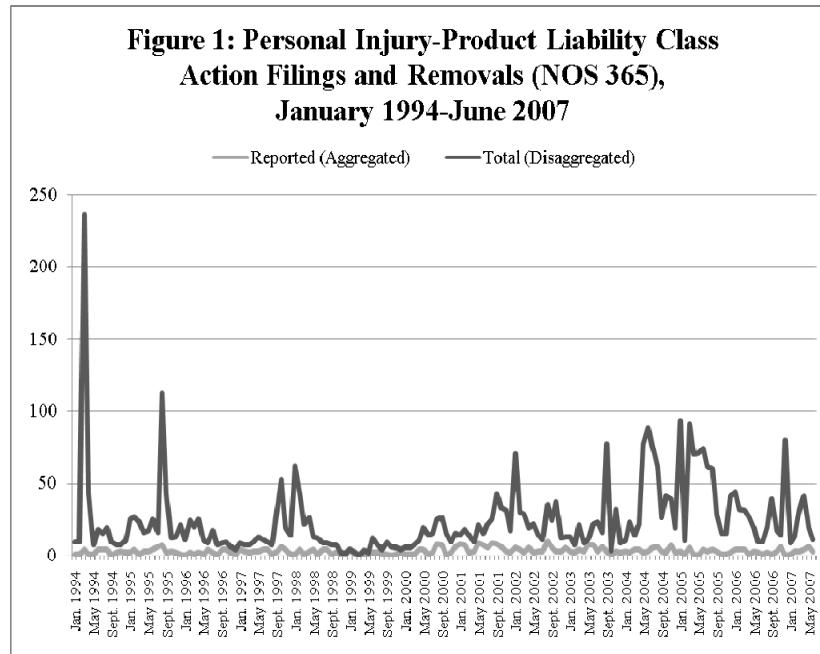
In sum, the personal-injury class action has not disappeared from the federal courts.<sup>26</sup> In the wake of *Ortiz*, the number of such cases initiated in federal courts appears to have increased. After CAFA, the number of such cases initiated in the federal courts appears to have remained steady—not increasing, as the proponents of CAFA may have hoped, but not decreasing, either.

It is possible to combine the databases compiled in the two FJC studies of class actions to analyze class action filings and removals from January 1994 through June 2007 over the entire 13.5-year (or 162-month) period. Figure 1 displays monthly filings and removals of products-liability personal-injury class actions over that time span in two different ways. The lighter gray line represents the number of filings and removals of personal-injury products-liability (PIPL) class actions as reported in FJC reports. The Committee generally prefers that, in counting the number of class actions, the FJC count multiple class action filings or removals that are later consolidated, either through the MDL process or in an intradistrict consolidation, as a single class action.<sup>27</sup> The darker line represents the total number of PIPL class actions that the FJC identified in the *Amchem–Ortiz* and CAFA studies without adjustment for intradistrict or MDL consolidations.

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26. For a discussion of another example of the survival of class actions despite adverse case law, see Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. KAN. L. REV. 845 (2010).

27. Lee & Willging, *supra* note 8, at 1746–47 (2008).



Even a cursory glance at Figure 1 suggests that PIPL class actions are alive and well in the federal courts, at least in terms of filings and removals. If one regresses the consolidated PIPL filings and removals on time, in a simple linear regression over the entire period,<sup>28</sup> the coefficient for time, i.e., the slope of the line, is positive, showing an increase in filings and removals during the period. The same is true if one regresses the total PIPL filings and removals on time. In other words, over the entire period from January 1994–June 2007, PIPL class action filings and removals appear to have increased—*slightly*—and this is true for both the consolidated and total PIPL filings and removals. To that extent, then, *Amchem* and *Ortiz* have not resulted in a decrease in PIPL class actions in terms of absolute numbers.

This statement is one that we must immediately caveat. Because we do not have reliable data on state court filings, we cannot address whether more such cases are being filed in state court than in the 1990s. It is possible that class action plaintiffs have fled the federal courts in great numbers. We simply do not know. Moreover, PIPL class actions may have increased in absolute numbers, but even an increase in absolute

28. See WILLIAM S. BROWN, *INTRODUCING ECONOMETRICS* 257 (1991) (describing linear regression as a first stage in identifying trends in time series data).

numbers may be, at times, a relative decrease. As will be discussed in Part III, other kinds of products-liability cases have seen much larger relative (and absolute) increases in the same period. Nevertheless, filings and removals get a person only so far. The real impact of *Amchem* and *Ortiz* on PIPL class actions should be seen in judicial rulings on class certification. That is the subject of the next section.

### B. Class Certification

The linchpin of the class action's power lies not with the filing of a class action, but with the class certification ruling.<sup>29</sup> In a seminal study, Bryant Garth of the American Bar Foundation found the class action's power to be associated with "[s]uccess in certification [, which] makes it possible to raise the stakes through aggregation, which justifies some greater expenditure of attorney time on the plaintiffs' (and defendants') side."<sup>30</sup> A more recent FJC study concluded that "[t]he dichotomy between certified and noncertified cases could hardly be clearer. A certification decision appears to be a turning point, separating cases and pointing them toward divergent outcomes."<sup>31</sup> Cases with a certified class invariably lead to class settlements, while cases without a certified class are either dismissed or result in settlement of the individual claims of the class representative, but not of the class.<sup>32</sup> Accordingly, examining certification rulings might reveal more about the impact of recent changes in the law on class action litigation than simply examining the rate of filing class actions. With that in mind, we now turn to an empirical examination of trends regarding class certification decisions at both the appellate and trial levels.

#### 1. Factors Other Than *Amchem–Ortiz*

Case law, procedural rules, and legal commentary have all pointed toward restricting certification of class actions in the decade since *Ortiz*

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29. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 49 (2005) [hereinafter WILLGING & WHEATMAN, EMPIRICAL EXAMINATION] (finding that "data support the proposition that class certification is at least one of the key decisions in class action litigation"); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 648 (2006) [hereinafter Willging & Wheatman, *Attorney Choice*] (same data and finding).

30. Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC'Y REV. 237, 267 (1992).

31. Willging & Wheatman, *Attorney Choice*, *supra* note 29, at 649.

32. *Id.*



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was decided. *Amchem* and *Ortiz* each imposed limits on the certification of class actions in the settlement context.<sup>33</sup> In the litigation context, two widely cited appellate cases decided before *Amchem* and *Ortiz*—*Castano v. American Tobacco Co.*,<sup>34</sup> and *In re Rhone-Poulenc Rorer Inc.*<sup>35</sup>—held that district courts erred in certifying products-liability common-issues classes for trial in cases where personal-injury and damages claims of individual class members arguably differed considerably from each other and required separate proof. In *Rhone-Poulenc*, an en banc Seventh Circuit also discussed the lack of opportunity to appeal class certification decisions under appellate jurisdictional rules calling for a final judgment as a precondition for an appeal.<sup>36</sup> The court issued a writ of mandamus directing decertification of a class of hemophiliacs exposed to HIV-contaminated blood.<sup>37</sup> Writing for the majority, Judge Posner emphasized “the undue and unnecessary risk of a monumental industry-busting error in entrusting the determination of potential multi-billion dollar liabilities to a single jury when the results of the previous cases indicate that the defendants’ liability is doubtful at best . . . .”<sup>38</sup>

This pronouncement precipitated significant changes in the class certification process, including adoption of Rule 23(f) and revisions to Rule 23(c). The Manual for Complex Litigation modified its approach to class actions based on changes in case law and Rule 23. These changes must be factored into any discussion of the impact of *Ortiz*.

a. Impact of Rule 23(f)

Soon after *Rhone-Poulenc*, the Advisory Committee revised Federal Rule of Civil Procedure 23 (“Rule 23”) to add section (f), authorizing a permissive interlocutory appeal, allowed at the discretion of the courts of appeals, to review decisions granting or denying class certification.<sup>39</sup> The Committee noted that “[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”<sup>40</sup>

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33. For a discussion of those limitations, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.72–73 (2004).

34. 84 F.3d 734, 752 (5th Cir. 1996).

35. 51 F.3d 1293, 1297 (7th Cir. 1995).

36. *Id.* at 1294–95.

37. *Id.* at 1304.

38. *Id.*

39. FED. R. CIV. P. 23(f).

40. FED. R. CIV. P. 23(f) advisory committee’s note.

In practice, Rule 23(f) has almost certainly contributed to the restriction in class action certification during the past decade. Empirical research indicates that courts of appeals more often grant Rule 23(f) appeals when defendants seek review of an order granting class certification than when plaintiffs seek review of an order denying class certification.<sup>41</sup> After reviewing published orders and unpublished docket records of Rule 23(f) petitions for appellate review of decisions to grant or deny class certification, attorney-researchers Sullivan and Trueblood concluded that “[i]n most circuits, our data suggest that the defendants’ petitions are granted more often.”<sup>42</sup> Specifically, they found that approximately three out of four appellate rulings on class certification arising out of Rule 23(f) petitions concerned cases where the district court had granted class certification.<sup>43</sup> Professor Richard Freer found strikingly similar results in a study of published opinions applying Rule 23(f).<sup>44</sup>

Moreover, this research suggests that Rule 23(f) interlocutory appeals more often result in the denial of class certification than in either affirming class certification or in the reversal of a denial of class certification.<sup>45</sup> Again, the percentages for each outcome documented in the two studies are very similar.<sup>46</sup> Combining the range of outcomes found in the two studies, a little more than half of the Rule 23(f) appeals decisions reversed class certification, while around 20% affirmed class certification. Only about a quarter of interlocutory appeals concerned decisions denying class certification, and these were affirmed about twice as often as they were reversed. Examined from the perspective of whether the appeal’s outcome ended with the possibility of a class being certified, both studies found that 71% terminated with no possibility of a certified class. In both studies, only about 30% of interlocutory appeals affirmed class certification or allowed for the possibility of class certification on remand.

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41. Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 286, 290 tbl.1 (2008).

42. *Id.* at 286.

43. *Id.* at 291 tbl.3 (showing that 95 of 126 (75%) Rule 23(f) appeals in which class certification had been ruled on dealt with cases where class certification had been granted and 31 of 126 (25%) dealt with cases where class certification had been denied).

44. Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 19 chart 1 (2007) (showing that 72.5 of 101 (72%) Rule 23(f) appeals dealt with cases where class certification had been granted and 28.5 of 101 (28%) Rule 23(f) appeals dealt with cases where class certification had been denied).

45. Sullivan & Trueblood, *supra* note 41, at 291 tbl.3.

46. *Id.* at 291 tbl. 3; Freer, *supra* note 44, at 19 chart 1.

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In sum, the existing research supports the view that Rule 23(f) has reduced the number of cases proceeding with certified classes.<sup>47</sup> While the impact of Rule 23(f) is separate from that of *Ortiz*, the Rule is a product of case law developed during the same period.<sup>48</sup>

b. Rule 23(c) Revisions

In 2003 the Advisory Committee revised two additional sections of Rule 23, which allowed for more restrictive application of the preconditions for class certification in sections (a) and (b). First, the Committee altered the timing of the certification decision, no longer requiring that a court determine class action status “as soon as practicable” after a case is filed, but instead allowing a court to determine class action status “at an early practicable time” after filing.<sup>49</sup> Second, the Committee deleted language in Rule 23(c)(1)(C) that class certification “may be conditional,” stating in its Committee Note that a “court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”<sup>50</sup> Read together, these provisions raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision. They expanded the opportunity for parties to engage in discovery prior to moving for class certification and removed any pressure for the court to decide a motion to certify before being informed about, and even ruling on, the merits of the underlying claims. One might reasonably expect that the rules would have the effect of restricting class certification because the presumption that a class would be certified preliminarily on a conditional basis was no longer available.

c. Manual for Complex Litigation, Third and Fourth

Standards for certifying class actions became more stringent during the period between promulgation of the Manual for Complex Litigation, Third (MCL, 3d) in 1995 and the Manual for Complex Litigation, Fourth (MCL, 4th) in 2004. Reflecting the case law at the time, the former had a pro-aggregation tilt, particularly in the sections dealing with mass torts. For example, the MCL, 3d started the discussion of class actions in mass

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47. Assuming, that is, that mandamus would be invoked “only in extraordinary cases.” *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995).

48. See *supra* notes 34–38 and accompanying text.

49. FED. R. CIV. P. 23(c)(1)(A) advisory committee’s note.

50. FED. R. CIV. P. 23(c)(1)(C) advisory committee’s note.

tort cases by asserting that, “[d]espite the Advisory Committee’s 1966 caveat, courts have increasingly utilized class actions to avoid duplicative litigation in mass tort cases . . . .”<sup>51</sup> The MCL, 3d went on to cite a host of mass tort “opt-out” cases that had been certified as class actions on both statewide and nationwide bases.<sup>52</sup> The manual also stated “[i]n appropriate cases, common issues of fact or law have been carved out for class certification under Rule 23(c)(4)(A).”<sup>53</sup>

In contrast, the current MCL, 4th begins its treatment of mass-tort class actions this way:

Federal courts have “ordinarily” disfavored—but not ruled out entirely—using class actions in dispersed mass tort cases. After experimentation with class treatment of some mass torts during the 1980s and 1990s, the courts have greatly restricted its use in mass torts litigation. Mass tort personal injury cases are rarely appropriate for class certification for trial. . . . Property damage claims may be different . . . .<sup>54</sup>

The MCL, 4th also refers to certification of issues classes under Rule 23(c)(4)(A) in conjunction with nonclass procedures for individual issues, but notes that in recent times, “questions have been raised about the constitutionality, fairness, and usefulness of issues classes in the mass tort context.”<sup>55</sup>

The MCL, 4th’s bottom line tracks its opening line: class certification of mass-tort cases is disfavored, but not out of the question. Based on the current guidance to judges and practitioners in mass tort litigation, one would expect that class certification of mass-tort cases would have become rare indeed during the decade between the two most recent versions of the Manual for Complex Litigation.

Scholarly commentary arriving after the 2004 publication of the MCL, 4th supports the conclusion that the certification decision is the key factor in analyzing the direction of class action litigation. Professor Edward Sherman observed that a “number of federal courts have applied increasingly stringent requirements for class certification, particularly for cases arising in multiple states;”<sup>56</sup> referenced “the aversion of many

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51. MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.262 (1995) (citation omitted).

52. *Id.*

53. *Id.*

54. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.7 (2004) (citations omitted).

55. *Id.* § 22.71 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748–51 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–1304 (7th Cir. 1995)).

56. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2206 (2008).

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federal courts to class certification of multistate class actions”<sup>57</sup>; and concluded that, “in most mass tort cases today . . . , class certification is unlikely.”<sup>58</sup> Along similar lines, Professor Richard Marcus launched his discussion of maximalist use of MDL procedures by quoting Judge Weinstein to the effect that “use of the class action device to aggregate claims has become more difficult.”<sup>59</sup>

All of the above—cases, commentary, and Rule changes—point in the direction of fewer certified classes. This combination of factors makes it less likely that one could identify an *Ortiz* effect. Instead, *Ortiz* should be understood as part of a larger trend in the class action context—a trend away from certified classes. The next subpart examines the existing empirical studies of class certification. What light can these studies shed on the perceived shift away from class certification and toward MDL aggregation?

## 2. Empirical Research

Empirical research on class certification is quite limited. Until recently, the body of such research related exclusively to class actions in federal courts, which is the subject of this paper. In this section, we discuss four federal studies, one of which dates from the 1970s. It is impossible to infer a post-*Ortiz* trend from four data points, especially when the studies differ in many respects. Moreover, none of the studies focused on mass-tort or PIPL cases. Nonetheless, these studies warrant discussion. Interestingly, the studies point toward more restrictive rulings on class certification over time. One might reasonably expect this based on developing case law, rule changes, and guidance from the Manual for Complex Litigation—discussed above—as well as the Supreme Court decisions in *Amchem* and *Ortiz*. But the paucity of data prevents us from drawing any firm conclusions.

In addition to the following discussion, the four studies are summarized in appended Table 3.<sup>60</sup> We also discuss two studies of state class action activity; one from California<sup>61</sup> (California Study) and one

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57. *Id.* at 2207.

58. *Id.* at 2208.

59. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2249 (2008) (quoting *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 542 (E.D.N.Y. 2006)).

60. See *infra* appended Table 3.

61. HILARY HEHMAN, JUDICIAL COUNCIL OF CAL., CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION (2010), available at <http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf>.

from Oklahoma.<sup>62</sup> While not directly related to the shift in federal aggregate litigation, the California study suggests that state class certification activity may have followed a similar path to that observed in the federal courts—that is, more restrictive rulings in recent years. Likewise, Oklahoma state courts have experienced a decline in motions and class certifications since CAFA's effective date of February 2005.

The first study to examine the rate of class certification was conducted by the 1974 staff of the *Georgetown Law Journal* at the request of the Senate Commerce Committee, following the 1966 adoption of Rule 23(b)(3).<sup>63</sup> The study included “a comprehensive examination of all class actions filed in the United States District Court for the District of Columbia between July 1, 1966 and December 31, 1972.”<sup>64</sup> Roughly two decades later, the FJC studied class actions terminated between July 1, 1992 and June 30, 1994 in four federal district courts with substantial class action activity: the Eastern District of Pennsylvania, the Northern District of California, the Northern District of Illinois, and the Southern District of Florida (1996 FJC).<sup>65</sup> That study encompassed all cases filed or litigated as class actions in those districts during the study period. Nine years later, the FJC conducted a national case-based survey of attorneys in closed class action cases, using a database constructed by examining electronic docket records in all civil cases filed during the study period for evidence of class action activity (2005 FJC). This study generated responses from a representative national sample of attorneys involved in class action terminations between July 1999 and December 2002.<sup>66</sup> These three studies (1974 Georgetown, 1996 FJC, and 2005 FJC) did not limit their analysis to certain kinds of class actions. The ongoing CAFA study, discussed above, divides class action cases broadly into federal-question and diversity class actions (2009 FJC).<sup>67</sup> In what follows, we limit the discussion of that study to the diversity cases.

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62. Stephen S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. KAN. L. REV. 809 (2010).

63. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1123 (1974) [hereinafter 1974 Georgetown].

64. *Id.* at 1126–27.

65. THOMAS E. WILLGING, LAURAL L. HOOPER, & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS (1996) [hereinafter WILLGING ET AL., 1996 FJC]; see also Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 82 (1996) [hereinafter Willging et al., *Empirical Analysis*].

66. WILLGING & WHEATMAN, EMPIRICAL EXAMINATION, *supra* note 29, at 6; see also Willging & Wheatman, *Attorney Choice*, *supra* note 29, at 601.

67. Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *Impact of the Class Action*

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## a. Motions to Certify

For a class certification ruling to exist, of course, counsel representing the putative class must, ordinarily, first file a motion to certify the class. The percentages of cases in which motions were filed in the four studies ranges a great deal, from 70% of the cases in the 1996 FJC study<sup>68</sup> to just 24% in the 2009 CAFA study.<sup>69</sup> The 1974 Georgetown study found that motions to certify were filed in 51% of the cases studied.<sup>70</sup> The 2005 FJC study did not ask directly about the filing of motions to certify, but instead asked attorneys to report court action on class certification; 43% reported court action on a motion, but the percentage of cases in which a motion was actually filed is likely higher.<sup>71</sup> The California study found that “not only was the filing of motions for class certification relatively infrequent overall, but the data also show a consistent decrease in the yearly rate of these motions over the study period, declining sharply from 2000 to 2005.”<sup>72</sup> The percentage of cases with certification motions ranged from over 25% in 2000 to just over 5% in 2005.<sup>73</sup> The Oklahoma study found a notable, but less steep, decline in certification motions, from 52% of all cases filed as class actions between January 1, 2001 and February 17, 2005 to 33% of such cases filed between February 18, 2005 and December 31, 2008.<sup>74</sup>

These findings indicate that in a substantial portion of cases raising class allegations, no motion to certify the alleged class is ever filed. In the most recent federal study, no motion to certify was filed in three quarters of the putative class actions. Even at the high end, in the 1996 FJC study, no motion to certify was filed in 30% of cases. Rule 23(c)(1)(A), as amended in 2003,<sup>75</sup> permits counsel to wait for an “early

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*Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions*, 256 F.R.D. 214, 214 (2009).

68. Of the 407 cases, 286 (70%) had at least one motion to certify a class. WILLGING ET AL., 1996 FJC, *supra* note 65, at 26; *see also* Willging et al., *Empirical Analysis*, *supra* note 65, at 101.

69. This is the percentage of all cases in the sample that had one or more motions to certify a class. Lee & Willging, *supra* note 67, at 219 tbl.4.

70. Of the 81 terminated cases, 41 (51%) included a motion for or against class certification, 15 of which were filed by a defendant. 1974 Georgetown, *supra* note 63, at 1142–43.

71. This is the percentage of all attorneys who reported court action on class certification; of the 57% with no action reported, there may or may not have been a motion to certify. WILLGING & WHEATMAN, *EMPIRICAL EXAMINATION*, *supra* note 29, at 47; Willging & Wheatman, *Attorney Choice*, *supra* note 29, at 645.

72. HEHMAN, *supra* note 61, at 9 fig.2.

73. *Id.*

74. Gensler, *supra* note 62, at 838 tbl. 3.

75. *See supra* note 50 and accompanying text.

practicable time” before filing such a motion, and the California rule calls for the filing of a motion for certification ““when practicable.””<sup>76</sup> The federal rule change likely delays the filing of certification motions and thus makes the filing of any such motion less likely, overall. The California rule seems even more likely to tolerate delaying or not filing a motion to certify.

#### b. Rulings on Motions

All four federal studies found that when a judge ruled on a motion to certify, the most likely ruling was to grant the motion.<sup>77</sup> The CAFA study found that the grant rate was 63%,<sup>78</sup> the 2005 FJC study 56%,<sup>79</sup> the 1996 FJC study 67%,<sup>80</sup> and the 1974 Georgetown study 66%.<sup>81</sup> These grant rates, combined with fewer motions to certify filed in later studies, have resulted in very different percentages of cases filed with class allegations that eventuate in a certified class. The 1974 Georgetown study, which had motions in about half the cases and a high grant rate, found that 27% of the cases filed as class actions saw a class certified.<sup>82</sup> The 1996 FJC study, with motions filed in most cases and a relatively high grant rate, found that 37% of putative class actions resulted in a certified class.<sup>83</sup> The 2005 FJC study, with motions activity in fewer cases, compared to earlier studies, and the lowest of the four grant rates, found that 24% of putative class actions resulted in a certified class.<sup>84</sup>

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76. HEHMAN, *supra* note 61, at 4 (citing CAL. R. OF CT. 3.764).

77. These percentages do not include cases in which there was no ruling on a motion to certify a class. In a sizeable number of cases courts take no action on class certification before the case is resolved. *See, e.g.*, WILLGING & WHEATMAN, *EMPIRICAL EXAMINATION*, *supra* note 29, at 35 tbl.9 (showing that 163 of 283 cases (58%), many of which had no motion to certify, had no action taken on class certification).

78. This is the percentage of all rulings on motions to certify a class, excluding orders deferring a ruling or finding the motion to be moot. Lee & Willging, *supra* note 67, at 224 tbl.9.

79. This is the percentage of the 43% of attorneys who reported court action on class certification: 56 percent of the rulings were to certify a class. WILLGING & WHEATMAN, *EMPIRICAL EXAMINATION*, *supra* note 29, at 47; Willging & Wheatman, *Attorney Choice*, *supra* note 29, at 645.

80. Of the 228 cases with at least one motion to certify a class and a ruling on class certification, 152 (67%) were certified. WILLGING ET AL., 1996 FJC, *supra* note 65, at 26–27; *see also* Willging et al., *Empirical Analysis*, *supra* note 65, at 101.

81. Of the 41 terminated cases that included a decision on a motion or a sua sponte ruling for or against class certification, 27 (66%) were certified and 14 (34%) denied certification. 1974 Georgetown, *supra* note 63, at 1142–43 & n.114.

82. *Id.* at 1137 (reporting class relief in 21 of 81 cases).

83. WILLGING ET AL., 1996 FJC, *supra* note 65, at 7.

84. Of 486 cases, 119 (24%) were certified. WILLGING & WHEATMAN, *EMPIRICAL EXAMINATION*, *supra* note 29, at 50 tbl.19. For diversity cases, 22% of the non-remanded cases were certified. *Id.* at 35 tbl.9.



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The CAFA study, with motions to certify filed in only about a quarter of cases, found that only 13% of cases filed as class actions resulted in a certified class of some type.<sup>85</sup>

The California study found that 44% of motions for certification were granted and that the overall rate of class certification was 12.8%.<sup>86</sup> In Oklahoma, the grant rates were 58% between January 2001 and February 2005 and 41–48% from February 2005 through December 2008.<sup>87</sup>

### c. Certification for Litigation or Settlement

Historically, courts certified class actions without restriction. Commentators now often refer to such cases as “litigation classes” to distinguish them from classes certified for settlement purposes only (settlement classes). Prior to the 2003 amendments to Rule 23, which allowed judges and litigants more flexibility in the timing of the certification decision,<sup>88</sup> the Manual for Complex Litigation cautioned judges against certifying settlement classes. For example, the Manual for Complex Litigation, Second, published in 1985, stated that “courts have permitted, with great caution, the use of ‘settlement classes.’”<sup>89</sup> In contrast, the current Manual for Complex Litigation, Fourth, published in 2004, states that “[s]ettlement classes . . . can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits.”<sup>90</sup> The changes in the Rules and the Manual for Complex Litigation open the door for more settlement-class certifications.

Each of the federal empirical studies found a lower percentage of litigation classes and a higher percentage of settlement classes than its predecessor. The 1974 Georgetown study found that 89% of the classes certified were litigation classes.<sup>91</sup> The 1996 FJC study found that 61% of certified classes were litigation classes.<sup>92</sup> The 2005 FJC study found that

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85. This is the percentage of the 161 nonremanded cases in the study, excluding all cases in which the court remanded the case to a state court. Lee & Willging, *supra* note 67, at 224 tbl.9. If all 231 cases in the sample are included, only 9% were certified as class actions. *Id.*

86. HEHMAN, *supra* note 61, at 8, 10 tbl.5.

87. Gensler, *supra* note 62, at 839 & n.121.

88. *See supra* notes 49–50 and accompanying text.

89. MANUAL FOR COMPLEX LITIGATION (SECOND) §30.45 (1985) (citations omitted).

90. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004). The Manual also cautions judges that “[c]lass actions certified solely for settlement, particularly early in the case, sometimes make meaningful judicial review more difficult and more important.” *Id.*

91. 1974 Georgetown, *supra* note 63, at 1142–43. Including 5 cases without formal motions yields 24 litigation classes and 3 settlement classes. *Id.* at 1142 n.114.

92. WILLGING ET AL., 1996 FJC, *supra* note 65, at 26 (finding 93 of 152 cases (61%) certified

42% of certified classes were litigation classes.<sup>93</sup> The CAFA study found that 20% of certified classes were litigation classes.<sup>94</sup> The California study found that 22% of classes certified between 2000 and 2005 were certified as a result of a contested motion.<sup>95</sup> In Oklahoma, 54% of the pre-CAFA certifications were litigation classes, and that percentage remained relatively constant at 53% after CAFA (but with a much smaller number of certified classes).<sup>96</sup> Although these findings, by themselves, do not establish a trend, they do seem to indicate that the litigation class, once the norm, has become relatively uncommon in federal courts as well as in California and Oklahoma.

When complete, the CAFA study will shed additional light on these issues. To date, we have collected data on 669 terminated class actions based on diversity jurisdiction that were initiated in federal court in the period February 2003–February 2007. A relatively large percentage of the sampled diversity cases remains pending, as of the last update (about 20% of the post CAFA cases). But a preliminary analysis is possible, with respect to class settlement rates in general and personal injury cases in particular. To date, none of the diversity class actions in the sample has terminated by trial; the nontrial class actions include, needless to say, any case in which a litigation class has been certified. That may change as additional cases terminate. But as of this writing, the result in every terminated case with a certified class has been class settlement.<sup>97</sup>

#### d. Personal-Injury Class Actions

Does it matter whether the case ending in a class settlement raised personal-injury claims? The CAFA study includes information categorizing every state-law claim raised in the complaints in sampled cases, permitting us to identify cases raising one or more personal-injury claims. Slightly more than one in eight (ninety-seven cases, or 14.5%) of the terminated diversity class actions raised one or more state-law claim classified as “tort personal injury” (a somewhat broader category than mass torts or products liability). Interestingly, the class settlement rate

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unconditionally); see also Willging et al., *Empirical Analysis*, *supra* note 65, at 101.

93. WILLGING & WHEATMAN, *EMPIRICAL EXAMINATION*, *supra* note 29, at 48 tbl.18 (reporting 52 of 125 (42%) cases certified for trial and litigation); see also Willging & Wheatman, *Attorney Choice*, *supra* note 29, at 647 tbl.20 (same).

94. Lee & Willging, *supra* note 67, at 224.

95. HEHMAN, *supra* note 61, at 11 tbl.6.

96. Gensler, *supra* note 62, at 842 tbl. 6.

97. Lee & Willging, *supra* note 67, at 227 (“Every case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement.”).

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for terminated cases raising one or more personal-injury claims and those not raising such a claim is *identical*—10.3%. Ten of 97 terminated class actions raising one or more state-law personal-injury claims resulted in a class settlement. Fifty-nine of 572 terminated class actions not raising a state-law personal-injury claim resulted in a class settlement. This finding is preliminary and is likely to change when all cases in the sample have terminated. It suggests, however, that class settlement is not necessarily a less likely outcome of class actions raising personal-injury claims, compared with other diversity class actions—even in the post-*Amchem*, post-*Ortiz* era.

In sum, the existing empirical evidence is consistent with the thesis that class certification has become less likely in the post-*Ortiz* period. Moreover, the settlement class—at issue in both *Amchem* and *Ortiz*—appears to have displaced the litigation class as the dominant form of class certification. Interestingly, the most recent evidence suggests that cases raising state-law personal-injury claims have not fared differently when compared with cases raising other kinds of claims. Any trends that do exist in class certification and settlement rates, in other words, may not be limited to personal-injury or mass-tort cases.

### III. MDL AGGREGATION

In this Part we address the increasing importance of MDL aggregation in the mass-torts and PIPL area.<sup>98</sup> Although the original proponents of the MDL process included products-liability cases on their list of case types in which “massive filings of multidistrict litigation are reasonably certain to occur,”<sup>99</sup> MDL consolidation of large numbers of products-liability cases into mammoth MDL proceedings is a more recent phenomenon. Prior to 1990, for example, the Judicial Panel on Multidistrict Litigation (JPML) ordered the consolidation of only six products-liability MDL proceedings. Those consolidations accounted for just 27% of the twenty-two products-liability proceedings that the JPML considered during its first twenty-one years of existence.<sup>100</sup> Up until

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98. See generally Symposium, *The Problem of Multidistrict Litigation*, 82 TUL. L. REV. 2199 (2008); see also DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2006); Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211 (1976–77).

99. H.R. REP. NO. 90-1130 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900 (Statement of the Coordinating Committee for Multiple Litigation of the U. S. District Courts).

100. This section analyzes data provided to the FJC by the clerk’s office at the JPML. The databases analyzed contain records for MDL proceedings and records for cases in the federal courts that the JPML has considered making part of an MDL proceeding. We use the term “case” to distinguish these actions from “proceedings,” the term we use to identify MDL consolidations. As

1990, in other words, the JPML considered about one products liability proceeding *per year*, on average, and declined to order consolidation of the overwhelming majority of those it did consider.

It is the more recent development of mammoth MDL proceedings that has spurred discussion of a *shift* toward MDL aggregation. In fact, some commentators have concluded that the “preferred way of handling mass tort lawsuits in the federal courts has been for the [JPML] to transfer and consolidate the cases in a single district court.”<sup>101</sup> In the nineteen years between the beginning of 1990 and the end of 2008, the JPML ordered consolidation of 112 products-liability MDL proceedings. During that period, the JPML considered at least 154 such proceedings, for a grant rate of 73%. In short, the JPML has become much more likely to order consolidation of products-liability proceedings—almost three times as likely to consolidate—at the same time as the number of products-liability proceedings has increased. From 1990 through 2008, the JPML considered eight products-liability proceedings per year, on average.

But to be clear, MDL aggregation is not *exactly* an alternative to class action aggregation of claims. Cases consolidated in an MDL proceeding may, and often do, raise class allegations, and an MDL proceeding can very well result in a class settlement, as discussed below. Moreover, the JPML has expressed a strong preference for ordering the consolidation of proceedings where the potential transferee cases raise class allegations: “a potential for conflicting and overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings.”<sup>102</sup> Whether the presence of a class allegation actually increases the likelihood of an MDL consolidation is an interesting question for further empirical investigation.

This Part will proceed in a somewhat backwards fashion. First, we will discuss MDL cases, with the purpose of establishing the mammoth size of a few of these MDL proceedings and of documenting the proportion of products-liability cases these few proceedings constitute. Then, we turn to the proceedings themselves and the issues they raise.

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of the end of 2008, for example, there were 28,360 JPML case dispositions in MDL 926 (*In re Silicon Gel Breast Implants Products Liability Litigation*), a single MDL proceeding.

101. Silver & Miller, *supra* note 9, at 3.

102. *In re Plumbing Fixtures*, 308 F. Supp. 242, 244 (J.P.M.L. 1970) (rejecting argument that putative transferor court should decide class certification question), *cited in* DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 5:24 (2007); *see also* HERR, *supra*, § 5:24 n.1 (noting a string of decisions of the Judicial Panel between 1968 and 2006 standing for the same proposition).

*A. Products-Liability MDL Cases*

Figure 2 displays the total number of JPML case dispositions in nonasbestos products-liability (NAPL) cases, 1991–2008.<sup>103</sup> By “disposition,” we refer to the JPML’s decision whether to make a case a part of a new or ongoing MDL proceeding. The figure includes case dispositions that did not result in the case being consolidated into an MDL proceeding. This is a relatively minor point, however, because 95.5% of all JPML dispositions in NAPL cases resulted in the case becoming part of an MDL proceeding. At minimum, to be included in the figure, a case had to be similar enough to other cases for the JPML to consider consolidating it with at least some other cases in an MDL proceeding.

The number of NAPL MDL case dispositions represented in Figure 2, as with PIPL filings in Figure 1, fluctuates a great deal from year to year. The line spikes in 1995, breaking through the 10,000-cases mark for the first time. It is worth emphasizing that point—in 1995, the JPML disposed of more than 10,000 NAPL cases. The line in Figure 2 ebbs after 1997–98 but spikes again in 2004, breaking through the 20,000-cases mark. In other words, the JPML disposed of more than 20,000 NAPL cases in 2004. The year 2004 saw a massive influx of NAPL filings and a correspondingly high number of MDL dispositions of NAPL cases. The line then fluctuates—remaining, however, at relatively high levels. In 2008, the number of MDL case dispositions in NAPL cases was greater than in each year prior to 2004, except 1995.

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103. This figure and Table 1 present data provided to the FJC by the clerk’s office at the JPML. See also note 100. The JPML automated its records in 1992; the Cases database is incomplete prior to that date. The data point for 1991 probably understates the number of NAPL cases disposed of in that year and should be interpreted with caution.

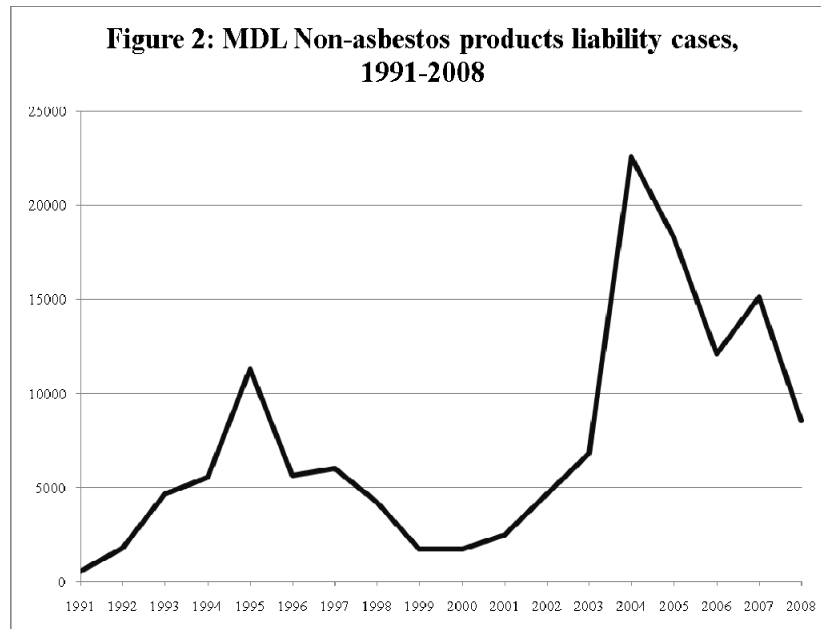


Table 1 lists the three largest MDL proceedings in every year, 1992–2008, in terms of case dispositions, as well as the overall number of NAPL case dispositions per year. A quick look at the table indicates that Figure 2 can be broken into two distinct periods. In the period 1992–98, the line is driven overwhelmingly by one massive MDL proceeding: MDL 926 (*In re Silicone Gel Breast Implants Products Liability Litigation*). In these seven years, MDL 926 cases represented 71.9% of all NAPL MDL cases disposed of by the JPML (28,082 out of 39,062 total NAPL cases). The peak observed in 1995 in Figure 2, as well as the shoulders in 1993–94 and, to a lesser extent, in 1996–97, represent *Breast Implant* cases. During that seven-year period, the next largest consolidation, MDL 1038 (*In re Norplant Contraceptive Products Liability Litigation*), accounted for 10.1% of NAPL MDL case dispositions, and the third largest, MDL 1014 (*In re Orthopedic Bone Screw Products Liability Litigation*), accounted for 8%.

**Table 1: Largest Nonasbestos MDL Proceedings, Dispositions by Year, 1992–2008**

Year	Largest MDL Proceeding (%)	Second-Largest MDL Proceeding (%)	Third-Largest MDL Proceeding (%)	N
1992	<i>Breast Implants</i> 81.4	<i>L-Tryptophan</i> 14.6	<i>Prozac</i> 2.4	1,779
1993	<i>Breast Implants</i> 96.5	<i>L-Tryptophan</i> 1.4	<i>GM Fuel Tank</i> 0.7	4,628
1994	<i>Breast Implants</i> 85.5	<i>TMJ Implant</i> 6.4	<i>Bone Screw</i> 2.0	5,542
1995	<i>Breast Implants</i> 87.0	<i>Bone Screw</i> 4.9	<i>Norplant</i> 3.0	11,267
1996	<i>Breast Implants</i> 51.2	<i>Bone Screw</i> 23.3	<i>Norplant</i> 16.4	5,626
1997	<i>Breast Implants</i> 38.8	<i>Norplant</i> 37.1	<i>Bone Screw</i> 17.2	6,028
1998	<i>Breast Implants</i> 57.3	<i>Diet Drugs</i> 20.3	<i>Norplant</i> 9.9	4,192
1999	<i>Diet Drugs</i> 67.7	<i>Breast Implants</i> 14.3	<i>Latex Gloves</i> 8.3	1,693
2000	<i>Diet Drugs</i> 60.9	<i>Rezulin</i> 14.3	<i>Bridgestone</i> 9.7	1,714
2001	<i>Rezulin</i> 20.4	<i>Bridgestone</i> 17.0	<i>Sulzer Hip</i> 12.4	2,490
2002	<i>Baycol</i> 55.3	<i>PPA</i> 12.1	<i>Rezulin</i> 6.9	4,652
2003	<i>Baycol</i> 58.4	<i>Diet Drugs</i> 15.6	<i>PPA</i> 9.3	6,794
2004	<i>Diet Drugs</i> 39.4	<i>Welding Fumes</i> 27.2	<i>Baycol</i> 10.0	22,561
2005	<i>Diet Drugs</i> 38.4	<i>Welding Fumes</i> 24.2	<i>Vioxx</i> 21.8	18,318
2006	<i>Vioxx</i> 35.0	<i>Zyprexa</i> 12.3	<i>Bextra/Celebrex</i> 9.8	12,107
2007	<i>Seroquel</i> 46.5	<i>Vioxx</i> 10.4	<i>Guidant</i> 8.0	15,107
2008	<i>Prempro</i> 42.8	<i>Vioxx</i> 7.1	<i>Medtronic</i> 5.1	8,549
1992–2008	<i>Breast Implants</i> 21.3	<i>Diet Drugs</i> 15.8	<i>Welding Fumes</i> 8.7	133,047

In contrast, Table 1 also shows that no single MDL proceeding dominated the ten-year period 1999–2008 in the way that MDL 926

dominated 1992–98. The best candidate for that role is MDL 1203 (*In re Diet Drugs Products Liability Litigation*). *Diet Drugs* was the largest MDL proceeding in terms of number of MDL case dispositions after 1998; it accounted for 21.5% of all NAPL MDL case dispositions, or 20,161 out of 93,985 cases, from 1999 through 2008. There were, however, fewer *Diet Drugs* dispositions in 1999–2008 than *Breast Implants* dispositions in 1992–98. Moreover, unlike *Breast Implants*, *Diet Drugs* had company. In the peak year 2004 and in the years since, the relatively large numbers of MDL case dispositions are the result of *Diet Drugs* and five other MDL proceedings: MDL 1431 (*In re Baycol Products Liability Litigation*), MDL 1507 (*In re Phenylpropanolamine (PPA) Products Liability Litigation*), MDL 1535 (*In re Welding Fume Products Liability Litigation*), MDL 1657 (*In re Vioxx Marketing, Sales Practices Products Liability Litigation*), and MDL 1769 (*In re Seroquel Products Liability Litigation*). Together, these MDL proceedings accounted for 71.7% of the NAPL MDL cases during this ten-year period—comparable to MDL 926 in the earlier period.

The relatively large numbers of products-liability MDL cases in recent years, in other words, have not been concentrated in one massive proceeding, like MDL 875 (*In re Asbestos Products Liability Litigation*) or MDL 926 (*Breast Implants*). In many of the years in the period 1999–2008, no single MDL proceeding accounts for a majority of NAPL MDL cases. *Diet Drugs* accounted for a majority of NAPL cases in 1999 and 2000 (67.7% and 60.9%, respectively), and *Baycol* accounted for a majority in 2002 and 2003 (55.3% and 58.4%, respectively). But in 2004–08, no MDL proceeding accounted for a majority of NAPL cases—although at 46.5% in 2007, *Seroquel* came close. In terms of aggregate litigation, in short, the period 2004–08 saw a greater number of NAPL MDL cases, spread across more proceedings, than the earlier period; the last few years have seen a massive increase in MDL aggregate litigation.

### B. MDL Proceedings

In recent years, the MDL process has played an increasingly important role in the management and resolution of products-liability litigations. Beginning with the Judicial Conference of the United States (JCUS) Ad Hoc Committee on Asbestos Litigation in 1991,<sup>104</sup> which

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104. REP. OF THE PROCEEDINGS OF THE JUDICIAL CONF. OF THE U.S. (Mar. 12, 1991), available at <http://www.uscourts.gov/judconf/91-Mar.pdf>.



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“concluded that no adequate procedures presently exist to enable the justice system to deal with the unique nature of asbestos cases,” the JCUS signaled to the Judicial Panel that mass-tort litigation posed serious challenges for the civil justice system that might be remedied by aggregating multiple claims.<sup>105</sup> The JCUS urged Congress to “consider legislation expressly to authorize consolidation and collective trial of asbestos cases in order to expedite disposition of cases in federal courts with heavy asbestos personal injury caseloads.”<sup>106</sup> In the absence of congressional action, the JPML took the lead and consolidated all pending asbestos cases and transferred them to the Eastern District of Pennsylvania for pretrial proceedings.<sup>107</sup> That proceeding, in fact, led to the settlement proposed in *Amchem*.<sup>108</sup> The Panel’s action regarding asbestos reversed a series of five decisions between 1977 and 1987 in which the Panel declined to consolidate asbestos cases.<sup>109</sup> The 1991 decision appears to have opened the door to consolidation of products-liability cases at the increased rate described above.

Empirical attention to the increasing MDL activity regarding products-liability litigation has been sparse. A 1999 FJC study, conducted for the Chief Justice’s Mass Torts Working Group, examined twenty-four mass-tort, personal-injury litigations and found that the JPML had transferred fifteen of them (between 1968 and 1999).<sup>110</sup> More recently, Professor Deborah Hensler combined the results of that FJC study with the results of a mass-tort study conducted by RAND and concluded that “[h]alf (seventeen) of the mass personal injury litigations identified by the studies were consolidated and transferred to a single federal court under the multi-district statute.”<sup>111</sup> She found that “[o]nly one-third (twelve) were resolved wholly or to a significant degree by a class action settlement . . . . But about two-thirds (twenty-two) . . . resulted in aggregate settlements, including both class and non-class global settlements that were intended to resolve all current claims against

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105. *Id.* at 33.

106. *Id.*

107. *In re Asbestos Prod. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991).

108. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 257–61 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3rd Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

109. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. at 417 & n.4.

110. Thomas Willging, et al., *Individual Characteristics of Mass Tort Case Congregations: A Report to the Mass Tort Working Group*, in Appendix D, Working Group on Mass Torts 7–8 (1999), [http://www.fjc.gov/public/pdf.nsf/lookup/masstapd.pdf/\\$file/masstapd.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/masstapd.pdf/$file/masstapd.pdf). Two of the twenty-six case congregations identified in the report preceded the creation of the Panel and thus were not included in the twenty-four reported above.

111. Hensler, *Fat Lady*, *supra* note 10, at 896, 903.

the defendant(s) . . . .”<sup>112</sup> Thus, even before any possible impact of *Amchem* and *Ortiz*, the MDL processes played a major role in resolving products-liability mass-tort litigation.

Hensler also examined ten products liability litigations filed between 1999 and 2007 and found that all ten had been consolidated by the JPML.<sup>113</sup> Those proceedings produced a range of outcomes from summary judgment through mixed individual and aggregate settlements to aggregate settlements.<sup>114</sup> Four of the litigations were ongoing at the time of her publication.<sup>115</sup> Three of the aggregate settlements (*Baycol*, *PPA*, and *Sulzer Inter-Op Implant*) included use of the class action device and two settlements (*Ephedra* and *Zyprexa*) did not.<sup>116</sup>

As noted by Hensler, *Ephedra* included a series of consolidated settlements against individual defendants, resolving hundreds of claims in each instance.<sup>117</sup> Prior to those settlements—and perhaps motivating the choice of consolidation rather than class settlement—the presiding MDL transferee judge denied a motion to certify a proposed settlement-only class consisting of 170 personal-injury claimants with cases against defendant Metabolite International, Inc.<sup>118</sup> The court held that (1) joinder of all claimants was practical because they had already filed suit,<sup>119</sup> (2) the proposed class was not cohesive enough to satisfy the *Amchem* criteria,<sup>120</sup> and (3) the class action procedure was not a superior procedure given the alternative of using the MDL process and an equivalent process in California.<sup>121</sup> The court also noted that the parties sought to “have the [c]ourt in effect invent, purportedly under Rule 23 and the All Writs Act, an alternative to the Bankruptcy Code for granting Metabolite a stay of litigation and discharge of liability while affording only one class of potential creditors an equitable share of Metabolite’s limited assets.”<sup>122</sup> After that opinion, it is not surprising that other

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112. *Id.*

113. *Id.* at 911–16.

114. *Id.* at 917.

115. *Id.* at 913–16.

116. *Id.* Note that the *Vioxx* litigation resulted in a nonclass MDL settlement after the article was published. See *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at \*9–13 (E.D. La. Oct. 21, 2008) (striking class action certification).

117. Hensler, *Fat Lady*, *supra* note 10, at 913–14 tbl.2 & nn.111–13 (reporting settlements of 140, 256, and 126 personal injury and wrongful death claims in three settlements).

118. *In re Ephedra Prods. Liab. Litig.*, 231 F.R.D. 167, 168 (S.D.N.Y. 2005).

119. *Id.* at 171.

120. *Id.* at 169–71.

121. *Id.* at 171. State courts in California had 90 of the 130 pending state-court cases. See *id.* at 168, 171.

122. *Id.* at 169.

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plaintiffs and defendants in the MDL litigation recognized the futility of invoking the class action procedure for their settlements and turned instead to nonclass consolidated settlements, giving up any prospect of *res judicata* being applied to the class of claimants.

The *Zyprexa* and *Ephedra* settlements, as well as the more recent *Guidant* and *Vioxx* settlements, suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements. Indeed, District Judge Jack Weinstein observed in 1994 that “[w]hat is clear from the huge consolidation required in mass torts is that they have many of the characteristics of class actions. . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions.”<sup>123</sup> Professors Silver and Miller, following Judge Weinstein’s lead, refer to these aggregated, multidistrict mass-tort settlements as “quasi-class actions.”<sup>124</sup>

Neither the MDL statute nor the Federal Rules of Civil Procedure include any requirement that the court review a consolidated settlement, even an opt-in settlement negotiated by attorneys in the proceeding. The presumption is that the attorneys for the individual plaintiffs will represent the plaintiffs’ interests adequately. In the *Zyprexa* litigation, Judge Weinstein approved a settlement with an estimated value of \$700 million on behalf of 8,000 individual claimants with alleged personal injuries resulting from using the prescription drug *Zyprexa*.<sup>125</sup> Recall that the class settlement that Judge Weinstein approved in the *Agent Orange* litigation amounted to \$180 million for a class with 240,000 claimants, much smaller both in total value and in the average recovery per claimant than the settlement in the *Zyprexa* MDL.<sup>126</sup> In the *Agent Orange* case, Judge Weinstein, after holding hearings before Vietnam veterans in five cities, wrote an extensive opinion upholding class certification under Rule 23(b)(3) and approving the class settlement as fair, reasonable, and adequate under Rule 23(e);<sup>127</sup> that opinion was reviewed by the Court of Appeals for the Second Circuit and affirmed after extensive discussion.<sup>128</sup> In contrast, Judge Weinstein approved a special master’s report on the *Zyprexa* settlement in an unpublished two-paragraph order issued after a brief hearing on the proposed

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123. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994).

124. Silver & Miller, *supra* note 9, at 2.

125. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

126. *In re “Agent Orange” Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145, 151 (2d Cir. 1987).

127. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 763–64 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

128. *In re “Agent Orange” Prod. Liab. Litig. MDL No. 381*, 818 F.2d at 151–52.

settlement.<sup>129</sup> Along the same lines, the *Vioxx* settlement appears to have been administered in a transparent fashion by the court, but it does not appear that the court exercised any independent review of the fairness, reasonableness, or adequacy of the terms of the settlement or the process that led to the agreement.<sup>130</sup>

Table 2 lays out the size of the awards and the number of claimants in three of the four nonclass mass-tort settlements discussed above.<sup>131</sup> All three settlement amounts are comparable in size to class action settlements. Surely, these cases also meet Rule 23(a)(1)'s numerosity requirement, and the number of claimants is comparable to the number of claimants in mass-tort class action settlements of yore.

None of this, of course, is to say that the settlements in the MDL proceedings were not fair, reasonable, or adequate to the settling parties. We have not engaged in any such analysis of the terms of the settlements. But, except for the attorneys and litigants involved in the settlements, neither has anyone else been required to do so. That's the point of the next section.

**Table 2: Number of Claimants and Gross Value of Settlements in Three Recent Multidistrict Consolidated Settlements**

Name of case	Number of claimants	Gross value of settlement
<i>Zyprexa</i>	8,000 <sup>132</sup>	\$690 million <sup>133</sup>
<i>Vioxx</i>	48,507 <sup>134</sup>	\$4.85 billion <sup>135</sup>
<i>Guidant</i> <sup>136</sup>	8,500 <sup>137</sup>	\$240 million <sup>138</sup>

129. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596, 2005 WL 3117302, at \*1 (E.D.N.Y. Nov. 22, 2005). At the hearing Judge Weinstein reviewed the settlement with Special Master Kenneth R. Feinberg and suggested substantial changes. Transcript of Settlement Hearing, *Zyprexa*, 2005 WL 3117302 (2005), 2005 WL 6191038. The transcript of the hearing consisted of twenty-nine pages. *Id.*

130. *See In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 552–53 (E.D. La. 2009) (explaining court's role in *Vioxx* Settlement Agreement).

131. *See supra* notes 117–22 and accompanying text for discussion of the multiple settlements in the *Ephedra* litigation.

132. Alex Berenson, Lilly to Pay \$690 Million in Drug Suits, N.Y. TIMES, June 10, 2005, at C6.

133. *Id.*

134. BROWNGREER PLC, CLAIMS ADMINISTRATOR COURT REPORT NO. 21, at 4, available at [http://www.browngreer.com/vioxxsettlement/images/pdfs/mdlreport\\_091709.pdf](http://www.browngreer.com/vioxxsettlement/images/pdfs/mdlreport_091709.pdf) (last visited Apr. 13 2010).

135. Master Settlement Agreement at 2, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (Nov. 9, 2007), available at <http://www.browngreer.com/vioxxsettlement/images/pdfs/mastersa.pdf>.

136. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 484 F. Supp. 2d 973 (D. Minn. 2007).

### C. Procedural Questions

This subpart poses, at a broad level, some of the procedural questions implicated by the nonclass aggregation process. Civil proceduralists have observed that few, if any, of the special procedural protections available to class members are afforded to litigants who settle their cases in a nonclass consolidated settlement.<sup>139</sup> Professor Howard Erichson succinctly summarizes the current state of affairs: “Class actions get all the attention.”<sup>140</sup> And, one might add, class actions get all the procedural protections. Suffice it to say that our procedural rules have drawn a sharp distinction between class action litigation and nonclass aggregate representation of a large group of individuals. The result has been to attempt to force nonclass settlements “awkwardly within either the class action device or the traditional model of the one-on-one lawsuit” when they are in fact hybrids of the two litigation models.<sup>141</sup>

As the above discussion of the *Zyprexa*, *Vioxx*, and *Guidant* litigations demonstrates, nonclass aggregate settlements can rival class action settlements in the size of the award and the number of claimants sharing in it. *Amchem* devoted considerable attention to the adequacy of representation of class members and found it wanting in the context of that sprawling settlement.<sup>142</sup> Nonclass aggregation proceeds on the unexamined assumption that individual plaintiffs joined together in consolidated litigation are adequately represented by individual counsel or by a plaintiff management committee (PMC) appointed by the judge presiding over multidistrict proceedings.<sup>143</sup> In the latter cases, judges typically address adequacy of representation at the time of appointment and not after a settlement has been reached.<sup>144</sup> Attorney-fee awards

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137. *Guidant Defibrillator Settlement Increased to \$240 M*, Online Lawyer Source, Nov. 20, 2007, <http://www.onlinelawyersource.com/news/guidant-settlement-increa.html>.

138. *Id.*

139. See, e.g., Burch, *Procedural Justice*, *supra* note 11, at 4 (“[N]onclass aggregate litigation . . . is afforded none of the judicial quality control measures in Rule 23 that cushion and protect class members.”); see also Erichson, *Beyond the Class Action*, *supra* note 10, at 519 (“[O]utside of class actions, the profession’s failure to recognize the collective nature of much litigation has left clients unprotected . . .”).

140. Erichson, *Beyond the Class Action*, *supra* note 10, at 519.

141. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation* 62 (Vand. Univ. Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 09-24), available at [http://ssrn.com/abstract\\_id=1506460](http://ssrn.com/abstract_id=1506460).

142. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625–28 (1997).

143. Silver & Miller, *supra* note 9, at 9–12 (discussing the selection of counsel and appointment of committees).

144. See, e.g., BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES*, 21, 30 (2d ed. 2009) (stating

remain for the court to resolve, but such decisions examine the merits of any settlement from a different perspective than would be the case in reviewing a class settlement as in *Amchem*.

Likewise, notice to the litigants and an opportunity to present any objections to the settlement is not contemplated, because each plaintiff is represented by counsel and is presumed to have no need for notice beyond that given to their counsel. Parties may object, in practice, by refusing to opt in or agree to the proposed settlement, of course. Clients may express any objections to their attorneys in the privacy of their consultations. But how much do we know about how attorneys and clients interact in the aggregate context, where attorneys may represent large numbers of clients with similar claims? The fairness, reasonableness, and adequacy of the settlement are left to the agreement of the parties without the special judicial oversight afforded to class action settlements.

The end result of the MDL process is that the parties have the benefit of a procedure facilitated by the courts to aggregate cases and establish the framework for a settlement without any independent review of the terms of the settlement. Judges and rule-makers, with the aid of academic commentators, have developed elaborate guidelines and rules of thumb to curb potential abuses associated with aggregate litigation taking the form of a class action.<sup>145</sup> From that angle, the availability of nonclass settlement procedures seems to provide opportunities, and perhaps incentives, for the parties to avoid the class action process while retaining the more-or-less-global settlement benefits of aggregate federal litigation.

Embedded in the assumption that individual plaintiffs are adequately represented by counsel (who sometimes have inventories of hundreds or even thousands of cases) is the assumption that ethical norms and attorney integrity will suffice to protect individual clients.<sup>146</sup> One commentator concludes that “we can accomplish the same objectives [of protecting litigant autonomy] by looking to lawyers’ professional obligations concerning conflicts of interest and aggregate settlements.”<sup>147</sup> By applying relevant rules of professional conduct, that commentator asserts, “lawyers can create opportunities for autonomous client

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that “settlement terms of a settlement class action need careful scrutiny” and “judges should avoid rigid adherence” to formulas in calculating attorney’s fees).

145. See, e.g., *id.*

146. See generally Erichson, *Beyond the Class Action*, *supra* note 10 (examining how the duties of attorneys compare with the procedures specified in the rules governing class actions).

147. *Id.* at 529.

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decisions at the outset and at settlement, as a substitute for client autonomy in the course of litigation and negotiation.”<sup>148</sup> But how often are ethical norms enforced, either through disciplinary proceedings or in private litigation over nonclass settlements? At the least, empirical research into how well ethical norms protect individual litigants in such cases seems warranted.

What, if any, rules and procedures should be developed to protect the individual whose attorneys do not, for whatever reasons, choose to follow the professional norms for handling aggregate settlements outside of the class action context? Proposing specific regulations for nonclass settlements exceeds the scope of this article. The American Law Institute (ALI), in its Proposed Principles of the Law of Aggregate Litigation, noted that “a fresh look needs to be taken at how non-class aggregate settlements should be regulated.”<sup>149</sup> The ALI posits the circumstances required for aggregate settlements to be enforceable and binding on the parties, including consideration of “whether, based on all the facts and circumstances, the agreement is fair and reasonable.”<sup>150</sup> One of the factors informing the determination of fairness and reasonableness is “whether the terms of the settlement were reviewed by a neutral third party.”<sup>151</sup> Those terms will, of course, only apply if there is a dispute about enforceability. Unlike the treatment of class actions, there is no routine review of the fairness, adequacy, or reasonableness of the settlement or of the process for obtaining the consent of parties to the settlement.

Professor Richard Nagareda, one of the ALI reporters, but writing in his personal capacity, advocates a broad approach to the regulation of new forms of aggregation like nonclass aggregate settlements, an approach “that exposes hybrids of traditional litigation features with aggregate ones and that, then, seeks to regulate them as such, not to fit them awkwardly within either the class action device or the traditional model of the one-on-one lawsuit.”<sup>152</sup> Under that approach, class actions should no longer get all the attention of proceduralists, rulemakers, and regulators.

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148. *Id.*

149. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.15 cmt. a (Tentative Draft No. 1, 2008). For a discussion of the adequacy of the representation standard in the Proposed Final Draft, see Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917 (2010).

150. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 149, § 3.17(d).

151. *Id.*

152. Nagareda, *supra* note 141, at 62.

## IV. CONCLUSION

Empirical findings suggest several shifts in practice appearing to lead to the current use of nonclass settlements to resolve mass-tort litigation. The class action litigation landscape shifted in relation to changes in case law and governing rules of procedure. Though the number of PIPL class action lawsuits has shifted very little, the percentage in which a party files a motion to certify a class that a court grants for litigation purposes appears to have shrunk markedly. And, while the shift in class certification was taking place, the JPML began transferring products-liability litigations to single courts for consolidated management at a higher rate, and the number of products-liability consolidated cases expanded. As the class certification hurdles were raised, creative lawyers noticed that there are few, if any, practical barriers to aggregate non-class settlements. The end result is to leave the interests of plaintiffs in these mass-tort contexts solely in the hands of their attorneys, with no systematic judicial or other regulatory oversight. The ultimate question is whether that result is a fair, reasonable, and adequate treatment of those litigants.



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## V. APPENDIX

**Table 3: Comparison of Data and Findings from Four Class Action Studies**

Title and Citation	<i>Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions</i> (November 2008); 256 F.R.D. 214 (2009)	<i>An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation</i> (FJC 2005); <i>Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?</i> 81 NOTRE DAME L. REV. 591 (2006)	<i>Empirical Study of Class Actions in Four Federal District Courts</i> (FJC 1996); <i>An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges</i> , 71 N.Y.U. L. REV. 74 (1996)	Note, <i>The Rule 23(b)(3) Class Action: An Empirical Study</i> , 62 GEO. L.J. 1123 (1974)
Description of Database	Sample of docket records in 231 diversity class actions filed or removed between 2/18/2003 and 2/17/2005	Sample of 728 attorney responses in 621 of 1,418 diversity and federal question class actions terminated 7/1/99 to 12/31/2002	Population of all class actions terminated between July 1, 1992 and June 30, 1994 in four federal district courts (407 cases)	All Rule 23(b)(3) class actions filed in U.S. District Court for the District of Columbia between July 1, 1966 and December 31, 1972 (120 cases; 81 terminations at time of study)
Methods	Examination of docket reports and case documents	Survey of attorneys by mailed questionnaire	Examination of docket reports and case documents	Examination of docket reports and case documents
Motions to certify filed	24%	43%	70%	51%
Motions to certify granted	63%	56%	67%	66%
Certification of litigation class	20%	42%	61%	89%
Cases with certified class	13%	24%	37%	26%