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DUBIOUS DOCTRINES: THE QUASI-CLASS ACTION

Linda S. Mullenix*

*The court here is faced with a procedural invention of unknown origin which bears a remarkable resemblance to the class action and which has engendered considerable controversy in the context of this case.*¹

I. INTRODUCTION

In the past few years, the term “quasi-class action” has been appearing with increasing, uncritical frequency in a spate of federal court decisions.² While it may be premature to characterize these sporadic references as a trend,³ it is perhaps soon enough to call attention to the misuse of loose labels that carry with them significant consequences. Before the quasi-class action gains any further traction, there are several valid reasons for definitively quashing this quasi.⁴

Three simple points about the quasi-class action. First, there is no such thing as a quasi-class action. A quasi-class action brings to mind the old joke about being slightly pregnant. Hence, either you are a class action, or you are not. There is no constitutional, statutory, doctrinal, or other basis for the quasi-class action. The label quasi-class action is a convenient, lazy fabrication to justify the lawless administration of aggregate claims.

Second, whatever historical antecedents or analogues may exist for the concept of a quasi-class action, the 1966 amendments to Rule 23⁵ the Supreme Court’s decisions in *Amchem*⁶ and *Ortiz*,⁷ and multiple class actions decisions lay to rest any notions of a quasi-class action.

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1. Fla. Power Corp. v. Granlund, 82 F.R.D. 690, 692 (M.D. Fla. 1979).

2. A Westlaw search in the “Allfeds” database of the term “quasi-class action,” in February 2011, located sixty-eight federal cases citing the term.

3. *But see* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 116 (2010) (characterizing the newly-created quasi-class action as an “emerging doctrine that MDLs are ‘quasi-class actions,’ and endorsing expanded judicial powers for MDL judges managing such quasi-class actions. *Cf. In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 n.4 (E.D. La. 2010) (rejecting the suggestion by Professor Silver and Miller that attorneys in MDL proceedings should select the Plaintiffs’ Steering Committee with the attorney with the largest number of cases having the laboring oar: “But the experience of MDL courts suggest otherwise.”).

4. The quasi-class action should perhaps be interred with its remote doctrinal cousin, quasi in rem jurisdiction. *See Shaffer v. Heitner*, 433 U.S. 186 (1977).

5. FED. R. CIV. P. 23 (outlining the federal class action rule).

6. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997).

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

The entire point of the class action rule is not only to supply an aggregate mechanism for efficiently resolving multiple claims, but also to balance efficiency values with the due process protection of absent class members in representative litigation. The so-called quasi-class action is the antithesis of due process. The quasi-class action is a jurisprudential oxymoron that its proponents deploy to justify the expeditious resolution of aggregate claims, while failing to adequately protect the interests of claimants.

Third, the quasi-class action ought to be repudiated as an unfortunate drift into further lawlessness in administering aggregate claims.⁸ Over the past thirty years, actors involved in resolving aggregate claims—especially aggregate tort claims—have embraced claims-resolution models that allow malefactors to control, manage, and settle their liabilities on highly preferential terms, permit plaintiffs' attorneys to reap bountiful and often excessive fees, and enable heroic judges (and their heroic surrogates) to clear their dockets of large numbers of cases.

The interests of powerful, well-funded, and self-interested actors have tacitly converged to support a de facto collusive model of aggregate-claims resolution. In the past three decades, federal courts—including the Supreme Court—have rejected collusive backroom aggregate settlement deals that do not adequately protect the interests of class members. In response, and in order to be free of formal class action constraints, self-interested actors on both sides of the docket have co-opted the federal multidistrict litigation procedure (MDL)⁹ to provide a staging-ground for the private resolution of aggregate claims. The most extreme variant of private aggregate claims resolution, completely outside the scrutiny of judicial management and review, is exemplified by fund approaches to mass-claims resolution—most recently the Gulf Coast Claims Facility.

In the judicial arena, there are good reasons why mass litigation lawyers now love MDL procedure, whereas they eschewed this mechanism in the past. Because the formal class action rule became an inconvenient impediment to resolving aggregate claims favorably to both plaintiff and defense interests, actors involved in mass litigation now promote MDL procedure and the quasi-class action concept as an entirely useful, creative legal fiction to accomplish self-interested goals.

It is not at all surprising that self-interested negotiators and some federal MDL judges have embraced the concept of the quasi-class action as the most effective means to resolve massive liabilities. Since 2005 private actors have evolved the nearly perfect model for accomplishing

8. *See generally* THE PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3 (2010).

9. 28 U.S.C. § 1407 (2006).

self-dealing agreements by manipulating MDL procedure to accomplish ends this mechanism was never intended to perform. Hence, resolving mass claims under MDL auspices and the penumbra of the quasi-class action effectively does an end-run around the class action rule, and liberates deal-makers from having to adequately protect the interests of injured claimants.

The deployment of MDL jurisdiction, with the quasi-class action fiction engrafted onto MDL procedure, has stripped away protections afforded by class action requirements. Mass litigation actors may now settle complex cases largely unconstrained by law. What the class action bar could not achieve through decades of judicial decisions—such as elimination of the need for an adequate class representative—has effectively been achieved through adroit manipulation of MDL procedure and the ministrations of selected heroic judges and their special masters.

Before the inspired fabrication of the quasi-class action, global agreements accomplished under MDL auspices had to be settled pursuant to formal class requirements and due process protections. By engrafting the label quasi-class action onto MDL procedure, self-interested actors have created a perfect staging ground for negotiating back-room deals that carry a false aura of judicial legitimacy, liberated from the constraints of the formal class action rule.

MDL judges, in turn, by endorsing the concept of the quasi-class action have greatly expanded the scope of their authority and have become complicit in allowing private parties to accomplish the very backdoor settlements that the Supreme Court and federal courts have disallowed for decades. The quasi-class action, then, represents an ultimate, cynical expression of an aggregate claims-resolution model that enables self-interested actors to resolve claims in the actors' best interests rather than the interests of injured claimants.

II. THERE IS NO SUCH THING AS A QUASI-CLASS ACTION: THE EMERGENCE OF A DOCTRINAL PHANTASM

A. *Documenting the Drift Towards the Quasi-Class Action: A Fabricated "Trend"?*

At first blush, the sheer frequency of federal use of the term quasi-class action would seem to suggest that the quasi-class action is a well-recognized and well-established doctrine in federal jurisprudence. Since 1946, sixty-eight federal cases have cited the label. However, careful reading of this case law suggests an entirely different conclusion: the quasi-class action is a phantasm. None of these cases actually discussed

the concept of the quasi-class action, and rarely-cited authority is inapposite or inaccurate.

Of the sixty-eight cases deploying the label quasi-class action, thirty-two decisions—almost half—are boilerplate, repetitive and self-referential citations to a single litigation: the *Zyprexa* products liability litigation under Judge Jack Weinstein’s supervision in the Eastern District of New York.¹⁰ The *Zyprexa* court’s usage of the quasi-class action label is discussed below. However, of the fifty-five cases using the term since 2006, thirty-two were piecemeal orders in the *Zyprexa* litigation, which rotely recite that the litigation was conducted as a quasi-class action. Hence, the label quasi-class action largely has emerged in the past five years, in one mass tort litigation.

In addition to the thirty-two repetitive *Zyprexa* decisions, Judge Jack Weinstein has used the term quasi-class action in five other decisions to describe aggregate litigation before him;¹¹ three orders involved the same Staten Island Ferry crash litigation. Hence, of sixty-eight cases that reference the quasi-class action, thirty-seven are by Judge Weinstein. Judge Weinstein, then, through sheer force of will and identical repetition in thirty-two *Zyprexa* orders and five other cases, may be credited with bullying the quasi-class action label into judicial consciousness.

Of the thirty-six non-*Zyprexa* cases using the term quasi-class action, none explain what a quasi-class action is or the authoritative support for such a concept. Instead, the term quasi-class action is more often cited in passing. For example, a set of cases under the Fair Labor Standards Act¹² refer to the label quasi-class action. The FLSA (Act) provides

10. The original *Zyprexa* case citation is *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006). As discussed later in this Article, there are thirty-two separate decisions and orders in the ongoing *Zyprexa* litigation, all which are denominated as “*In re Zyprexa Prods. Liab. Litig.*”

11. See *McMillan v. City of New York*, No. 08-CV-2887, 2010 WL 1487738, at *1 (E.D.N.Y. Apr. 13, 2010) (addressing Staten Island Ferry crash litigation; attorney fee dispute, stating, “The benefits of that aspect of this quasi-class action litigation allegedly accrued to hundreds of injured claimants, including the clients.”); *McMillan v. City of New York*, No. CV 08 2887 (JBW)(VVP), 2010 WL 1459218 at *1 (E.D.N.Y. March 4, 2010) (relating the Report and Recommendation of the U.S. Magistrate on attorney fee dispute; referring to claimant’s damage award as being comparable in a sense to a “quasi-aggregate or quasi-class action”); *McMillan v. City of New York*, No. 03-CV-6049, 2008 WL 4287573 at *5 (E.D.N.Y. Sept. 19, 2010) (concerning attorney fee dispute; “in a sense this was a quasi aggregate or quasi class action with increased power to control fees.”) (citing *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006)); *Blue Cross and Blue Shield of New Jersey Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162, 178 (E.D.N.Y. 2001) (discussing third-party payor litigation against tobacco company defendant; “Defendants have not raised the point that, in a sense the class action or quasi-class action such as the present one, where many claims are aggregated, takes care of the problem of social payment for the full cost of damages a defendant caused.”); *United States v. Cheung*, 952 F. Supp. 148, 148–49 (E.D.N.Y. 1997) (concerning federal restitution action for criminal actions; “What was in effect a civil quasi-class action is coordinated with a criminal proceeding to assure maximum recovery by the victims with minimum transactional costs.”).

12. Fair Labor Standards Act, 29 U.S.C. §§ 201 to 219 (2006) [hereinafter FLSA].

employees with a private right of action to sue an employer for violations of the Act “for and in behalf of himself or themselves and other employees similarly situated.”¹³ Federal courts have recognized that the FLSA authorizes collective actions.¹⁴

FLSA actions are unique and subject to idiosyncratic statutory procedures, including opt-in requirements, a two-step certification procedure, and distinctive discovery rules.¹⁵ Federal courts agree that FLSA lawsuits are not class actions subject to Federal Rule of Civil Procedure 23.¹⁶ In discussing FLSA procedure, however, some courts have noted—with the briefest, passing mention—that the collective nature of an FLSA lawsuit resembles a quasi-class action.¹⁷ In all FLSA decisions, that is the extent of the reference to the quasi-class action; FLSA decisions are entirely devoid of doctrinal discussion of the quasi-class action. Instead, the FLSA decisions merely acknowledge the mimicking effect of one type of statutory procedure for another.

Another series of Mississippi federal cases, in property damage insurance litigation arising out of the Hurricane Katrina disaster, refer to the label quasi-class action.¹⁸ These brief decisions recognize the quasi-class action for what it actually is: an attempt to accomplish by label what is otherwise prohibited by doctrine. In 2006, the federal district court in Mississippi refused to certify three proposed class actions alleging property damage claims because of the highly individualized issues that defeated class certification under Rule 23.¹⁹ In the aftermath

13. 29 U.S.C.A. § 216(b) (West 2008).

14. *Abubakar v. City of Solano*, No. CIV S-06-2268 LKK EFB, 2008 WL 508911 (E.D. Cal. Feb. 22, 2008).

15. *Id.* at *2.

16. *Douglas v. GE Energy Reuter Stokes*, No. 1:07CV077, 2007 WL 1341779 at *3 (N.D. Ohio Apr. 30, 2007); *Highland v. Wal-Mart Stores, Inc.*, No. CIV04-0711, 2005 WL 3415855 at *1, n.1 (D.N.M. Sept. 15, 2005); *Montalto v. Morgan Guar. Trust Co.*, 83 F.R.D. 150, 152 (S.D.N.Y. 1979).

17. *Douglas*, 2007 WL 1341779 at *3 (citing *Montalto*, 83 F.R.D. 150); *see also Highland*, 2005 WL 3415855 at *1, n.1 (“This type of quasi-class action, governed by the FLSA, does not proceed under Fed. R. Civ. P. 23); *Hallas v. Western Electric Co., Inc.*, No. C-2-79-519, 1981 WL 205 at *2 (S.D. Ohio 1981); *Cowlishaw v. Armstrong Rubber Co.*, 425 F. Supp. 802, 806 (E.D.N.Y. 1977); *Sweetman v. Remington Rand*, 65 F. Supp. 940, 944 (S.D. Ill. 1946).

18. *See McFarland v. State Farm Fire & Cas. Co.*, No. CIV1:06CV466LTS-RHW, 2006 WL 3071988, at *2 (S.D. Miss. Oct. 25, 2006); *McFarland v. State Farm Fire & Cas. Co.*, No. 1:06CV466-LTS-RHW, 2006 WL 2577852, at *2 (S.D. Miss. Sept. 6, 2006) (Magistrate Judge’s Order of Severance), *aff’d*, 2006 WL 3071988; *Vaz v. Allstate Property & Cas. Co.*, No. 1:06CV481 LTS RHW, 2006 WL 2583733, at *2 (S.D. Miss. Sept. 6, 2006) (Magistrate’s Order of Severance); *Bradley v. Nationwide Mut. Ins. Co.*, No. 1:06CV528-LTS-RHW, 2006 WL 2594548, at *2 (S.D. Miss. Sept. 6, 2006) (Magistrate’s Order of Severance).

19. *See Guice v. State Farm Fire & Cas. Co.*, No. 1:06CV1-LTS-RHW, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006); *see also Comer v. Nationwide Mut. Ins. Co.*, No. 1:05cv436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123, at *6 (S.D. Miss. Feb. 23, 2006) (“Each property owner in Mississippi who had real and personal property damaged in Hurricane Katrina is uniquely situated. No two property owners will have experienced the same losses. The nature and the extent of the property damage the

of these rulings, plaintiffs' attorneys then filed lawsuits that individually joined hundreds of plaintiffs' claims against various insurance companies.

When the court *sua sponte* questioned whether it should sever individual claims,²⁰ the magistrate recommended severance, noting that the court recently denied attempts to certify Hurricane Katrina property damage classes.²¹ The magistrate presciently recognized the problem with the plaintiffs' creative, renewed end-run around the class action rule: "In essence, Plaintiffs have filed what amounts to a quasi-class action lawsuit but without regard for the rigid requirements for class certification."²²

Following the magistrate's recommendations, the court recognized and resisted the lawyers' attempts to hijack mass joinder procedure as a method for accomplishing an end-run around the class action rule. In adopting the magistrate's recommendations, the judge similarly observed:

It would also be inconsistent for this Court to deny class certification in a setting where similar broad claims were made and at the same time allow the instant action to go forward in what the Magistrate accurately described as a 'quasi-class action lawsuit but without regard for the rigid requirements for class certification.'²³

The remaining grab-bag of cases citing the quasi-class action label are similarly devoid of doctrinal analysis, but typically represent a court's short-hand description for collective litigation where numerous plaintiffs are consolidated under simple joinder rules.²⁴ Not only do these cases

owners sustain from the common cause, Hurricane Katrina, will vary in particulars, depending on the location and condition of the property before the storm struck and depending also on what combination of forces caused the damage . . . the undersigned [Judge Senter] finds that the same considerations that applied in *Guice* and *Comer*, apply to the instant case as well.").

20. *McFarland*, 2006 WL 2577852, at *1.

21. *Id.* at *2.

22. *Id.* at *2 (citing *Guice*, 2006 WL 2359474). As is typical of citations to the label quasi-class action, the same magistrate judge repeated this exact identical language in three similar cases.

23. *McFarland*, 2006 WL 3071988, at *2.

24. *See, e.g.*, *Avila v. Willits Env't*, No. C 99-03941 SI, 2009 WL 4254367, at *7 (N.D. Cal. Nov. 24, 2009) (relating to taxing of litigation costs in toxic tort litigation; over 110 plaintiffs consolidated in one suit; "the case operated like a quasi-class action), *vacated*, 633 F.3d 828 (9th Cir. 2011), *cert. denied*, No. 10-1552, 2011 WL 4530474 (Oct. 3, 2011); *United States v. Gallion*, 257 F.R.D. 141, 158 (E.D. Ky. 2009) (disqualifying proposed expert; passing reference to attorney Stan Chesley as an attorney who had participated in "mass tort quasi class actions); *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, No. 05 1708 (DWF/AJB), 2008 WL 682174, at *6 (D. Minn. Mar. 7, 2008) (considering attorney fees in defibrillator MDL proceeding after settlement; "Before this Court is a coordinated litigation of many individual yet related cases that effectively is, and proceeded as, a quasi-class action."); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ.3288(DLC), 2004 WL 113484, at * 7 (S.D.N.Y. Jan. 26, 2004) (referencing plaintiffs' parallel and vexatious *de facto* class action, also labeled as a quasi-class action, without further elaboration); *In re Desrosiers*, 212 B.R. 716,

have nothing in common, but none described, endorsed, enlightened, or otherwise supplied meaningful content to the label of quasi-class action.

B. The Zyprexa Litigation and the Invention of the Quasi-Class Action

It is perhaps not too far-fetched to suggest that Judge Jack Weinstein single-handedly invented the quasi-class action, and it should come as little surprise that the term quasi-class action has been given its most robust voice by Judge Weinstein in his judicial management of the *Zyprexa* litigation.²⁵ The *Zyprexa* litigation involved a complicated array of lawsuits brought by individual consumers of the pharmaceutical,²⁶ third-party payors such as unions and health plans,²⁷

725 (Bankr. D. Mass. 1997) (rejecting debtors' contention that former lawsuit was a class action or quasi-class action); *Gordon and Breach Sci. Publishers S.A. v. Am. Inst. Physics*, 905 F. Supp. 169, 179 n.9 (S.D.N.Y. 1995) (deciding *res judicata*; footnote mention of relationship of concepts of virtual representation, privity, and quasi-class action status; no meaningful discussion); *Joseph v. Hage*, 121 B.R. 679, 682 (Bankr. N.D.N.Y. 1990) ("In addition to the general body of creditors as beneficiaries of a quasi-class action pursuant to Code § 727(a); no discussion of concept of quasi class action); *Fla. Power Corp. v. Granlund*, 82 F.R.D. 690, 694 (M.D. Fla. 1979) (referencing a quasi-class action in absence of certification under Rule 23); *EEOC v. Rexene Polymers Co.*, MO-74-CA-62, 1975 WL 121 (W.D. Tex. 1975) (standing issue relating to EEOC; "Although the defendant has raised an academically interesting class action question, the Court finds it unnecessary to address itself to the issue raised in regard to whether this suit is properly labeled a class action, quasi-class action, or whatever other label might be appropriate.").

25. The *Zyprexa* litigation was not the first case in which Judge Weinstein used the term quasi-class action, nor the last. *See supra* note 11. However, the *Zyprexa* litigation is significant in that it spawned no fewer than thirty-two separate orders in which Judge Weinstein repeated that he conducted the *Zyprexa* litigation as a quasi-class action.

26. This article addresses only the individual *Zyprexa* lawsuits that were collected and transferred pursuant to the MDL statute in March 2004. *See* Complaint, *Benjamin v. Eli Lilly & Co.*, No. 04-CV-893 (E.D.N.Y. 2004). This article does not address the parallel third-party-payor litigation, or the actions pursued and settlements achieved by the federal government.

27. *See* Linda S. Mullenix, *The Practice: A Recent Blow for Third-Party-Payor Plaintiffs: 2d Circuit Reversed Class Certification in Zyprexa Case, Disapproving of Plaintiffs' Classwide Reliance Theories*, 33 NAT'L L.J. 32 (Oct. 18, 2010) (discussing *UFCW Local 1776 and Participating Emp'rs Health and Welfare Fund v. Eli Lilly and Co.*, 620 F.3d 121 (2d Cir. Sept. 10, 2010)); *see also* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (rejecting Judge Weinstein class certification of tobacco third-party-plaintiff class action based on reliance problems) *abrogated by* *UFCW Local 1776*, 620 F.3d 121; *In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005) (reversing Judge Weinstein class certification of third party-payor tobacco class action). In the third-party-payor litigation, individual users of *Zyprexa*, and insurers and unions as third-party plaintiffs, sued Eli Lilly, the manufacturer of *Zyprexa*, in a class action. *Zyprexa* is an antipsychotic pharmaceutical that the U.S. Food and Drug Administration originally approved for treatment of schizophrenia and bipolar disorder. TPPs underwrite the purchase of prescription drugs for their members and insureds. The class was composed of two subclasses of individual purchasers and TPPs that paid for *Zyprexa* prescriptions.

The plaintiffs alleged that Lilly had misrepresented to physicians *Zyprexa's* efficacy and side effects, including weight gain, hyperglycemia and diabetes. The plaintiffs alleged that Lilly falsely claimed that *Zyprexa* was more effective than other antipsychotics and promoted off-label use to treat depression, anxiety and dementia.

These misrepresentations, the plaintiffs contended, resulted in a greater demand for *Zyprexa*—at a higher price—than would have existed if accurate information about *Zyprexa's* efficacy and risks were

and civil and criminal proceedings by the federal government. These actions were brought against the pharmaceutical's manufacturer, Eli Lilly.

Zyprexa is an antipsychotic pharmaceutical that the U.S. Food and Drug Administration originally approved for treatment of schizophrenia and bipolar disorder. The plaintiffs alleged that Eli Lilly had misrepresented to physicians Zyprexa's efficacy and side effects, which included weight gain, hyperglycemia, and diabetes. The plaintiffs alleged that Lilly falsely claimed that Zyprexa was more effective than other antipsychotics and promoted off-label use to treat depression, anxiety, and dementia.

Thousands of lawsuits against Eli Lilly were filed in both federal and state courts. In March of 2004 the Judicial Panel on Multidistrict Litigation created a *Zyprexa* MDL in the Eastern District of New York to be managed by Judge Jack Weinstein.²⁸ As a consequence of the MDL order, thousands of individual Zyprexa cases were transferred

known. Consequently, the plaintiffs alleged that class members were injured by paying for Zyprexa prescriptions that would not have issued but for the alleged misrepresentations (the 'quantity theory') and by paying a higher price for Zyprexa than would have been charged without the alleged misrepresentations (the 'excessive price' theory).

The plaintiffs asserted five claims: a civil RICO claim based on the predicate act of mail fraud, conspiracy to violate RICO, violation of state consumer protection laws, common law fraud and unjust enrichment. The plaintiffs posited two damage theories: first, a quantity effect theory, claiming that the improper promotion of off-label use resulted in more off-label prescriptions than otherwise would have been written, and, second, a loss-of-value or excess-price theory, claiming the monetary difference between what the plaintiffs were led to believe was Zyprexa's worth and Zyprexa's actual worth. The plaintiffs estimated the value of their overpayments at between \$4 billion and \$7.7 billion.

On Sept. 5, 2008, Weinstein certified a TPPs' RICO class predicated on the overpricing theory but declined to certify an individual payor class or one based on state consumer-protection laws. The court found that the class could use generalized proof to show that Zyprexa was overpriced as a result of Lilly's excessive claims of utility as well as its disavowal of secondary effects. Weinstein held that the plaintiffs could prove reliance on a classwide basis because the alleged fraud was directed through mailings on which doctors relied, causing TPP overpayments. *See In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008). Weinstein denied the defendant's motion for summary judgment. *In re Zyprexa Prods. Liab. Litig.*, 493 F. Supp. 2d 571 (E.D.N.Y. 2008), *vacated in part by UFCW Local 1776*, 620 F.3d 121.

The Second Circuit reversed class certification, holding that, pursuant to recent U.S. Supreme Court and Second Circuit precedents, plaintiffs must allege and prove third-party reliance as part of their chain of causation in a RICO claim. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (holding plaintiff alleging RICO mail fraud claim is not required to show first-person reliance); *City of New York v. Smokes Spirits.com, Inc.*, 541 F.3d 425, 44 n.24 (2d Cir. 2008) (noting RICO plaintiff must establish at least third-party reliance in order to prove causation; complete absence of reliance may prevent plaintiff from establishing proximate cause).

28. *See* Letter from Multidistrict Litigation Panel to Clerk of the Eastern District of New York, *in In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, Docket Entry No. 1 (E.D.N.Y. Apr. 14, 2004). Throughout federal coordination of federal Zyprexa cases, state courts also were managing state Zyprexa cases. Many state Zyprexa cases were removed to federal court. *See In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2009 WL 5062109 (E.D.N.Y. Dec. 10, 2009), *aff'd sub nom.*, *Gove v. Eli Lilly & Co.*, 394 Fed. App'x 817 (2d Cir. 2010); *In re Zyprexa Prods. Liab. Litig.*, 239 F.R.D. 316 (E.D.N.Y. 2007) (communicating to state judges on cooperation between federal and state judges).

from federal district courts throughout the United States in March 2004.²⁹ Judge Weinstein supervised the *Zyprexa* MDL litigation and in 2006 the parties accomplished a non-class settlement of consumer claims under the auspices of the *Zyprexa* MDL.³⁰ Since then, Judge Weinstein has issued numerous orders dealing with various trailing issues in the wake of the *Zyprexa* settlement.

The core issue that prompted Judge Weinstein to invoke the concept of the quasi-class action focused on an attorney fee dispute. In class action litigation, attorney fees are subject to judicial scrutiny and approval.³¹ Although there are different methodologies for determining attorney fees in class action litigation,³² the most common method calculates fees based on a percentage of the common-benefit fund that the attorneys negotiate on behalf of the class claimants.³³

The *Zyprexa* litigation, however, was not resolved as a class action settlement and therefore theoretically was not subject to any class action constraints, such as judicial review of the attorney fee requests. Consequently, some plaintiffs' attorneys sought to enforce privately negotiated contingent fee contracts, which would have provided attorney fees in excess of those typically awarded in common-benefit class litigation.

Judge Weinstein apparently believed these privately negotiated fee contracts would reward excessive fees to the attorneys, and were unfair to claimants. In order to block enforcement of the contingent fee contracts, Judge Weinstein requested that the special masters assisting him in the *Zyprexa* litigation to adjust the requested attorney fee schedules.³⁴ In issuing this order, Judge Weinstein declared that the

29. *In re Zyprexa Prods. Liab. Litig.*, 239 F.R.D. 316.

30. After an initial round of claims settlement, Judge Weinstein appointed a second plaintiffs' steering committee to deal with additional *Zyprexa* cases transferred to the MDL court after the initial settlement. For a brief history of the settlement and post-settlement proceedings, see *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458 (E.D.N.Y. 2006) (referring to the *Zyprexa* litigation's quasi-class action status; denying certain plaintiffs' request for remand of cases from the MDL court to their original transferor courts).

31. FED. R. CIV. P. 23(h).

32. MANUAL FOR COMPLEX LITIGATION § 14 (4th ed. 2004).

33. *Id.* The other common method for determining attorney fees in class litigation is the lodestar method, which requires plaintiffs' attorneys to keep detailed billing records of time expended in the representation, as well as detailed records of other fees and expenses. The court then adjusts actual billing fees by a lodestar, which effectively is a multiplier to account for assumption of risk, loss opportunity costs, and similar factors in pursuing class litigation on behalf of claimants.

34. *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006) (containing the first of series of *Zyprexa* orders invoking the concept of the quasi-class action; instructing special masters to "consider a fee that shall be the lesser of the maximum reasonable general fee schedule they recommend, the fee agreed upon between the client and the attorney in an individual case, and the maximum amount permitted under the applicable local state rules or statutes."); see also *In re Zyprexa Prods. Liab. Litig.*, No. 04 MD 1596, 2008 WL 2511791 (E.D.N.Y. June 19, 2008) (describing fee

Zyprexa litigation had been administered as a quasi-class action, which theoretically provided Judge Weinstein with the authority to adjust attorney fees.³⁵

Judge Weinstein's brief allusion to the quasi-class action in the context of the attorney fee dispute—and the authority for this construct—is discussed below. However, even though the quasi-class action had its origins in the *Zyprexa* attorney fee dispute, it is important to note that the concept has gained traction in no small part because of Judge Weinstein's repeated citation to the label in numerous subsequent published opinions and orders. It is almost as if repeated incantation of a phrase can bring an avatar into actuality.

Thus, in the aftermath of Judge Weinstein's original announcement that the *Zyprexa* litigation was administered as a quasi-class action, Judge Weinstein issued no fewer than thirty-one additional orders re-asserting that the *Zyprexa* litigation was a quasi-class action. However, few of these opinions discuss what a quasi-class action is, the consequences of characterizing a litigation as a quasi-class action, or authority in support of this concept. Instead, Judge Weinstein's voluminous orders dramatically illustrate the problem of computer-generated boilerplate opinions that repeat formulaic, conclusory set pieces. Hence, in at least twenty-five of his thirty-one *Zyprexa* decisions, Judge Weinstein pasted-and-glued the identical paragraph referring to the quasi-class action:

The individual *Zyprexa* user litigation has been administered as a quasi-class action. *See in re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262 (E.D.N.Y. 2006) (“The court, magistrate judge and special masters will continue to administer this litigation as a quasi-class action.”); *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006) (“Recognizing its obligation to exercise careful oversight of this national ‘quasi class action,’ the court has already realized its equitable power to limit attorneys’ fees and costs.”) (citation omitted); *In re Zyprexa Prods. Lib. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (finding that individual *Zyprexa* user litigation “may be characterized properly as a quasi-class action subject to the general equitable power of the court”); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (same); *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122, 122 (E.D.N.Y. 2006) (same).³⁶

Clearly, this repeated reference to the quasi-class action is self-referential and provides no doctrinal support for the concept.

adjustments).

35. *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. at 122.

36. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2009 WL 5062109 (E.D.N.Y. Dec. 10, 2009) (considering Arizona's two-year statute of limitations on consumer products liability claim).

Moreover—and significantly in the numerous orders in which Judge Weinstein recites that *Zyprexa* was administered as a quasi-class action, that status had absolutely no implication at all for the issue adjudicated in the order.³⁷ Despite Judge Weinstein’s repeated reminder that the *Zyprexa* litigation was administered as a quasi-class action, this status had absolutely no effect on Judge Weinstein’s ruling on an array of motions dealing with statute of limitations issues,³⁸ summary judgment,³⁹ remand,⁴⁰ proximate causation,⁴¹ the learned intermediary

37. *See id.*; *see also In re Zyprexa Prods. Liab. Litig.*, 260 F.R.D. 13 (E.D.N.Y. 2009) (reciting boilerplate of quasi-class action status; magistrate’s discovery order in state attorney generals’ litigation not clearly erroneous; MDL settlement warranted); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2009 WL 1173069, at app. A (E.D.N.Y. May 1, 2009) (reciting boilerplate of quasi-class action status; order expanding authority of special master to include attorney generals of Idaho and Minnesota); *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008) (reciting boilerplate of quasi-class action status; granting class certification to institutions and patients against pharmaceuticals manufacturer alleging overpayment on purchases of *Zyprexa*), *rev’d*, *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2008 WL 2696916 (E.D.N.Y. July 2, 2008) (reciting boilerplate of quasi-class action status; order in preparation for conference on motion for class action status in third-party payor litigation); *see also In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458 (E.D.N.Y. 2006) (referring to quasi-class action status as basis for limiting attorney fees; ordering that state Medicaid agencies pay share of attorney fees and costs in procuring settlement).

38. *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596, 06-CV-2592, 2009 WL 5062109 (E.D.N.Y. Dec. 10, 2009) (considering Arizona’s two-year statute of limitations on consumer products liability claim); *In re Zyprexa Prods. Liab. Litig.*, No. 04 MD 1596, 2009 WL 5062114 (E.D.N.Y. Dec. 10, 2009) (reciting boilerplate of quasi-class action status; order relating to claimant’s time-bar under California statute of limitations); *In re Zyprexa Prods. Liab. Litig.*, No. 04 MD 1596 (JBW), 2009 WL 3597447 (E.D.N.Y. 2009) (reciting boilerplate of quasi-class action status; action barred by California’s two-year statute of limitations); *In re Zyprexa Prods. Liab. Litig.*, No. 04 MD 1596 (JBW), 2009 WL 2485829 (E.D.N.Y. July 31, 2009) (reciting boilerplate of quasi-class action status; claimant’s action barred by California statute of limitations); *In re Zyprexa Prods. Liab. Litig.*, No. 04 MD 1596, 2009 WL 1850970 (E.D.N.Y. June 22, 2009) (reciting boilerplate of quasi-class action status; plaintiff barred by two-year statute of limitations); *In re Zyprexa Prods. Liab. Litig.*, No. 04 MD 1596, 2009 WL 1851062 (E.D.N.Y. June 22, 2009) (reciting boilerplate of quasi-class action status; plaintiff’s claim barred by Missouri’s five-year statute of limitations).

39. *In re Zyprexa Prods. Liab. Litig.*, 688 F. Supp. 2d 130 (E.D.N.Y. 2009) (reciting boilerplate of quasi-class action status; manufacturer defendant’s motions to exclude proposed expert witness testimony and motion for summary judgment denied); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2009 WL 2245068 (E.D.N.Y. July 22, 2009) (reciting boilerplate of quasi-class action status; issue of material fact existed as to failure to warn; summary judgment denied); *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007) (reciting boilerplate of quasi-class action status; defendant’s motion for summary judgment and to exclude expert testimony denied).

40. *In re Zyprexa Prods. Liab. Litig.*, No. 04 1596, 2008 WL 2511791 (E.D.N.Y. June 19, 2008) (referencing quasi-class action status of litigation; denying motion to remand MDL cases to their original transferor courts); *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539 (E.D.N.Y. 2006) (referring to quasi-class action nature of *Zyprexa* litigation; motion to remand two thousand pending cases to state court).

41. *In re Zyprexa Prods. Liab. Litig.*, 649 F. Supp. 2d 18 (E.D.N.Y. 2009) (reciting boilerplate of quasi-class action status; applying Arizona law, manufacturer’s warning not proximate cause of plaintiff’s injuries); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596, 06-CV-2798, 2009 WL 2487305 (E.D.N.Y. July 27, 2009) (reciting boilerplate of quasi-class action status; administratrix failed to prove inadequate warning proximately caused decedent’s diabetes); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 07-CV-4505 (JBW), 2009 WL 2004540 (E.D.N.Y. July 1, 2009) (reciting

defense,⁴² failure to warn,⁴³ or other evidentiary issues.⁴⁴ In short, Judge Weinstein's numerous references to the quasi-class action in his numerous *Zyprexa* opinions offer scant enlightenment on the quasi-class action construct, and had no effect on his rulings (except in the attorney fee context).

C. Dubious Authority for a Dubious Doctrine

Only a very small subset of Judge Weinstein's *Zyprexa* orders attempt to amplify a theory of the quasi-class action, as it relates to the attorney fee issue.⁴⁵ In this handful of decisions, Judge Weinstein referred to the *Zyprexa* litigation variously as a "non-class conglomerate settlement,"⁴⁶ something analogous to the class action,⁴⁷ and a "structural class action."⁴⁸ Yet Judge Weinstein acknowledged that the resolution of the

boilerplate of quasi-class action status; failure to warn did not proximately cause claimant's injuries); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-2782 (JBW), 2009 WL 1851999 (E.D.N.Y. June 24, 2009) (reciting boilerplate of quasi-class action status; no proximate causation); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 07-CV-987 (JBW), 2009 WL 1514628 (E.D.N.Y. June 1, 2009) (reciting boilerplate of quasi-class action status; no basis in West Virginia law no proximate cause upon which plaintiff could establish a failure-to-warn claim).

42. *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-2782 (JBW), 2009 WL 3596982 (E.D.N.Y. Oct. 20, 2009) (reciting boilerplate of quasi-class action status; consumer's claim barred by learned intermediary doctrine under California law); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 04-CV-1612 (JBW), 2009 WL 3596526 (E.D.N.Y. Oct. 16, 2009) (reciting boilerplate of quasi-class action status; consumer's claim barred by learned intermediary doctrine); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-2592 (JBW), 2009 WL 2163118 (E.D.N.Y. July 13, 2009) (reciting boilerplate of quasi-class action status; learned intermediary defense established).

43. *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 07-CV-1161 (JBW), 2009 WL 3597194 (E.D.N.Y. Oct. 16, 2009) (reciting boilerplate of quasi-class action status; patient's estate failed to adduce evidence of failure to warn; manufacturer not liable for failure to warn); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-1338 (JBW), 2009 WL 1404978 (E.D.N.Y. May 19, 2009) (reciting boilerplate of quasi-class action status; drug manufacturer's failure to warn not cause of plaintiff's injuries).

44. *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397 (E.D.N.Y. 2009) (reciting boilerplate of quasi-class action status; order denying Mississippi state's request to utilize aggregate proof of claims); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-2782 (JBW), 2009 WL 1852001 (E.D.N.Y. June 22, 2009) (reciting boilerplate of quasi-class action status; insufficient evidence to indicate drug caused plaintiff's injuries; drug manufacturer not liable); *In re Zyprexa Prods. Liab. Litig.*, Nos. 04-MD-1596 (JBW), 06-CV-1600 (JBW), 2009 WL 1514427 (E.D.N.Y. May 29, 2009) (reciting boilerplate of quasi-class action status; lack of evidence to establish causal connection between drug and plaintiff's diabetes).

45. See *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539; *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397.

46. *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d at 262; see also *id.* at 269 (referring to the *Zyprexa* settlement as a "conglomerate mass quasi-class action in the offing . . .").

47. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 491.

48. *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d at 433 (characterizing individual lawsuit

Zyprexa litigation was “in the nature of a private agreement between individual plaintiffs and defendants.”⁴⁹

Judge Weinstein, in one of his earliest *Zyprexa* decisions, described the central features of a quasi-class action. Quasi-class actions, then, occur under the umbrella of MDL proceedings. Within this MDL auspice, a quasi-class action is characterized in the following way:

The large number of plaintiffs subject to the same settlement matrix approved by the court, the utilization of special masters approved by the court to control discovery and assist in and administer the settlement, and the order of the court for a huge escrow arrangement and other interventions by the court reflect a degree of control requiring the exercise by the court of fiduciary standards to ensure the fair treatment to all parties and counsel regarding fees.⁵⁰

In a half-dozen orders, Judge Weinstein cited various authoritative sources in support of his ability to supervise the award of attorney fees in the context of a private-party settlement, based on his theory that he is supervising a quasi-class action. Judge Weinstein briefly cites four types of authority: (1) the “general equitable powers of the court,”⁵¹ (2) the Federal Rules of Civil Procedure, (3) precedential cases, and (4) the Class Action Fairness Act. As will be discussed, none of these briefly referenced authorities in Judge Weinstein’s various *Zyprexa* orders remotely authorized or legitimized the concept of the quasi-class action. In addition, Judge Weinstein also appealed to various broad policy rationales to justify his endorsement of the quasi-class action mechanism.

Judge Weinstein’s broadest invocation of authority for the quasi-class action is the “general equitable powers of the court.”⁵² Under the rubric of the “general equitable powers of the court,” Judge Weinstein located a mandate to federal judges to creatively innovate in the supervision and administration of aggregate litigation. Relying on no-less an authoritative body than the Federal Judicial Center, in a daisy-chain of logic, Judge Weinstein suggests:

Recognizing the special difficulties presented by mass tort quasi-class actions, the federal Judicial Center has advised that “[a]lthough the ‘just

by the State of Mississippi as constituting a “structural class action,” even though not pursued formally under Rule 23; “Mississippi’s suit is in the nature of a structural class action. The extensive case law regarding the uses and limitations of aggregative evidence in Rule 23 class action is applicable.”)

49. *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. at 122.

50. *Id.* at 122–23; *see also In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. at 540 (same); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 491 (same).

51. *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. at 122; *see also In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (noting quasi class action subject to general equitable powers of the court).

52. *See In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d at 271.

speedy, and inexpensive determination of every action' requirement applies to all cases, the difficult and sometimes contradictory demands posed by mass torts make case management both challenging and critical. The absence of precedent or of legislative rulemaking solutions *should not foreclose innovation and creativity*. MANUAL FOR COMPLEX LITIGATION, FOURTH § 22.1 (emphasis added).⁵³

Relying, then, on the FJC's *Manual for Complex Litigation* to supply content to the court's inherent power, Judge Weinstein concluded that when confronting the novel challenges of aggregate litigation, individual courts and judges are obligated to rely on the innovation and creativity allowed by their inherent equitable power.⁵⁴ However, Judge Weinstein's references to the *Manual for Complex Litigation* as directly or indirectly supporting the quasi-class action seem dubious, at best; the *Manual* does not articulate, propose, endorse, or recognize the quasi-class action, anywhere in its hundreds of pages. Indeed, it might come as a surprise to many federal judges that the FJC and its *Manual for Complex Litigation* endorse the quasi-class action.

Judge Weinstein's second cluster of support for the quasi-class action is derived from the Federal Rules of Civil Procedure. Ironically, many of the authorities Judge Weinstein cited rely on the class action rule itself: Rule 23(g), (h), and (e).⁵⁵ Obviously, this is self-referential, tautological, and circular reasoning: Judge Weinstein would find support for the quasi-class action in the class action Rule 23 itself. But Rule 23 and the Advisory Committee Note nowhere speak of the concept of a quasi-class action, and Rule 23 does not by its terms provide support for broad assertions of judicial power in aggregate settlements outside the context of a certified class action. Again, something either is a class action under Rule 23, or it is not; a conglomeration is not a class action or even something analogous to a class action, except perhaps, for size.

In addition to citing Rule 23 as authority in support of the quasi-class action, Judge Weinstein also cites Rule 1 of the Federal Rules of Civil Procedure, which mandates that federal courts should administer the rules to accomplish the "just determination of every action."⁵⁶ This is

53. *Id.*

54. *Id.* Judge Weinstein also cites to the American Law Institute, *Complex Litigation Project: Appendix B, Reporter's Study: A Model System for State to State Transfer and Consolidation*, § 6, cmt. c (Tentative Draft No. 4, October 23, 1992). While interesting as legislative history, citation to an ALI Tentative Draft has scant authoritative value.

55. *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122, 122 (E.D.N.Y. 2006). Judge Weinstein cites Rule 23(g)(1)(C)(iii) (explaining judicial authority in appointing counsel to consider alternative possible fee proposals by competing applicants for appointment as class counsel); Rule 23(h) (explaining judicial authority to approve fee petitions in class actions); and Rule 23(e)(1)–(2) (dealing with judicial approval of proposed class action settlements); *see also In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (citing Rule 23 provisions in support of quasi-class action).

56. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 491 (citing FED. R. CIV. P. 1).

bootstrap authority; it is simply not plausible that Rule 1 broadly legitimizes private mass dispute resolution mechanisms under some pseudo-aura of judicial sanction such as the quasi-class action. Certainly the global asbestos class settlements in *Amchem* and *Ortiz*—both accomplished under the formal requirements of Rule 23 and subsequently repudiated by the Supreme Court—were not therefore legitimized by Rule 1 simply because the settlements accomplished an efficient resolution of all asbestos claims. Rule 1 embraces three core values: justice, expedition, and efficiency. However, Rule 1 does not embrace efficiency and expedition to the exclusion of justice.

The third type of authority that Judge Weinstein broadly cited included two class actions that he presided over as district judge: the New York asbestos litigation⁵⁷ and the *Agent Orange* settlement.⁵⁸ Yet both these cases are dubious support—actually provide no support at all—for the theory that a quasi-class action is a legitimate construct. Both cases were pursued under the formal class action rule, and the New York asbestos litigation ultimately was resolved under bankruptcy auspices. All that these two cases represent is the proposition that judges in properly certified class actions may approve or disapprove attorney fee requests. Neither decision has anything to do with the quasi-class action.

Finally, Judge Weinstein cites the Class Action Fairness Act of 2005⁵⁹ as providing additional support for the quasi-class action.⁶⁰ He referred to a subsection in the newly created CAFA original jurisdiction provisions that authorize the removal of “mass” actions to federal court.⁶¹ However, this CAFA provision has nothing to do with quasi-class actions. Of the fifty states, two do not have state class action rules.⁶² Consequently, actions instituted in those states that join large numbers of plaintiffs would not be subject to removal under CAFA. To remedy this problem, Congress enacted a provision to provide defendants sued in these states to remove cases involving the mass

57. *Id.* (citing *In re Joint Eastern and Southern District Asbestos Litig.*, 129 B.R. 710, 784 (E.D.N.Y. 1991)).

58. *Id.* (citing *In re Agent Orange Litig.*, 611 F. Supp. 1296, 1304–05 (E.D.N.Y. 1985)).

59. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4 (2005) codified at 28 U.S.C. § 1332(d) (2006) (concerning original diversity jurisdiction), 28 U.S.C. § 1453 (2006) (concerning removal jurisdiction).

60. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 491.

61. *Id.* (citing to 28 U.S.C. § 1332(d)(11)(A)).

62. These states are Mississippi and Virginia. Mississippi, at least, permits simple joinder of large numbers of plaintiffs in a single action, but does not recognize the class action mechanism. *Cf. In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 433 (E.D.N.Y. 2006) (characterizing Mississippi’s individual lawsuit in the *Zyprexa* litigation, seeking approval for use of classwide statistical aggregate evidence, as constituting a “structural” class action congruent with other forms of aggregate litigation, insofar as the State sought to use generalized evidence to prove its claims).

joinder of claimants, and called these types of cases mass actions. In so doing, Congress did not contemplate, create, or endorse the concept of a quasi-class action.

In addition to the weak rule-based and precedential authority that Judge Weinstein conjured for his assertion of judicial power outside the confines of an appropriately constituted class action, he relied on dicta and policy rationales in support of his notion of the quasi-class action. For example, Judge Weinstein cited—with disapproval—the history of mass tort litigation as a narrative of judicial ineffectiveness in resolving mass torts.⁶³ Thus, after citing Rule 23 as authority for his power to adjust attorney fees, Judge Weinstein next attacks Rule 23 jurisprudence as an obstacle to accomplishing resolution of mass litigation. Judge Weinstein would have it both ways: he cited to Rule 23 both in support of his judicial powers,⁶⁴ as well as an impediment to those powers.

In particular, Judge Weinstein criticized the Supreme Court's decisions in *Amchem*⁶⁵ and *Ortiz*,⁶⁶ and the Second Circuit's decisions in *Stephenson v. Dow Chemical Co.*,⁶⁷ as decisions that “made total closure of possible future claims by class action more difficult.”⁶⁸ Considering these obstructionist Supreme Court and Second Circuit decisions, Judge Weinstein discerns a trend and support for his new quasi-class action concept:

As a result of the dubious benefits available from class actions in resolving mass disputes, particularly in pharmaceutical cases, more defendants have now begun to embrace a form of quasi-class action to aggregate and settle cases, using masters, matrices and other administrative techniques.⁶⁹

In a subsequent *Zyprexa* order—invoking this same theme which criticizes the *Amchem*, *Ortiz*, and *Stephenson* decisions—Judge

63. *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 269 (E.D.N.Y. 2006) (“It is well to reflect for a moment on the recent history of mass litigation generally.”); *see also In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (manifesting concern for the fate of the pharmaceutical industry and public health considerations).

64. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d at 433 (characterizing individual lawsuit by the State of Mississippi as constituting a “structural class action,” even though not pursued formally under Rule 23; “Mississippi’s suit is in the nature of a structural class action. The extensive case law regarding the uses and limitations of aggregative evidence in Rule 23 class action is applicable.”). Thus, when Judge Weinstein desires to use Rule 23 or Rule 23 jurisprudence, he finds authority to do so by conjuring the litigation before him as some pseudo-class action.

65. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

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

67. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d in part vacated in part*, *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003).

68. *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d at 269 (citing, for discussion purposes only, also to the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Preliminary Draft No. 4, 2006)).

69. *Id.* at 269–70.

Weinstein similarly suggests the following:

This development [the *Amchem*, *Ortiz*, and *Stephenson* decisions] has led a number of judges and attorneys, particularly in pharmaceutical cases, to attempt mass settlements on consolidated and cooperative basis without the formalities of a class action. The substitute quasi-class action aggregate technique has advantages and is being closely studied.⁷⁰

Judge Weinstein's observation concerning the practicing bar's and the judiciary's embrace of private settlements as a preferred means for resolving aggregate liabilities, however, certainly does not provide authoritative *legal* support for the quasi-class action. (Or, just because some people may be doing it, doesn't make it legitimate.) In addition, apart from Judge Weinstein, there is scant record that "a number" of judges have supervised private mass settlement deals outside the purview of the class action rule.⁷¹

It is hardly surprising that Judge Weinstein would eschew the Second Circuit's *Stephenson* decision which in essence held that Judge Weinstein had failed to provide future claimants with adequate representation at the time of his approval of the *Agent Orange* settlement.⁷² But Judge Weinstein's repudiation of the *Amchem*, *Ortiz*, and *Stephenson* decisions manifests a tone-deaf dismissal of the fundamental importance of those cases. Judge Weinstein rejected the Court's *Amchem*, *Ortiz*, and *Stephenson* decisions because he perceived those decisions as limiting the usefulness of the class action rule to resolve mass litigation; collectively, these decisions—Judge Weinstein believed—bound his hands as a judge and frustrated his ability to achieve efficiency in resolving big cases. These decisions were ill-conceived, in his view, because they were impediments to judicial efforts to resolve mass cases. In addition, these decisions were harmful to industry, and in the instance of pharmaceutical litigation, adverse to public health considerations.⁷³

70. *In re Zyprex Prods. Liab. Litig.*, 238 F.R.D. 539, 541 (E.D.N.Y. 2006) (citing, for discussion purposes only, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Preliminary Draft No. 4, 2006)).

71. See discussion of the *Vioxx* settlement, *infra* Part II.D; see also *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05 1708 (DWF/AJB), 2008 WL 682174, at *6 (D. Minn. Mar. 7, 2008) (discussing court authority to supervise attorney fee award in private settlement of medical device mass action: "Before this Court is a coordinated litigation of many individual yet related cases that effectively is, and proceeded as, a quasi-class action."). Apart from the *Zyprexa*, *Guidant*, and *Vioxx* litigations, as of this writing the author could not find any other reported decision referring to a mass settlement resolved as a quasi-class action.

72. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part vacated in part*, *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003) (4–4 decision) (noting future claimants not bound by class settlement of future claims due to lack of adequate representation at the time of the settlement; future claimants permitted to pursue collateral attack against the settlement).

73. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) ("In addition, the viability of an effective pharmaceutical industry and public health considerations necessitate

In this same vein, Judge Weinstein drew further support for private settlements under the umbrella of the quasi-class action because he viewed the quasi-class action as an antidote to the perceived failure of past mass tort litigation: “Most would agree that a reprise of the asbestos litigation with an almost uncontrolled search by plaintiffs’ attorneys for new cases and new parties, ultimately exhausting the courts and bankrupting industries, ought not be encouraged.”⁷⁴

However, the fundamental purpose of the Courts’ reasoning in *Amchem*, *Ortiz*, and *Stephenson* was to strengthen the due process protections of absent class members by requiring heightened scrutiny of the Rule 23 adequacy-of-representation requirement, especially in the settlement context. Judge Weinstein, then, would jettison the requirements of Rule 23 and the due process protections of absent class members, in favor of efficiency rationales. Therefore, if *Amchem*, *Ortiz*, and *Stephenson* set the due process bar too high, Judge Weinstein approved circumventing these pesky decisions by allowing litigants to privately cut deals without the necessity to satisfy formal Rule 23 requirements and its due process protections. If Rule 23 is now a barrier to accomplishing aggregate settlements, Judge Weinstein would simply dispense with the rule, except when he needs the rule as buttressing support for his ability to exercise some judicial authority in a limited sphere of operation.⁷⁵

efficient and fair control by the courts of cases of this kind.”).

74. *In re Zyprex Prods. Liab. Litig.*, 238 F.R.D. at 541.

75. *See, e.g., In re Zyprex Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 433 (E.D.N.Y. 2006) (characterizing individual lawsuit by the State of Mississippi as constituting a “structural class action,” even though not pursued formally under Rule 23; “Mississippi’s suit is in the nature of a structural class action. The extensive case law regarding the uses and limitations of aggregative evidence in Rule 23 class action is applicable.”).

In fairness to Judge Weinstein, he does at least concede, in one of his *Zyprex* orders, that “Avoiding formal Rule 23 class actions presents serious pitfalls.” *See In re Zyprex Prods. Liab. Litig.*, 238 F.R.D. at 541. Judge Weinstein notes:

One is the possibility that new cases, and attorneys, will be attracted to the honey pot of litigation after all, or almost all, of the well-founded cases have been disposed of. Only the Rule 23 class action can provide full closure in many litigations. *Id.*

However, after acknowledging that Rule 23 has its virtues, Judge Weinstein nonetheless defaults to his preferred position, which favors private settlement of mass litigation under the auspices of MDL proceedings.

Again, in one of his earliest decisions discussing the quasi-class action, Judge Weinstein acknowledges that many of the concerns about the protection of class members should apply with equal force to aggregate settlements achieved in a non-class format. Thus, Judge Weinstein writes:

Many of the same considerations that necessitate close judicial supervision of plaintiffs’ counsel and proposed settlements in the class action context—such as protecting absent class or disinterested litigants, and dealing with plaintiffs’ practical inability to monitor their attorneys, some of whom represent hundreds of clients within the same litigation—apply to quasi-class actions such as the instant one. Some of the conventions required when a class is certified are appropriate in quasi-class actions involving large aggregations of claims. In both contexts, the primary goal of the court is to “ensure that similarly situated individuals receive equal fairness

D. The Vioxx Litigation: Exploitation and Expansion of the Quasi-Class Action

The resolution of the *Vioxx* litigation illustrates how judicial deployment of the quasi-class action concept has been expanded beyond judicial authority to adjust attorney fees to adversely affect the rights of unrepresented or under-represented persons with an interest in the litigation. As will be discussed below, the *Vioxx* litigation has inspired the first wholesale attack against the concept of the quasi-class action, with an appeal to the Supreme Court of the United States.⁷⁶

Merck Co. manufactured, marketed, and distributed *Vioxx*, a drug designed to relieve pain from osteoarthritis, rheumatoid arthritis, menstrual pain, and migraine headaches.⁷⁷ The Food and Drug Administration approved *Vioxx* for sale in the United States on May 20, 1999. Merck withdrew *Vioxx* from the market in September 2004, after the results of a clinical trial indicated that use of *Vioxx* increased the risks of cardiovascular thrombotic events such as myocardial infarction (heart attack) and ischemic stroke. Between 1999 and 2004, it was estimated that physicians wrote nearly 105 million prescriptions for *Vioxx*, and that an estimated twenty million patients had taken the drug.⁷⁸

Thousands of individual and class action suits against Merck were filed in state and federal courts alleging products liability, tort, fraud, and breach of warranty claims. On February 16, 2005, the Judicial Panel on Multidistrict Litigation created a *Vioxx* MDL and transferred all federal cases to the Eastern District of Louisiana.⁷⁹ Between February 2005 and 2006, the court engaged in MDL coordinated pre-trial proceedings, including the appointment of plaintiff and defendant steering committees. In November 2006, the presiding Judge Eldon

protections regardless of how the courts aggregated the litigation.” L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Tort claims Creates Second-Class Settlements*, 65 La. L. Rev. 157, 241 (2004). *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d at 272.

However, Judge Weinstein’s initial recognition of the need for Rule 23 constraints in the context of quasi-class action settlements does not re-appear in his numerous subsequent citations to the quasi-class action.

76. See Petition for Writ of Certiorari, *In re: Vioxx Prods. Liab. Litig.*, 2010 U.S. Briefs 666 (Nov. 17, 2010) (No. 10-666); Petition for Writ of Certiorari, Glenn L. Dier v. Merck Sharp & Dohme Corp., 2010 U.S. Briefs 666 (Jan. 21, 2011) (No. 10-666). The Court denied the petition for certiorari on February 22, 2011. See *Dier v. Merck & Co. Inc.*, 131 S. Ct. 1477 (2011).

77. See *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549 (E.D. La. 2009) (addressing motion for reconsideration of attorney fee cap on contingent fee arrangements).

78. *Id.* at 551. A more detailed factual background to the *Vioxx* litigation, before creation of the *Vioxx* MDL, is at *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 656 (E.D. La. 2005) (resolving *Daubert* challenges to various expert witnesses).

79. *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (creating *Vioxx* MDL).

Fallon denied class certification of a nationwide class because the plaintiffs' claims raised choice-of-law problems and numerous individualized questions of fact.⁸⁰ After denial of class certification, however, the court conducted six bellwether trials.⁸¹ As a consequence of the bellwether trials, the parties entered in settlement negotiations and on November 9, 2007, Merck announced a settlement of the *Vioxx* claims.⁸²

The *Vioxx* settlement was a private settlement agreement. It established a pre-funded program in the amount of \$4.85 billion dollars for resolving pending or tolled federal and state claims against Merck as of the date of the settlement. The settlement provided compensation for claims of heart attack, ischemic stroke, and sudden cardiac death. The settlement agreement provided for claimants to opt-in to the fund.

The opt-in mechanism set forth threshold criteria for eligibility to opt-in to the settlement. In addition, the settlement imposed a requirement that any plaintiffs' counsel enrolling clients in the Master Settlement Agreement had to affirm that the attorney had recommended to 100% of the attorney's clients that they must accept the terms of the agreement, or the attorney must attempt to withdraw from representing clients who refused to accept the settlement terms.⁸³

The settlement agreement also gave the court continuing authority to oversee various aspects concerning implementation of the settlement, including the appointment of a fee allocation committee, allocating a percentage of the settlement proceeds to a common benefit fund, and modifying any provisions of the settlement agreement that were otherwise unenforceable.⁸⁴ The MDL court also asserted its "inherent authority over the multidistrict litigation" to ensure that "the settlement proceedings move[d] forward in a uniform and efficient manner."⁸⁵

Merck retained the right to walk away from the settlement if certain conditions were not satisfied.⁸⁶ In July of 2008, Merck announced that

80. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458–59, 461 (E.D. La. 2006).

81. *See In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 552. During this same period, thirteen additional cases were tried in state courts in Texas, New Jersey, California, Alabama, Illinois, and Florida. *Id.*

82. *See* Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, MDL 1657 (E.D. La. Nov. 9, 2007), available at <http://www.browngreer.com/vioxxsettlement>.

83. *In re Vioxx Prods. Liab. Litig.*, No. 09-30446, 388 Fed. App'x 391, 393 (5th Cir. 2010), *cert. denied sub nom.*, *Dier v. Merck & Co.*, 131 S. Ct. 1477 (2011).

84. *See In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 552–53; *see also In re Vioxx Prods. Liab. Litig.*, No. 08-1633, 2008 WL 3285912 (E.D. La. Aug. 7, 2008), *aff'd sub nom. Avmed Inc. v. BrownGreer PLC.*, 300 Fed. App'x 261 (5th Cir. 2008).

85. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 553; *see also* Pretrial Order No. 32, *In re Vioxx Prods. Liab. Litig.* (2007) (No. 04-MD-1657) (memorializing the court's inherent authority over the multidistrict litigation to appoint a fee allocation committee).

86. *See In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 553.

it was satisfied that the thresholds necessary to trigger funding of the *Vioxx* program had been fulfilled, that Merck would waive its walk-away privilege, and that it would begin funding the program.⁸⁷ On August 20, 2008, the claims administrator reported to the court that it had successfully reviewed claims from approximately 2,750 claims for interim payments. At this point, the court issued an order capping plaintiffs' contingent fee arrangements at 32%.⁸⁸

Similar to events in the *Zyprexa* litigation, the *Vioxx* MDL Court's decision to cap the contingent fee arrangements caused a consortium of plaintiffs' lawyers—the *Vioxx* Litigation Consortium (VCL)—to challenge that decision.⁸⁹ The VCL challenged the court's authority to adjust legal fees by arguing that classifying an MDL as a quasi-class action was inappropriate.⁹⁰ The VCL pointed out that the underlying actions in an MDL remain individual in nature, while a class action is a representative proceeding.⁹¹ For this reason, the VCL contended, fee capping was appropriate in a class action but not in an MDL proceeding.⁹²

The court responded by indicating that it was true that the Federal Rules of Civil Procedure expressly provided that district courts may require reasonable fees in class actions, while the MDL statute lacked an analogous provision.⁹³ But, relying on both the *Zyprexa* and *Guidant* cases, the Louisiana court held that the *Vioxx* settlement could “properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness.”⁹⁴ The court noted that the global settlement in the

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 558.

91. *Id.*

92. *Id.*

93. *Id.* (comparing FED. R. CIV. P. 23(g)(1)(C)(iii), and FED. R. CIV. P. 23(h), with 28 U.S.C. § 1407).

94. *Id.* at 553–54, 558–59. Taking a page from Judge Weinstein's playbook, the Louisiana federal court located its authority to oversee attorney fee arrangements in the quasi-class action, in various provisions of Rule 23 as well as the FJC's *Manual for Complex Litigation*. Thus, the Court opined:

First, any court presiding over a mass tort proceeding possesses equitable authority to examine fee arrangements. The Federal Rules of Civil Procedure expressly grant this power to district courts in class actions. See FED. R. CIV. P. 23(g)(1)(C)(iii); FED. R. CIV. P. 23(h); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.927 (2004). While an MDL is distinct from a class action, the substantial similarities between the two warrant the treatment of an MDL as a quasi-class action. *Order & Reasons*, August 27, 2008, Rec. Doc. 15722, 8–9 (Aug. 27, 2008). Accordingly, this Court found that “the *Vioxx* global settlement may be properly analyzed as occurring in a quasi-class action, giving the Court equitable authority to review contingent fee contracts for reasonableness.” *Id.* at 9; see also *In re Guidant Corp. Implantable*

Vioxx litigation bore a significant resemblance to the *Zyprexa* global settlement.⁹⁵ Comparing the two litigations, the court concluded that “[g]iven these similarities, and § 1407’s mandate of just and efficient treatment, it is correct to consider the MDL as a quasi-class action.”⁹⁶ Furthermore, in assessing the boundaries of its authority under the private settlement agreement, the court further noted that the parties had given the court express authority to modify any provision under certain circumstances.⁹⁷

E. The Dier Attack Against the Vioxx Quasi-Class Action

Although the VCL asserted an unsuccessful objection to the district court’s authority to modify fee arrangements, another group of *Vioxx* plaintiffs who had not opted-in to the settlement subsequently mounted a different challenge to the court’s continuing authority over this quasi-class action.⁹⁸ The Master Settlement Agreement designated Judge Fallon as its chief administrator.⁹⁹ In this capacity, Judge Fallon entered several pre-trial orders in November 2007 with respect to the claims of those plaintiffs who could not or chose not to participate in the Master Settlement Agreement (the non-settling plaintiffs).

In particular, Judge Fallon issued pre-trial order 28 (PTO 28)¹⁰⁰ that required non-settling plaintiffs to notify their healthcare providers that they must preserve evidence pertaining the plaintiffs’ use of *Vioxx*.¹⁰¹ In addition, these plaintiffs were also required to produce pharmacy records and medical authorizations, answers to interrogatories, and a Rule 26(a) report from a medical expert attesting that the plaintiff had sustained an injury caused by *Vioxx* and that they injury occurred within a specified period.¹⁰² If a non-settling plaintiff failed to comply with

Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *18 (D. Minn. March 7, 2008) (relying on the quasi-class action nature of an MDL proceeding and the court’s equitable authority to implement a reasonable cap on contingent fees); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (exercising the court’s inherent power to “impos[e] . . . fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses.”). *Id.*

95. *Id.*, 650 F. Supp. at 559.

96. *Id.*

97. *Id.* at 554.

98. *In re Vioxx Prods. Liab. Litig.*, No. 09-30446, 388 Fed. App’x 391, 2010 WL 2802352 (5th Cir. July 16, 2010), *cert. denied sub nom.* *Dier v. Merck & Co.*, 131 S. Ct. 1477 (2011).

99. *Id.* at 393.

100. *Id.* PTO 28 is characterized as a “Lone Pine” order. *See id.*; 388 Fed. App’x at 393 n.1. (describing Lone Pine orders).

101. *Id.* at 393–94. The court issued several other pre-trial orders; see description of PTOs 30 and 31.

102. *Id.* at 394.

these requirements, the court could dismiss the plaintiffs' claims with prejudice.¹⁰³

Various non-settling *Vioxx* plaintiffs brought challenges to PTO 28, which Judge Fallon dismissed.¹⁰⁴ In November 2008, Merck moved for a show-cause order relating to sixty-one non-settling plaintiffs for their failure to provide a case-specific expert report required by PTO 28, and in December 2008 Judge Fallon issued this show cause order. In April 2009, Judge Fallon dismissed certain plaintiffs' complaints (the *Dier* plaintiffs) with prejudice for failure to comply with PTO 28.¹⁰⁵

The *Dier* plaintiffs appealed the dismissal of their cases to the Fifth Circuit, challenging the validity of the Master Settlement Agreement, Judge Fallon's lack of impartiality, and PTO 28.¹⁰⁶ In a brief, unpublished decision issued July 16, 2010, the Fifth Circuit held that the *Dier* plaintiffs lacked standing to challenge the Master Settlement Agreement, and denied all the other challenges to the dismissal of their cases.¹⁰⁷

In November 2010, the *Dier* plaintiffs petitioned the Supreme Court for a writ of certiorari to review the Fifth Circuit's decision. In this appeal, the *Dier* plaintiffs perfected an attack against the authority of the district court to enter PTOs against the non-settling plaintiffs under the umbrella of a quasi-class action. The concept of the quasi-class action was attacked not for the court's authority to adjust attorney fees, but the judiciary's expansive, continuing authority over a settlement to modify the rights of claimants. The *Dier* plaintiffs squarely focused on the court's authority derived from the concept of a quasi-class action, framing the issue as follows:

Can a transferee court use its authority pursuant to 28 U.S.C. § 1407 to invoke the judicially-created "quasi-class action" doctrine to preside over a mass settlement involving thousands of widely divergent personal injury claims and permit such a settlement to be approved outside the strictures of Rule 23 of the Federal Rules of Civil Procedure without contravening Article III and depriving individual litigants of their rights guaranteed by the due process and right to trial by jury clauses of the Constitution of the United States.¹⁰⁸

103. *Id.*

104. *Id.* The non-settling *Vioxx* plaintiffs also brought challenges to subsequent orders by Judge Fallon ordering the non-settling plaintiffs to appear in person at various conferences held around the country. For a description of these orders, see *id.* at 395. Judge Fallon similarly denied challenges to these orders.

105. *Id.* *Dier* maintained that they were in substantial compliance with PTO 28 and that New York law required only general causation proof.

106. *Id.* at 395–97.

107. *Id.* at 395, 397–98.

108. See Petition for Writ of Ceriorari, *In re: Vioxx Prods. Liab. Litig.*, 2010 U.S. Briefs 666

Although the Supreme Court denied certiorari in February 2011,¹⁰⁹ the *Dier* plaintiffs' challenge to the quasi-class action sets forth the constitutional, statutory, rule-based, and precedential grounds for repudiating this construct. As such, the *Dier* petition comprehensively set forth the array of arguments against the legitimacy of judicial authority invoked under the umbrella of a quasi-class action.

Thus, the judicially created quasi-class action contravenes Article III of the Constitution, deprives litigants of their due process and jury trial rights, violates the Rules Enabling Act,¹¹⁰ impermissibly expands the scope of judicial authority under the multidistrict litigation statute, and does an end-run around the requirements of the class action Rule 23. Moreover, private settlement agreements consummated as quasi-class actions may, if unchecked, violate the spirit if not the letter of the court's *Amchem* and *Ortiz* decisions.

The nub of the *Dier* plaintiffs' argument was that courts now illegitimately employ the multidistrict litigation procedure to create and approve class action settlements outside the scope of Rule 23. The *Dier* plaintiffs objected to Judge Fallon's view there is a judicial trend towards recognizing the quasi-class action, and that class actions may morph into multidistrict litigation.¹¹¹ This trend, they objected, not only impermissibly intruded upon legislative prerogatives, "but runs roughshod over constitutional rights of individual litigants . . . who 'morph' from absent class members into 'non-settling plaintiffs' by judicial override of Rule 23."¹¹²

Thus, the *Vioxx* Master Settlement Agreement established a nationwide administrative claims regime similar to the nationwide class action settlements in *Amchem* and *Ortiz*, but contrary to the court's opinions repudiating those settlements, "the managerial authority conferred upon multidistrict courts pursuant to 28 U.S.C. § 1407 is being used to create class settlements outside Rule 23. . ."¹¹³ The *Dier* plaintiffs argued that in the past decade federal judges have made an end-run around Rule 23 "by impermissibly expanding the limited reservoir of authority conferred by 28 U.S.C. § 1407 and sought to provide doctrinal basis for avoiding their fiduciary duties to absent class

(Nov. 17, 2010) (No. 10-666) [hereinafter *Petition*].

109. See *Dier v. Merck & Co. Inc.*, 131 S. Ct. 1477 (2011).

110. *Petition* at *35–37. The Rules Enabling Act provides that rules of procedure "shall not abridge, enlarge or modify any substantive right." See 28 U.S.C. § 2072(b) (2006). In essence, the *Dier* plaintiffs contend that settlement outside the purview of Rule 23 requirements, under the umbrella of the quasi-class action, is "bottomed on the view that the day in court principle has gone the way of the dodo bird." *Id.* at *37.

111. *Id.* at *19–20.

112. *Id.* at *20.

113. *Id.* at *19.

members by creating a quasi-class action.”¹¹⁴

Pointing to the district court’s denial of certification of a nationwide *Vioxx* class action, the *Dier* plaintiffs contended that the settling parties in *Vioxx* consummated a private agreement that they could not have accomplished under the requirements of Rule 23.¹¹⁵ In so doing, the settling parties were able to negotiate a deal that circumvented the court’s concerns about, and requirements for, global class action settlements articulated in *Amchem* and *Ortiz*.¹¹⁶ For the *Dier* plaintiffs, the use of the quasi-class action rationale to empower Judge Fallon to dismiss their cases for non-compliance with the PTO 28 “breathe[d] real meaning into the concerns this Court observed in both *Amchem* and *Ortiz* and especially its conclusion that settlement classes require ‘heightened attention.’”¹¹⁷ The *Dier* plaintiffs argued: “The importance of the issue raised . . . is that, absent this Court putting a halt to the trend [of using the quasi-class action], the federal courts will be able to create *de facto* class actions at will outside the strictures of Rule 23.”¹¹⁸

The *Dier* plaintiffs objected to the negotiation and consummation of the *Vioxx* deal not subject to Rule 23 requirements, precisely because in its view Merck, as a wealthy defendant, accomplished a favorable sweetheart deal to the detriment of absent class members.¹¹⁹ In addition, under the umbrella of the quasi-class action, Merck engineered as part of the agreement the requirement for the subsequent discovery orders against non-opt-in plaintiffs, with the punitive dismissal of claims for non-compliance.¹²⁰

114. *Id.* at *20. The *Dier* plaintiffs also cited Judge Alex Kozinski as having identified a similar trend, characterizing this as “a remarkable power grab by federal judges who have parleyed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to a trial in the forum of their choice.” *Id.* at *26 (citing *In re: Am, Cont’l Corp./Lincoln Sav. & Loan Sec. Litig. Lexecon, Inc.*, 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, C.J., dissenting)).

115. *Id.*

116. *Id.* at *21.

117. *Id.* at *30.

118. *Id.* at *22–23; *see also id.* at *36 (citing Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010)) (“By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, ridden roughshod over attorneys, turned a blind eye to questionable behavior, and weakened plaintiff lawyers’ incentives to faithfully serve their clients.”).

119. *Id.* at *23. The *Dier* plaintiffs objected: “The practical effect may be seen in the instant litigation in that it empowers defendants, who are inevitably large-scale corporations, to use their wealth and resources to dictate the terms of the settlement.”

120. *Id.* at *24–25 (“Indeed, in *Amchem* this Court instructed the safeguards provided for by rule (a) and (b) were set for the protection of absent class members and serve to ‘inhibit appraisals of the chancellor’s foot kind’ at 521 U.S. 621 Since there is precious little in the record which permits any substantive review of the settlement achieved below, the result obtained permits the inference that the power of the purse had an influence in letting a wealthy defendant get out cheap.”).

Furthermore, because the *Vioxx* deal was negotiated and consummated free from Rule 23 constraints, the district court was “hampered by both lack of adversarial presentation on the one hand and hydraulics of moving a large-scale settlement such as the one at bar.”¹²¹ The fact that private settlements may be accomplished apart from class action requirements affected the rights of persons not wishing to agree: “These machinations virtually guarantee one or another legal doctrine will be invoked to dispose of recalcitrants without reaching the merits of their claims.”¹²²

Finally, the *Dier* plaintiffs additionally noted the thin doctrinal basis for the concept of the quasi-class action, suggesting that Judge Weinstein in the *Zyprexa* decisions did nothing more than describe the characteristics of an MDL and then “baldly assert they provided the foundation for the doctrine of quasi-class action.”¹²³ Tracing the evolution of Judge Weinstein’s jurisprudential philosophy relating to the resolution of mass tort litigation, the *Dier* plaintiffs pointed out that Judge Weinstein consistently believed that due process must be subordinated to the public interest implicated in the resolution of mass tort litigation.¹²⁴ Moreover, the *Dier* plaintiffs challenged Judge Weinstein’s suggestion that the Class Action Fairness Act provided additional support for the judicial embrace of the concept of the quasi-class action.¹²⁵

* * *

As indicated above, the Supreme Court declined to grant certiorari to the *Dier* plaintiffs’ appeal, thus avoiding consideration of the legitimacy of the quasi-class action question raised by these plaintiffs. Moreover, Merck’s response to the certiorari petition largely ignored the core issue relating to the quasi-class action. Instead, Merck simply argued that the Fifth Circuit correctly determined that the *Dier* plaintiffs lacked

121. *Id.* at *28.

122. *Id.*

123. *Id.* at *38.

124. *Id.* at *39–40.

125. *Id.* at *40–41 (citing Judge Young: “It is precisely because MDL practice is perceived so clearly to favor the defense that Congress appears to have lost confidence in a judicial management mechanism that once had such great promise. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), itself thought to be legislation that favors business defendants, *see Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 164–68 (D. Mass. 2005), contains an unmistakable rebuke to the Panel on Multi-District Litigation in Section 4, which provides that no class action removed to federal court under its provisions shall thereafter be transferred to another district pursuant to Title 28, Section 1407(a) of the U.S. Code without the request of the majority of plaintiffs.[] *See* Pub. L. No. 109-2, 119 Stat. 4, 11-12 (2005) (codified at 28 U.S.C. § 1332(d)(11)(C)(i)).”).

standing to challenge the agreement.¹²⁶ While cabining its arguments chiefly to the standing issue, Merck nonetheless argued that the district court acted well within its broad discretion to manage multidistrict proceedings when it entered and enforced its pretrial orders.¹²⁷

In response to the *Dier* plaintiffs, Merck contended that the lower court decisions did not conflict with the Court's holdings in *Amchem* and *Ortiz*, because *Amchem* and *Ortiz* involved class settlements.¹²⁸ The *Vioxx* Master Settlement Agreement, Merck argued, did not present the dangers that the Court identified in *Amchem* and *Ortiz* because the MSA was never viewed as a "class settlement."¹²⁹ Moreover, the MSA was not a de facto class action settlement. Thus, the risks presented by class settlements were not germane to the *Vioxx* deal because the agreement was binding only on individuals who affirmatively opted-in to the agreement.¹³⁰

In addition, the district court had not abused its discretion in entering the pre-trial orders—especially PTOs 28 and 29—because district courts have wide discretion to manage discovery in proceedings before them.¹³¹ A district court's discretion to manage complex multidistrict proceedings, Merck argued, includes the power to issue so-called *Lone Pine* orders,¹³² as well as to order dismissal of claims as a sanction for non-compliance with a trial court's orders.¹³³

In sum, Merck declined to directly address the *Dier* plaintiffs' objections to the court's use of the quasi-class action. Instead, Merck contended that the *Vioxx* agreement was simply not a class action, and therefore outside the purview of class action jurisprudence. By evading the quasi-class action issue, Merck offered no further analysis, justification, or rationales supporting the court's invocation of the doctrine. Thus, while the *Dier* plaintiff's certiorari petition offers a detailed roadmap for a future challenge to the quasi-class action, Merck's opposition does not afford a similar array of supporting arguments. Instead, Merck's opposition to the certiorari petition left defense of the legitimacy of the quasi-class action to some other

126. Brief in Opposition at 1, *Dier v. Merck Sharp & Dohme Corp.*, 131 S. Ct. 1477 (Jan. 21, 2011) (No. 10-666) (noting that every court that has considered the question has held that non-settling parties, even parties who opt out of class settlements, lack standing to challenge a private agreement between parties) [hereinafter Brief in Opposition].

127. *Id.* at 14, 23–27.

128. *Id.* at 15.

129. *Id.* (noting, ironically, that the district court expressly considered and denied class certification in the underlying litigation).

130. *Id.* at 16.

131. *Id.* at 24.

132. *Id.*

133. *Id.* at 25.

litigators in some other future action.

II. THE QUASI-CLASS ACTION AND THE RULE OF LAW

As indicated at the outset of this Article, there is no such thing as a quasi-class action and the judiciary ought to reject this doctrine as an illegitimate expansion of judicial authority and a usurpation of the rule of law. Once individuals have retained counsel and are represented to pursue legal redress—especially in complex, aggregate litigation—courts undertake a fiduciary role to protect the interests of all claimants, and not to subvert the interests of some. Therefore, courts should not become complicit in providing an aura of judicial authority, through invocation of the quasi-class action, to sanctify private backroom deals negotiated and consummated to the advantage of some, but to the detriment of others.

The concept of the quasi-class action is the very antithesis of the class action. Instead, the concept cloaks a federal judge with an aura of authority to do whatever the judge desires, and outside the formal requirements of Rule 23 or class action jurisprudence. This leaves both plaintiff and defense attorneys involved in complex cases at liberty to privately arrange solutions to their own advantage, also free from the constraints of the class action rule. The quasi-class action is not authorized by Rule 23, the Class Action Fairness Act, or some expansive interpretation of the multi-district litigation statute, as is discussed below.

Furthermore, the quasi-class action is not legitimized by any crisis mentality inspired by complex cases on the federal docket, or arguments derived from judicial efficiency and economy. Numerous federal courts agree—and it is fundamental principle of class action jurisprudence—that the value of judicial efficiency can never be invoked to supersede the interests of justice and fairness.

A. Rule 23 Does Not Authorize or Rationalize the Quasi-Class Action by Analogy

The federal class action rule historically has been centrally concerned with providing due process protections to individuals involved in aggregate litigation. The quasi-class action is an oxymoron: the label provides no formal or informal protections to individuals involved in aggregate litigation. Instead, the quasi-class action supplies pseudo-legitimacy for those who wish to manipulate aggregate deals outside the rule of law, but under the guise of judicial legitimacy.

The quasi-class action offends the very understanding of the class

action. The core concept underlying the class action rule is that it is representative litigation; claimants in the class are not actually present in the litigation to represent their own interests, as they would be if the individual were involved in a simple, bipolar litigation. Thus, Rule 23 and the considerable class jurisprudence developed under the rule sets forth numerous due process protections for absent class members. These due process protections are derived from the fact that class action judgments are binding on all members of a class, and that fairness dictates that before an absent claimant may be bound to a judgment, that individual must be adequately represented by those pursuing the litigation.¹³⁴

Perhaps the most significant difference between ordinary litigation and class litigation is the imposition or intercession of a judicial officer, at the very outset of the litigation, to manage and oversee the litigation. This is not excessive formalism or hoop-jumping; the purpose is to ensure the protection of individuals not present to represent themselves.

Rule 23 sets forth detailed requirements, many of which are directed at ensuring the due process protections of absent class members. For example, Rule 23(a)(4) requires that a court make a finding that proposed class representatives are adequate to represent persons not actually present to protect their own interests.¹³⁵ The adequacy requirement is to ensure that the class representatives are knowledgeable about the litigation, understand the nature of the claims and defenses, the scope of the class they are representing, and that they are free from conflicts of interest.

Adequate class representatives are necessary from the outset of class litigation to serve as independent fiduciaries protecting the interests of absent class members against possible self-dealing by class counsel and their adversaries. Adequate class representatives serve as an independent bulwark against potentially collusive settlement agreements negotiated by interested parties, to the advantage of some and the disadvantage of others. Adequate class representatives provide a safeguard against potentially deleterious reverse auction settlements whereby defense counsel seeks out the weakest class counsel with whom to negotiate discounted settlements.

In tandem with the Rule 23(a)(4) requirement for adequate class representatives, Rule 23(g) provides for judicial appointment of class counsel.¹³⁶ Judicial appointment of class counsel, at the outset of class action litigation, is another way in which the judicial system protects the interests of absent class members. Thus, pursuant to Rule 23(g), a court

134. *Hansberry v. Lee*, 311 U.S. 32 (1940).

135. FED. R. CIV. P. 23(a)(4).

136. FED. R. CIV. P. 23(g).

must evaluate proposed candidates to represent the class, examining counsel's experience, resources, and potential conflicts of interest, among other factors.¹³⁷ In addition, if more than one attorney seeks appointment as class counsel, a court must comparatively evaluate among competing candidates to represent the class.¹³⁸

Courts afford potential class members additional due process protections through other requirements of Rule 23. For example, no aggregate litigation may proceed as a class action unless the court certifies that the proposed action satisfies all the requirements of Rule 23(a),¹³⁹ and may be maintained as a class pursuant to one of the categories of Rule 23(b).¹⁴⁰ The early certification of a class ensures that there is sufficient cohesion of interest among class members to permit their claims to be resolved on an aggregate basis.¹⁴¹ If a court certifies a damage class action under Rule 23(b)(3), then class members must be afforded notice and an opportunity to opt out, among other rights.¹⁴²

One of the most important due process protections afforded by the class action rule is the requirement of judicial approval of any class action settlement.¹⁴³ Since 2003, Rule 23(e) now requires that judges conduct a formal "fairness hearing" prior to approving a class action settlement. At a fairness hearing, the court must finally certify the class; evaluate the settlement to determine if it is fair, adequate, and reasonable; and consider fee petitions of class counsel. The court must evaluate the settlement for both procedural and substantive fairness. In this fashion, the court serves as the ultimate fiduciary and guardian of the interests of absent class members.

Aggregate litigation conducted under the umbrella of multidistrict litigation, but outside the requirements and protections of the class action rule, affords individuals who are involved in an aggregate litigation none of these protections. Indeed, as the *Vioxx* litigation demonstrated, it is entirely possible for a court supervising a multidistrict litigation to determine that a proposed class action is not

137. FED. R. CIV. P. 23(g)(1).

138. FED. R. CIV. P. 23(g)(2).

139. FED. R. CIV. P. 23(a)(1)–(4). These are the requirements that the proposed class satisfy requisite numerosity, commonality, typicality, and adequacy of representation.

140. FED. R. CIV. P. 23(b)(1)–(3).

141. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 594 (1997) (discussing sufficient cohesion among class members to proceed as a class action).

142. FED. R. CIV. P. 23(c). Since 2003, the rule also permits judges, in their discretion to order that notice be provided in Rule 23(b)(1) and (b)(2) classes. However, the 2003 amendment to Rule 23 does not permit class members to opt-out of these mandatory classes. Notice to absent class members also must indicate that class members have the right to appear in the action with their own counsel, if they choose.

143. FED. R. CIV. P. 23(e).

suitable for class action treatment, but then for the attorneys to go off and cut a deal without regard for the requirements of class action litigation. For attorneys (on both sides of the docket) who wish to evade the strict requirements for resolving aggregate litigation, the quasi-class action is a wonderful construct, providing judicial cover without the burdens, roadblocks, and entanglements of due process.

B. The Quasi-Class Action as a End-Run Solution Around the Class Action Rule and Class Action Jurisprudence—The Evolution of the Concept

The emergence of the quasi-class action represents the logical convergence of two class action trends over the past three decades. This narrative embodies the increasing frustrations of the plaintiff and defense bar, as well as the judiciary, in resolving aggregate litigation. Against the backdrop of increasing impediments to settling aggregate claims, the actors involved in complex litigation have arrived at the quasi-class action as a favorable conceit to resolve massive litigation, favorable to all except perhaps the claimants involved in the litigation. As will be discussed below, the ascendancy of the MDL auspices has effectively freed the actors involved in aggregate litigation from most legal constraints, allowing parties to go off and negotiate deals liberated from the rule of law.

In order to comprehend how the quasi-class action has provided an ingenious construct that enables aggregate settlements, it is important to understand why the various actors involved in complex litigation have welcomed this concept. In the past thirty years, federal courts have heightened requirements for certification of litigation classes, and more stringently articulated the rigorous analysis standard for class certification.¹⁴⁴ After a brief period of experimentation with innovative multi-phase class action trial plans,¹⁴⁵ federal courts in 1995–1996 reacted by issuing a series of landmark decisions that rejected certification of litigation classes, especially in mass tort litigation arena.¹⁴⁶

144. See, e.g., *In re Hydrogen Peroxide Products Liab. Litig.*, 552 F.3d 305 (3d Cir. 2009); *In re IPO Sec. Fraud Litig.*, 471 F.3d 24 (2d Cir. 2006) (clarifying standards that courts must apply in conducting a rigorous analysis in order to grant class certification).

145. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (upholding class certification of torture and death victims of Ferdinand Marcos regime; multi-phase trial plan including statistical damage sampling); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (involving three phase trial plan, trying state of the art defense and liability for punitive damages in first phase).

146. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing class certification of a nationwide class of persons addicted to tobacco products); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (reversing class certification of a nationwide class of penile implant

The series of judicial decisions in the mid-1990s that tightened class certification requirements seriously affected the plaintiffs' bar's ability to pursue class litigation in federal court. The plaintiffs' bar reacted by regrouping and retreating—many attorneys determined to avoid federal courts altogether, and instead to pursue class litigation in state courts. This retreat to state courts ushered in a decade of rapidly expanding state court class action litigation, accompanied by forum-shopping for favorable venues and the emergence of so-called “judicial hell-holes,” so labeled because of the propensity of certain state courts to provide quick and easy class certification on the pleadings alone.

The ascendance of state court class litigation and easy class certification there precipitated its own backlash, which eventually resulted in efforts by the corporate defense bar to enact the Class Action Fairness Act of 2005.¹⁴⁷ CAFA provided a mechanism for corporate defendants to remove state class actions to federal court, where defendants could rely on the body of restrictive federal class action jurisprudence to defeat proposed class certification.¹⁴⁸ CAFA's legislative history clearly suggests that the legislative purpose in enacting CAFA was to provide corporate defendants with an alternative forum to—and some relief from—state court venues that unfairly favored class action plaintiffs.

In the same period that federal courts began to tighten the requirements for certification of litigation classes, federal courts also embarked on an examination of the concept of the settlement class.¹⁴⁹ The debate over the viability and criteria for settlement classes ultimately culminated in the Supreme Court's dual decisions in *Amchem* in 1997¹⁵⁰ and *Ortiz* in 1999.¹⁵¹ As is well-known, although the Supreme Court upheld the concept of a settlement class, the Court rejected the *Amchem* and *Ortiz* global asbestos settlement agreements that the district courts had approved in those two litigations. The Court's *Amchem* decision set forth important due process requirements (and constraints) on Rule 23(b)(3) settlement classes,¹⁵² while the Court's *Ortiz* decision likewise set forth three important criteria for Rule

claimants); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (reversing class certification of a nationwide class of hemophiliacs in the so-called “tainted blood products” litigation).

147. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4 (2005).

148. See 28 U.S.C. § 1453 (2006) (concerning CAFA removal provision).

149. See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1995) (examining the concept of a “settlement class” and setting forth requirements for court approval of a settlement class).

150. *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997).

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

152. *Amchem*, 521 U.S. at 613.

23(b)(1)(B) limited fund settlement classes.¹⁵³ In addition, the Court in *Ortiz* reiterated the important due process requirements it had set forth two years earlier in its *Amchem* decision.¹⁵⁴

For the purposes of this discussion, the importance of the *Amchem* and *Ortiz* decisions is that the Supreme Court made it more difficult for the practicing bar to negotiate and resolve aggregate litigation, by setting forth clear due process and other requirements that litigants must satisfy and that courts must consider in order to approve a proposed class action settlement.¹⁵⁵ Moreover, the *Ortiz* decision virtually ensured that few, if any, class actions would be approved under the Rule 23(b)(1)(B) limited fund provision.¹⁵⁶

By the end of the twentieth century, two class action trends were apparent: plaintiffs could be expected to encounter significant obstacles to certifying litigation classes in federal courts, and both sides of the docket would most likely encounter considerable impediments to negotiating and consummating class action settlements. While the first trend gave an advantage to the corporate defense bar sued in massive class litigation, the second trend clearly was problematic for the plaintiff and defense bars when both sides mutually desired settlement of massive litigation. The *Amchem* and *Ortiz* decisions also presented obstacles to federal judges who wished to expeditiously resolve massive litigation on their dockets, limiting the ability of judges to approve class action settlements subjected to due process objections.

Against this backdrop—and after CAFA in 2005 ensured that most class litigation would be resolved in federal court—the interests of the plaintiff and defense bars (and the judiciary) converged to encourage development of a means for resolving complex litigation outside the confines of the *Amchem* and *Ortiz* decisions. Thus, after 2005, corporate defendants involved in massive litigation led the way in favoring the multidistrict litigation statute as mechanism for resolving complex cases. While in many instances corporate defendants sued in class litigation continue to oppose class certification, in other instances when corporate defendants have strategically decided to settle their

153. *Ortiz*, 527 U.S. at 838–39.

154. *Id.* at 845.

155. Ironically, it is precisely these requirements and constraints that the Supreme Court has set forth in *Amchem* and *Ortiz* that Judge Weinstein, in his *Zyprexa* orders, has used as a justification and rationale for use of the concept of the quasi-class action. See *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230 (E.D.N.Y. 2007). In other words, Judge Weinstein views the *Amchem* and *Ortiz* decisions as obstacles to accomplishing settlements unbounded by the rule of law.

156. See, e.g., *In re Simon II Litig.*, 407 F.3d 125, 127–28 (2d Cir. 2005) (overturning class certification of a Rule 23(b)(1)(B) nationwide punitive damage tobacco class action based on theory of constitutional limits on the amount of punitive damages that may be imposed on a defendant; requirements of *Ortiz* not satisfied in proposed class).

potential liabilities, they have clearly favored MDL auspices as the means for accomplishing global peace.

Thus, whereas MDL procedure had once been something of a judicial backwater for large-scale litigation, MDL procedure rapidly has emerged in the twenty-first century as the preferred procedural umbrella under which to resolve aggregate litigation. Now, the Judicial Panel on Multidistrict Litigation almost immediately creates an MDL after the emergence of a defective products or pharmaceutical litigation.¹⁵⁷ For the most part, the plaintiffs' bar—frustrated at its inability to gain class certification in many federal courts—has willingly gone along with this shift in litigation strategy. In addition, MDL courts also have embraced their authority as an efficient way of docket-clearing massive litigation.

C. The Illegitimate Expansion of the Multidistrict Litigation Statute to Embrace the Quasi-Class Action

The shift in the twenty-first century of aggregate litigation to MDL courts under MDL auspices is somewhat ironic in light of the Judicial Panel on Multidistrict Litigation's historical resistance to creating mass tort MDLs.¹⁵⁸ The MDL Panel accomplished a major doctrinal breakthrough in 1991, when the MDL Panel reversed its longstanding opposition to creation of an asbestos MDL.¹⁵⁹ The panel's authorization of an asbestos MDL finally encouraged subsequent MDL panels to make increasing use of MDL procedures to resolve aggregate litigation.

The rationales justifying the MDL's panel's reversal of course in 1991 are worth noting, because the panel sounded the themes of judicial expediency, pragmatism, and fundamental justice in light of increasing docket congestion inspired by large-scale litigation. Thus, the panel noted that "we are persuaded that this [asbestos] litigation has reached a magnitude, not contemplated in the record before us in 1977, that threatens the administration of justice and that requires a new streamlined approach."¹⁶⁰ In a similar vein, the panel indicated the following:

157. This trend towards rapid creation of MDL forums for massive cases holds true for other types of class litigation, including securities and antitrust cases.

158. See, e.g., *In re A.H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 610 F. Supp. 1099 (J.P.M.D.L. 1985) (declining to create an MDL for Dalkon Shield litigation); *In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713 (J.P.M.D.L. 1985) (declining to create School Asbestos MDL); *In re Ortho Pharm. "Lippes Loop" Prods. Liab. Litig.*, 447 F. Supp. 1073 (J.D.P.M.D.L. 1978) (declining to create an MDL for Lippes Loop IUD litigation); *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.D.L. 1977) (declining to create an asbestos MDL).

159. See *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.D.L. 1991) (authorizing creation of an asbestos MDL after five previous refusals by MDL panels to authorize creation of an asbestos MDL).

160. *Id.* at 418.

The heyday of individual adjudication of asbestos mass tort lawsuits had long passed. . . . The reasons are obvious; the complexity of asbestos cases makes them too expensive to litigate; costs are exacerbated when each individual has to prove his or her claim *de novo*; high transaction costs reduce the recovery available to successful plaintiffs; and the sheer number of asbestos cases pending nationwide threatens to deny justice and compensation to many deserving claimants if each claim is handled individually. The backlog is eroding a fundamental aspiration of our judicial system to provide equality of treatment for similarly situated persons.¹⁶¹

The panels' new-found embrace of the MDL approach to resolving mass tort litigation in 1991 has inspired paradoxical, unintended consequences. On the one hand, the panel's 1991 decision authorizing creation of a nationwide asbestos MDL opened the floodgates to numerous, subsequent mass tort (and other) MDL litigations.¹⁶² On the other hand, it is worth remembering that the 1991 asbestos MDL was the incubator of the infamous *Georgine* global asbestos settlement,¹⁶³ which the Supreme Court repudiated in its 1997 *Amchem* decision. Ironically, then, the creation of the 1991 asbestos MDL contained the seeds of its own destruction.

Nonetheless, since 1991 the Judicial Panel on Multidistrict Litigation has been motivated to create MDLs for almost all massive litigation that emerges on the federal docket. Along with the increase in MDL proceedings, federal courts also have experienced a concomitant expansion of judicial authority in overseeing and managing MDL litigation.¹⁶⁴ Whereas in the first three decades of MDL history the MDL forum was perceived as a successful venue for resolving massive litigation, the usual auspices for ultimately resolving such litigation under an MDL umbrella was through the class action mechanism.¹⁶⁵ Thus, after an MDL court managed pretrial discovery and motions practice, these efforts often resulted either in a class certification

161. *Id.* at 419 (internal citations omitted).

162. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.33 (2004) (citing numerous mass tort and other MDLs).

163. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (reversing approval of global asbestos settlement class); *Georgine v. Amchem Prods. Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (approving of asbestos settlement).

164. For example, MDL judges can oversee test-cases of selected cases within the MDL, and can coordinate resolution of similar cases with state court judges. See MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 162 at § 22.36.

165. *Id.*; see also *id.* at n.1149 (noting that it is still an unresolved question whether, after certifying a class action in an MDL proceeding, an MDL court may then retain the class action for trial itself). In 1998, the Supreme Court held that an MDL court had no authority under 28 U.S.C. § 1407 to transfer an MDL case to itself for trial. *Lexecon, Inc. v. Milberg, Wiess, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998).

motion,¹⁶⁶ or in class settlement to be finalized and approved under the class action rule.¹⁶⁷

In the post-CAFA litigation landscape, however, while MDL forums have continued to provide fruitful venues for resolving aggregate litigation, some MDL judges and the parties involved now eschew the class action settlement within the MDL. In contrast to past practice, and with the tactic encouragement and complicity of MDL judges, self-interested parties instead now use MDL forums as means to negotiate, consummate, and finalize private deals outside the confines of the class action rule. The MDL procedural mechanism, then, has been co-opted into a useful tool for settling massive claims without the constraints imposed by class action procedure. The *Vioxx* and *Zyprexa* deals are perhaps the premier illustrations of precisely this phenomenon.

* * *

The MDL statute and MDL procedure was never intended to confer such broad power and authority on a federal court to provide judicial cover for privately negotiated backroom settlement deals that do not comport with the rule of law, are subject to scant checks for abuse or due process violations, and that resolve the claims of perhaps thousands or hundreds of thousands of absent claimants. This, however, is precisely the legacy of the quasi-class action.

The MDL statute, 28 U.S.C. § 1407, actually describes a meager and vague set of powers for MDL judges.¹⁶⁸ The statute indicates that when civil actions involving “one or more common questions of fact” are pending in different district courts, the Judicial Panel on Multidistrict litigation may transfer such cases to any district “for coordinated or consolidated pretrial proceedings.”¹⁶⁹ The statute further states that MDL judges “may exercise the powers of a district judge in any district *for the purpose of conducting pretrial depositions* in such coordinated or

166. See, e.g., *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001), *rev'd sub nom. In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002).

167. See, e.g., *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330 (N.D. Ohio 2001) (certifying settlement class); *In re Diet Drugs Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (certifying settlement class).

168. Almost the entire MDL statute describes the Judicial Panel on Multidistrict Litigation, and how the Panel is constituted, 28 U.S.C. § 1407(d); the grounds for initiation and creation of an MDL, 28 U.S.C. § 1407(b), (c); review of orders issued by an MDL judge, 28 U.S.C. § 1407(e); and the limitation excluding trial in the MDL forum, 28 U.S.C. § 1407(a). The statute also contains miscellaneous sections delineating civil action that may or may not be subject to MDL proceedings. 28 U.S.C. § 1407(g)–(h) (2006).

169. 28 U.S.C. § 1407(a).

consolidated pretrial proceedings.”¹⁷⁰ That is the extent of powers authorized to MDL transferee judges under the MDL statute. Over the past five decades, MDL judges have exercised authority to decide motions to remand cases from the MDL, coordinate and consolidate cases pending in different districts, identify differences in applicable law, and seek information from parties as to the status of cases in order to determine how to proceed with pretrial discovery and other motions.¹⁷¹

In addition, MDL judges have exercised authority to dispose of cases by ruling on the merits, by granting summary judgment. More recently, MDL judges have exercised authority to carve out limited issues classes to resolve common issues or try test cases originally filed in the transferee court or refilled in the transferee court.¹⁷² Summarizing the scope of judicial authority of an MDL judge, however, the FJC’s *Manual for Complex Litigation* simply concludes:

The transferee judge usually supervises discovery, decides motions, and, if called for, decides whether to certify a class action. Under the decentralized approach, the transferee judge would then remand the cases to their original districts for trial In other cases, grants of summary judgment or approvals of settlement have obviated remand to the transferee courts.¹⁷³

Thus, the express text of the MDL statute and the history of MDL procedure has been one of limited delegation of authority of a federal MDL judge to consolidate and coordinate pre-trial proceedings. Over time, this authority has expanded to encourage settlements under MDL auspices, but always within the purview of the class action rule. After the Supreme Court in *Amchem* repudiated a global class action settlement consummated in the asbestos MDL—largely because of due process defects—the Court inadvertently spurred on a movement by actors seeking global resolution of large-scale liabilities to retain the good offices of the MDL proceeding, but to avoid the class action rule altogether in achieving ultimate settlement. Hence, in the post-*Amchem* era, it is not surprising to see the embrace of the quasi-class action by Judge Weinstein in the *Zyprexa* litigation, and Judge Fallon in the *Vioxx* litigation, as a means of accomplishing an end-run around the rule of law. In the realm of unintended consequences, this cannot possibly be

170. 28 U.S.C. § 1407(b) (emphasis added). The statute also indicates that the MDL Panel “may prescribe rules for the conduct of its business not inconsistent with the Acts of Congress and the federal Rules of Civil procedure.” 28 U.S.C. § 1407(f). This, however, is a power of the Panel, rather than the MDL transferee judge.

171. *MANUAL FOR COMPLEX LITIGATION (FOURTH)*, *supra* note 162, at § 22.36.

172. *Id.* (citing examples).

173. *Id.*

what the Court intended in its *Amchem* and *Ortiz* decisions.

III. THE QUASI-CLASS ACTION AS THE EMBODIMENT OF LAWLESS AGGREGATE CLAIMS RESOLUTION

The *Zyprexa* and *Vioxx* litigations present two contrasting examples of use of the quasi-class action concept. Arguably, Judge Weinstein's invocation of the quasi-class action construct in the *Zyprexa* litigation illustrates an admirable application of the concept; Judge Weinstein employed this theory to enable him to adjust the private attorney fee contracts that would have extracted high contingency fees from claimants. In this instance, Judge Weinstein's invocation of the quasi-class action was used for a commendable end, which was to protect claimants from excessive attorney fees.

On the other hand, Judge Fallon invoked the quasi-class action conceit to enable him to issue post-settlement orders that affected the rights of non-settling parties; in exercising this authority under the rubric of the quasi-class action, Judge Fallon became an active participant in enforcing provisions of a private settlement deal that had not been subject to class fairness scrutiny, which orders resulted in the dismissal of certain claimants' claims. Judge Fallon's use of the quasi-class action conceit in the *Vioxx* litigation, then, was a far cry from Judge Weinstein's invocation of the concept in *Zyprexa*, and represents a troubling expansion of the concept. In this instance, deployment of the quasi-class action concept was used to harm the interests of at least some segment of the universe of potential *Vioxx* claimants.

As discussed above, it is easy to understand why various actors involved in complex aggregate litigation have embraced MDL proceedings and the concept of the quasi-class action. Thus, plaintiffs and defendant may now mutually enjoy the good offices of an MDL judge to settle massive liabilities without concern that any agreement they reach will have to undergo the rigorous certification and fairness analysis required by the formal class action rule. In this regard, Judge Weinstein was shrewdly correct in his appreciation that the *Amchem* and *Ortiz* decisions created impediments to resolution of mass tort litigation. Instead, parties involved in MDL proceedings now can simply go off and cut whatever deal satisfies the interests of the attorneys involved in negotiations, without fear of judicial check.

On the other hand, it could not possibly have been the intention of the Supreme Court, in deciding *Amchem* and *Ortiz*, to encourage litigants to simply circumvent the mandates of those decisions by creating a new pseudo concept that sounds like a class action, but evades all due process requirements. The quasi-class action represents the worst-

possible outcome after *Amchem* and *Ortiz*: aggregate class settlements not subject to class action due process requirements.

It is well worth recalling that the underlying *Amchem* litigation involved a controversial narrative of a private, backroom collusive settlement that benefitted some class members at the expense of others, resolved the defendants' massive asbestos liabilities, and amply rewarded class counsel with attorney fees. The backroom, collusive nature of the so-called *Georgine* deal inspired a firestorm of criticism,¹⁷⁴ and ultimately caused the Supreme Court to repudiate the deal in *Amchem*, and to reject a similarly infected deal in *Ortiz*. Yet, in spite of *Amchem* and *Ortiz*, with the advent of the *Zyprexa* and *Vioxx* deals, we have returned to an era of back-room settlements that inspired such controversy in the 1990s.

The objection may be raised that there is nothing wrong with privately negotiated settlement deals. Indeed, private settlements frequently are accomplished by counsel, or under the umbrella of mediation or arbitration. However, in ordinary litigation the client is actually present to oversee settlement negotiations, and to modify, approve, or disapprove a proposed settlement. In the mediation or arbitration, the client gives prior consent to be bound by the determinations of an impartial intermediary.

Modern MDL proceedings that consolidate thousands of claims, on the other hand, are unlike other private settlement auspices. Detached from class action status, claimants who are the subject of an MDL proceeding are largely unmoored from representation. While class certification, at a minimum, ensures adequate representation at the outset of proceedings—both by adequate representatives and class counsel—individuals involved in an MDL proceeding have no assurance that anyone is protecting their interests. Furthermore, there are few mechanisms that provide claimants with meaningful opportunities to consent to ongoing negotiations or the results of negotiations.

Thus, MDL settlement negotiations that are conducted outside the auspices of the class action mechanism encourage precisely the type of self-dealing and collusion among the attorneys which became the object of criticism in *Amchem*. With judicial embrace of the notion of a quasi-class action, we have returned to a pre-*Amchem* era of lawless aggregate claims resolution. Worse still, under the rubric of the quasi-class action, the federal judiciary now provides an equally quasi-judicial imprimatur to such dealings.

174. See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Roger C. Cramton, *Individualized Justice, Mass Torts, And "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995) (devoting entire issue to critical commentary of the *Georgine* settlement).

IV. CONCLUSION

In 2009, discussing his role as the Special Master overseeing the World Trade Center Victims' Compensation Fund,¹⁷⁵ Ken Feinberg used this opportunity to embrace the concept of the quasi-class action.¹⁷⁶ As the administrator of both the WTC Fund and the Gulf Coast Claims Facility,¹⁷⁷ it is easy to appreciate Ken Feinberg's endorsement of the concept of the quasi-class action, with its free-form approach to aggregate claims resolution.

Given his prestige and authority as a special master involved in numerous large-scale litigations, Ken Feinberg's embrace and endorsement of the concept of the quasi-class action ought to be viewed with some alarm. Even more troubling is the support and adoption of the quasi-class action concept in other quarters,¹⁷⁸ with suggestions that the authority of MDL judges ought to be expanded in significant ways, but amendment of the MDL statute.

Private parties should not be permitted to hijack MDL procedure, either to negotiate away their liabilities under the cloak of law, or to gain ample attorney fees. MDL procedure should not be usurped to permit back-room deals consummated free from the constraints of due process that are intended to protect absent individuals. The current MDL statute and the history of MDL proceedings do not support expansive powers of federal judges overseeing such consolidated cases to provide judicial cover for privately negotiated class action deals not subject to class action due process requirements. Moreover, the MDL statute does not provide authority for an MDL judge to exercise power over recalcitrant

175. See Air Transportation Safety and System Stabilization Act, IV, Pub. L. No. 107-42, 115 Stat. 230 (2001) codified at 49 U.S.C. § 40101 (2006); Kenneth R. Feinberg et al., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at http://www.usdoj.gov/final_report.pdf.

176. Kenneth Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473, 476. (2009) (citing to *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 230 (E.D.N.Y. 2007)). Feinberg stated:

Read Judge Weinstein's *Zyprexa* opinion last year. He's coined a new phrase: a "quasi-class," mainly the principles governing due process and notice in Rule 23 may be, and should be, transferrable to any aggregative claim, even if it's not a Rule 23 class, dealing with notification of claimants, legal fees, opt-out rights or rights not to participate in an aggregative settlement; a very valuable opinion discussing how in the twenty-first century some of the principles governing notice in Rule 23 ought to also be deemed important in a non-23 aggregative situation. He was focusing on the *Zyprexa* case involving the settlement of 700 MDL non-class claims.

177. The Gulf Coast Claims Facility website is located at <http://gulfcostclaimsfacility.com>. The website includes a "Frequently Asked Questions" section, located at <http://gulfcostclaimsfacility.com/faq>. See Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Litigation—A Fund Too Far*, 78 LA. L. REV. 819 (2011).

178. See, e.g., PRINCIPLES OF AGGREGATE LITIGATION ch. 3 (2010).

claimants who object to private deals consummated outside the purview of the class action rule.

The notion of the quasi-class action is not justified by statute, rule, precedent, or any other authority. It is a judicially-created label intended to provide judges overseeing MDL or other aggregate proceedings with an aura of judicial legitimacy. The quasi-class action is the antithesis of the rule of law, providing instead a mantle of legality to unbounded, freewheeling aggregate claims resolution. As such, this dubious doctrine ought to be repudiated.