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MASS SETTLEMENT RIVALRIES

*Adam S. Zimmerman**

Private attorneys in class actions and civil bankruptcies increasingly compete with federal prosecutors, agencies, and state attorneys general, for the same funds, from the same defendant, for the same harm, and often, on behalf of the same groups of people. To some, government attorneys offer less expensive and more accountable representation for victims of widely disbursed harm. To others, politically insulated private attorneys in class actions and bankruptcies offer more effective representation for parties. But few have examined the dynamic way public and private settlements impact each other when they are implemented at the same time.

This Article argues that dueling public and private settlements offer several potential advantages—including more efficient representation, more oversight, and more complete forms of compensation to different subgroups of victims. In their current form, however, settlement rivalries can fall short of these goals. Among other things, rival settlements: (1) may duplicate cases proceeding on separate tracks without coordinated judicial oversight; (2) introduce new uncertainty into litigation financing by unpredictably affecting the number of victims who ultimately participate in a class settlement, and accordingly, the fees that private attorneys recover; and (3) confuse unrepresented victims with separate, rival settlement offers. In this way, these new settlement rivalries share some of the same advantages and disadvantages once presented by rival class action settlements, where attorneys for putative class members competed in different courts to certify class actions for overlapping groups of people.

Accordingly, this Article recommends three reforms that tap settlement rivalries' potential benefits. First, courts should formally or informally coordinate review over dueling public and private settlements. Second, courts should streamline notice and opt-out provisions to reduce victim confusion and unintended waivers of rights. Third, government lawyers should adopt the distribution guidelines proposed by the American Law Institute to consistently balance victims' competing interests and reduce

* Associate Professor of Law, Loyola Law School, Los Angeles. I owe deep thanks to the insightful comments of Judge Jack B. Weinstein, Robert Rabin, Alison Frankel, Maggie Lemos, David Jaros, Anita Krishnakumar, Dana Remus, Amanda Rose, Georgene Vairo, Verity Winship, Sergio Campos, and all of the members of the St. John's and Loyola Law School Scholarship Colloquium. I also owe a special debt to my wife for her endless patience with this project.

strategic behavior among parties.

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I. INTRODUCTION

Just as the last decade saw the collapse of “global settlements”—all-encompassing agreements that, once and for all, resolved thousands of claims against one defendant¹—the next must contend with the rise of “mass settlement rivalries.” In a mass settlement rivalry, private and public lawyers jockey to compensate groups of victims with funds from the same wrongdoer. Consider the following examples:

- A year after private attorneys commenced class actions against the nation’s largest banks alleging they defrauded non-profits in a complex bid-rigging scheme, federal agencies and state attorneys general settled with the same defendants, establishing a large settlement fund for the same set of victims. Private attorneys argued that the government fund “hijacked” their own settlement efforts: “[t]hat’s what happens when you have two different processes . . . the defendant can pick door number one or door number two.”²
- After Scott Rothstein’s Ponzi scheme collapsed in October 2009,

1. See, e.g., Howard Erichson & Benjamin Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 267 (2011) (“Ever since the Supreme Court rejected a pair of asbestos settlement class actions in the late 1990s . . . mass tort lawyers largely abandoned any hope that settlement class actions would be the key to finding closure.”).

2. Nate Raymond, *Plaintiffs Lawyers in Muni Bond Derivative MDL Object to UBS Bid-Rigging Settlement*, THE AMERICAN LAWYER (May 11, 2011). Government attorneys, by contrast, argued the class action frustrated state sovereign interests and suffered from conflicts of interest. Nate Raymond, *NY AG Office to Plaintiffs Lawyers: Stay Out of Our Bid-Rigging Cases*, THE AMERICAN LAWYER (May 12, 2011).

federal agents seized tens of millions of dollars of his assets—including exotic cars, over twenty properties, and fifteen million illicitly wired to Morocco. But after creditors filed a petition against Rothstein in bankruptcy to recover their losses, federal authorities sold the same contested assets in a separate criminal proceeding, dividing the proceeds among a different set of victims.³

- Shortly after Computer Associates Technologies, Inc. (Computer Associates) settled a class action that alleged the company unlawfully inflated its quarterly earnings reports, Computer Associates reached an agreement with the U.S. Attorney's Office to establish a \$225 million restitution fund to compensate shareholders injured by the scandal.⁴

Rival compensatory settlements reflect a new development among government attorneys and private lawyers. Historically, plaintiff class counsel worked in tandem with prosecutors and regulators to supplement law enforcement efforts, while compensating large groups of victims.⁵ But as public officials were encouraged by federal and state legislatures to aggressively seek victim compensation, they increasingly found themselves competing with private attorneys in class actions and civil bankruptcies to compensate the same group of people—oftentimes in different jurisdictions, according to different legal standards, and subject to different degrees of judicial scrutiny.

Some commentators—including myself⁶—have highlighted the comparative benefits that government attorneys and private lawyers offer in this growing rivalry over mass compensation.⁷ But relatively

3. Jordan D. Maglich, *While Rothstein Victims Wait, Appellate Court Hears Argument Over Entitlement To Forfeited Assets*, PONZITRACKER (Jan. 7, 2013, 8:47 PM), <http://www.ponzitracker.com/main/2013/1/7/while-rothstein-victims-wait-appellate-court-hears-argument.html>. See also Caitlin F. Saladrigas, *Corporate Criminal Liability: Lessons from the Rothstein Debacle*, 66 U. MIAMI. L. REV. 435 (2012). The Eleventh Circuit recently reversed the district court decision to permit the government seizure and distribution, concluding that the government should not have forfeited Rothstein's assets. See *In re Rothstein*, 2013 WL 2494980 (11th Cir. June 12, 2013).

4. *United States v. Computer Assocs.*, Deferred Prosecution Agreement (Sept. 22, 2004), available at <http://news.findlaw.com/wp/docs/ca/usca904defpagr.pdf>.

5. See, e.g., Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 17, 35 (2000).

6. Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011) (tracing the rise of federal agency based settlement funds, which collected over \$10 billion over the past decade); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011); Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012).

7. See Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 345–46 (2008) (concluding that the SEC's new role in providing investor compensation

few have examined the dynamic effect that overlapping public and private compensation schemes have on each other. Dueling public and private settlements, in theory, offer some advantages over a single large settlement, including more efficient representation, more authority to collect information and funds, more oversight over mass settlements, and more complete forms of compensation to different subgroups of victims.⁸ In their current form, however, public and private settlement rivalries may fall short of this ideal, compromising fair and efficient representation and compensation.

To be sure, compensation is not the only goal of mass litigation. In some areas of law—like securities and consumer protection law—many argue that the primary function of large-scale litigation is to deter bad behavior, not to compensate injured parties.⁹ In such cases, rival settlements also may frustrate goals of optimal deterrence.¹⁰ For

in securities fraud cases unnecessarily duplicates private securities fraud class actions); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1134–41 (2008) (proposing a framework for the SEC to determine whether to use its power to create a victims' compensation scheme when private and public actions are available); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012).

8. See, e.g., Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1922 (2000).

9. For representative articles that challenge compensatory goals in securities class actions, see, e.g., Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1312–15 (2008) (“Rule 10b-5 class actions fail to provide meaningful compensation to the class members on whose behalf they are brought.”); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1545 (2006) (“From a compensatory perspective, the conclusion seems inescapable that the securities class action performs poorly.”); Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1507 (1996) (observing that, in securities cases, “[t]he compensation rationale does not persuasively justify the present measure of damages.”); but see James J. Park, *Shareholder Compensation as Dividend*, 108 MICH. L. REV. 323, 340–42 (2009) (noting the limitations of some arguments, like diversification, to real securities fraud losses). For similar critiques that challenge the compensatory objectives of small-claim, consumer class actions, see Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2008) (“But small-stakes class actions serve no insurance function. Rather, the only function they serve is deterrence.”); Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104 (2006) (“In reality, there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all. Nor is there any economic reason to fret that entrepreneurial plaintiffs’ lawyers are being overcompensated.”).

10. Indeed, multiple layers of public enforcement may also complicate deterrence. See, e.g., Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013) (describing lack of coordination among executive agencies and recommending coordinated enforcement through White House intervention); Amanda M. Rose, *The Multi-Enforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010) (describing costs to optimal deterrence when multiple enforcers—the SEC, state regulators, and private attorneys general—participate in securities regulation). But see Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. — (forthcoming 2015) (manuscript at 59), available at

defendants, rival public and private settlements add to the cost of enforcement or may overly deter. For plaintiffs, the undefined threat of rival compensatory settlements may mean under-deterrence—weakening incentives for private attorneys to invest in valid class actions out of a fear that, at some undefined point in time, government attorneys will “hijack” their lawsuit with the same offer of relief for victims.

This Article takes a different tack. I take the settlements on their own terms and assume compensation remains an important objective. Many mass settlements still offer very substantial awards to victims. Moreover, class action settlements and public officials increasingly devote substantial resources to compensating victims, even when the stakes are relatively small. Accordingly, in this Article, I instead ask whether settlement rivalries between public and private actors further or frustrate their express goals of compensatory justice.

This Article proceeds in three parts. Part II explores the features of mass settlement rivalries in major national settlements. In many cases, just as private lawyers tried to settle large claims for compensation with defendants, a public actor chose to settle similar claims of wrongdoing. Public attorneys’ increasing competition with private attorneys to compensate victims reflects two distinct developments in public law. First, as victims’ rights advocates successfully moved public law institutions toward “a more victim-centered justice system,”¹¹ federal and state officials have been encouraged—and sometimes required—to seek victim compensation.¹² Second, large corporate scandals prompted actors in the executive branch—the Department of Justice (DOJ),¹³

<http://ssrn.com/abstract=2400189> (arguing that when individuals pay out-of-pocket to settle with the SEC the result “increases the deterrence of the SEC’s enforcement and reduces the circularity of its compensation.”).

11. Zimmerman & Jaros, *supra* note 6. The Mandatory Victim Restitution Act of 1996, for example, was hailed as part of a move “toward a more victim-centered justice system,” which would help transform a criminal justice system that Congress believed was ignoring the plight of victims. Matthew Dickman, *Should Crime Pay: A Critical Assessment of the Mandatory Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688–89 (2009).

12. *See, e.g., A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) (statement of Sen. Hatch); 141 Cong. Rec. H1302, H1306 (daily ed. Feb. 7, 1995) (statement of Rep. Foley) (“For far too long we have forgotten the innocent victims of crime.”).

13. *See, e.g., Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep’t Components, U.S. Attorneys*, at 2 (Jan. 20, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (“Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.”); FEDERAL TRADE COMM’N POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES, 68 Fed. Reg. 45,820 (Aug. 4, 2003) (“situations can arise, for example, when significant aggregate consumer injury results from relatively small individual injuries not justifying the cost of a private lawsuit, or when direct purchasers do not

federal agencies,¹⁴ and state attorneys general—to shift their focus from punishing individual offenders to using coordinated enforcement actions to reform business practices. The newly adopted strategy, sometimes organized in White House task forces,¹⁵ created an opportunity to design compensation schemes for large classes of victims harmed by wealthy corporate wrongdoers.

As set forth in Part III, rival settlements may, in fact, promise advantages over global settlements monopolized by a single set of attorneys. First, competition theoretically may mean more efficient representation as defendants bargain with private and public attorneys over who may best represent victims' interests. Second, rival settlements may offer more total compensation, particularly when public and private actors have statutory authority to collect money from different defendants. Finally, dueling representation promises more compensation for different subgroups of victims in the settlement, as public and private attorneys vie with each other to represent different group interests in the overall settlement.

However, Part III also shows that, in their current form, settlement rivalries may fall short of the goals of more effective representation and compensation by: (1) threatening duplicative actions that proceed on separate tracks without coordinated judicial oversight; (2) introducing new uncertainty into litigation and settlement financing; and (3) confusing unrepresented victims with separate, rival settlement offers. In this regard, settlement rivalries among public and private actors share some of the same advantages and disadvantages as rival state class action settlements. Before Congress passed the Class Action Fairness Act of 2005, which pushed many class actions into federal court, commentators complained that attorneys for putative class members competed in different state courts to certify class actions for overlapping groups of people.¹⁶

sue”).

14. See, e.g., U.S. SEC. & EXCH. COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT FOR 2009, at 11, available at <http://www.sec.gov/about/secpar/secpar2009.pdf#sec1> (observing SEC's primary goals are to “take prompt action to halt the misconduct, sanction wrongdoers effectively, and, where possible, return funds to harmed investors.”).

15. Andrias, *supra* note 10. See also Adam S. Zimmerman, *Presidential Settlements*, 163 U. PA. L. REV. (forthcoming 2015) (manuscript at 25–26), available at <http://ssrn.com/abstract=2414748>.

16. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462–63 (2000) (detailing problems of waste in dueling class actions); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 516 (1996). Although competitive class actions still exist, the Class Action Fairness Act (CAFA) has reduced their number by permitting defendants to remove state class actions to federal court with minimal diversity. 28 U.S.C. § 1332(d) (granting federal jurisdiction over interstate class actions where the amount in controversy exceeds \$5 million and at least one plaintiff and one defendant are citizens of different states). See also Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion*, 66 VAND. L. REV. 1053 (2013); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 469, 469 (presenting empirical evidence that in litigation over corporate mergers,

Part IV offers three reforms that tap into the theoretical advantages and persistence of rival settlements, while ameliorating their downsides: (1) reducing duplication by permitting a single court to formally or informally coordinate review over dueling public and private settlements; (2) reducing strategic behavior and uncertainty among parties by calling for public actors to adopt the distribution guidelines proposed by the American Law Institute in large-scale litigation; and (3) streamlining notice and opt-out provisions to reduce victim confusion and unintended waivers of rights.

II. THE RISE OF SETTLEMENT RIVALRIES

A. Settlement Rivalries Defined

In a settlement rivalry, public officials and private attorneys attempt to establish a settlement fund with money from the same wrongdoer, on behalf of the same beneficiaries, often run by same administrators, for the same kinds of harm. Such cases may involve high profile defendants, like Adelphia Communications,¹⁷ British Petroleum,¹⁸ Apple,¹⁹ and Computer Associates,²⁰ or high profile scandals, like Bernard Madoff or Tom Petters—known as the “Minnesota Madoff,”

which is expressly excepted from CAFA, class counsel “regularly file identical claims in more than one forum and then compete with each other for position in settling with defendants”).

17. Adelphia paid \$715 million in restitution to defrauded shareholders, shortly before filing for bankruptcy, even though, under bankruptcy’s “priority-rule,” shareholders receive funds after creditors. According to Adelphia’s agreement with federal prosecutors, the Attorney General and SEC would disburse funds to victims “in such forms and amounts [to be determined] in their sole discretion.” Letter from David Kelley, U.S. Attorney, Southern District of New York, to Alan Vinegrad et. al., Counsel to Adelphia 3 (Apr. 23, 2005) (on file with author).

18. British Petroleum paid over \$53 million into a restitution fund for direct and indirect purchasers of propane to settle criminal price fixing charges as part of a larger settlement with the United States Attorney for the Northern District of Illinois. See Deferred Prosecution Agreement, United States v. B.P. Am. Inc., No. 07 CR 683 (N.D. Ill. Oct. 25, 2007), available at <http://www.justice.gov/criminal/vns/docs/2007/oct/10-25-07bpameriac-dpa.pdf>. That settlement was reached on the heels of a private class action settlement for the same conduct.

19. Press Release, State Attorney General E-book Settlements, \$69 Million Attorneys General Settlement Provides Money Back for Certain E-book Purchases, (Oct. 17, 2012), available at <http://www.pnewsire.com/news-releases/69-million-attorneys-general-settlement-provides-money-back-for-certain-e-book-purchases-174552291.html>; Complaint, Petru v. Apple, 11-CV-03892 (N.D. Cal. Aug. 9, 2011).

20. Computer Associates settled criminal securities violations by, among other things, agreeing to set up a \$225 million fund for victims. See Deferred Prosecution Agreement, United States v. Computer Assocs. Int’l, No. 04-837 (E.D.N.Y. Sept. 22, 2004). The fund administrator in that case, Kenneth R. Feinberg, struggled to determine how much, and how differently, to compensate claimants in the second fund. United States v. Computer Assocs., Plan of Allocation for the Restitution Fund, 2 n.2 (June 2005) [hereinafter *Computer Associates*, Plan of Allocation] (describing disputed claims by holders, purchasers, and sellers of defendants’ stock), available at <http://www.computerassociatesrestitutionfund.com/pdf/carflplan.pdf>.

for his own multi-billion dollar Ponzi-scheme that spanned over a decade.²¹

It should come as no surprise that American-style litigation—which involves a federal system built on government factionalism,²² and talented, private entrepreneurial lawyers²³—encourages rivalries. For years, public and private actors commenced parallel actions against corporate defendants.²⁴ Congress increasingly assigns federal regulators, state attorneys general, and private attorneys competing responsibilities for interpreting and enforcing federal law.²⁵ Private attorneys also frequently vie over the position of lead counsel in class actions and other forms of mass litigation.²⁶

But settlement rivalries differ in that they typically involve cases where public attorneys offer compensation to individuals though a massive settlement—sometimes after private counsel separately investigates, conducts discovery, and nears final settlement on behalf of the same group of victims.²⁷ Public and private rivalries thus raise new

21. Anthony Lake, *Tom Petters, The “Minnesota Madoff,” Gets 50 Years Out of Potential 335 Years for \$3.7 Billion Ponzi Scheme*, FEDERAL CRIMINAL DEFENSE BLOG (Apr. 9, 2010), available at <http://www.federalcriminaldefenseblog.com/2010/04/tom-petters-the-minnesota-madoff-gets-50-years-out-of-potential-335-years-for-3-7-billion-ponzi-scheme/>.

22. See Jacob Gersen & Adrian Vermeule, *Delegating To Enemies*, 112 COLUM. L. REV. 2193, 2204 (2012) (“The working premise of separation of powers is that the divergent interests of different government institutions will keep them at odds with each other.”); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 2 (2d ed. 1998); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127, 1130 (2000).

23. See Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 397 (1988) (asserting that the American concept of private attorneys who advance public law “celebrates the power of attorneys to do good, to overcome structural obstacles to the vindication of legal rights, and therefore to bring justice to those who may be priced out of the market”).

24. See, e.g., Harry Kalven & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941) (“explor[ing] the possibilities of revitalizing private litigation to fashion an effective means of group redress” to supplement administrative law enforcement); Sergio J. Campos, *Class Actions All the Way Down*, 113 COLUM. L. REV. SIDEBAR 20, 22 (2013).

25. See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Gersen & Vermeule, *supra* note 22; Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1461–83 (2011) (examining interactions of multiple agents as a mechanism for information gathering); Rose, *supra* note 10, at 2176.

26. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 115 (1991); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 FORD. L. REV. 1985 (2011) (describing contests between “lead” and “disabled” lawyers in class actions and other forms of multidistrict litigation); Vanessa Blum, *Breyer Doles Out Lead Counsel Roles in HP Suits*, THE RECORDER (Mar. 4, 2013) (describing battle for lead counsel in HP shareholder litigation).

27. See Alison Frankel, *Welcome to the MBS Party, SEC . . . You’re Only 3 Years Late*, REUTERS (Feb. 2, 2012), <http://blogs.reuters.com/alison-frankel/2012/02/10/welcome-to-the-mbs-party-sec-youre-only-3-years-late/> (observing that agencies and federal prosecutors sued years after plaintiffs’ firms

risks for defendants—who no longer may rely on private class litigation or bankruptcy to globally resolve claims for compensation—and plaintiff attorneys, who face new risks and competition as they attempt to recover their upfront investment in mass litigation.

Rival settlements between public and private actors take several forms. Congress may create a rival settlement scheme, as it did when it reopened the September 11 Victim Compensation Fund in 2010.²⁸ That fund followed a landmark \$700 million private settlement between thousands of rescue workers and the City of New York.²⁹ It, like other public settlements of its kind, requires private litigants to waive their rights in private litigation in exchange for a public payment.³⁰

Presidents may also forge rival settlements.³¹ The BP disaster, for example, produced two avenues of relief, litigation in federal district court and an independent compensation fund established at the behest of the President, pursuant to the Oil Pollution Act.³² The result involved ongoing jockeying between counsel who pushed for a global settlement in federal court and those who sought relief before the Gulf Coast Claim Facility.³³

But most rival settlements are produced by other executive branch officers, who forgo criminal or civil trials in exchange for settlements with corporate defendants that seek structural reforms and compensation for large groups of victims like a class action. These actions include those commenced by state attorneys general,³⁴ federal prosecutors,³⁵ and

“sunk thousands of hours and millions of dollars into their [mortgage backed securities] cases”).

28. James Zadroga 9/11 Health and Compensation Act of 2010, P.L. 111-347 (2010).

29. Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES, Nov. 19, 2010, at A1.

30. See, e.g., September 11 Victim Compensation Fund, Interim Final Rule, 66 Fed. Reg. 66274 (Dec. 21, 2001) (“The Fund offers the eligible claimant an alternative to litigation.”); United States Dep’t of Health Resources and Services Admin., *National Vaccine Injury Compensation Program*, HRSA.GOV, <http://www.hrsa.gov/Vaccinecompensation/> (last visited Feb. 2, 2014).

31. Zimmerman, *supra* note 15 (documenting Presidential Settlements throughout United States history that resolve mass compensation claims like class actions).

32. See, e.g., *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*, 2011 WL 6817982 (E.D. La. Dec. 28, 2011).

33. That rivalry culminated in a decision by Judge Charles J. Barbier—the federal judge overseeing thousands of lawsuits lodged against British Petroleum (and others) for the Gulf Coast Oil Spill—to pay fees for the lead attorneys in Multidistrict Litigation by deducting money from awards to people (and accordingly their attorneys) who applied to the Gulf Coast Claim Facility, the no-fault alternative to the litigation, then overseen by Special Master Kenneth R. Feinberg. John Schwartz, *Plaintiffs’ Lawyers in a Bitter Dispute Over Fees in Gulf Oil Spill Cases*, N.Y. TIMES, Dec. 3, 2011, at A30.

34. Lemos, *supra* note 7.

35. Zimmerman & Jaros, *supra* note 6, at 1411–14; Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 900 (2007) (collecting agreements and finding that of the \$4.9 billion sought by prosecutors against corporate defendants, 86% was not for fines, but for large civil compensation awards).

federal agencies.³⁶ Such compensation funds increasingly rival class actions and bankruptcies in their attempt to provide compensation on a massive scale through a large compensation fund.

As such “executive branch” compensation funds increasingly mirror multi-million dollar class action settlements, they themselves must overcome similar challenges to ensure that victims receive notice, compensation, and fair representation. Some use mass mailings, toll-free phone services, and “victim–witness coordinators” to alert victims to their rights in large criminal, agency, or state attorney restitution funds.³⁷ While few detailed rules exist to notify or resolve claims between multiple parties, the notice forms used in both public restitution schemes and private class actions may be strikingly similar. They both may require victims to give up rights to sue in civil litigation.³⁸ In some cases, the inattentive victim may not notice that a prosecutor, and not a private plaintiff attorney, commenced the original action.³⁹

Large public settlements may also rely upon the same sophisticated administrators used in the civil system to develop distribution plans for potential victims.⁴⁰ Federal courts, for example, may refer complex

36. Gretchen Morgenson, *Countrywide to Distribute Settlement to Its Clients*, N.Y. TIMES, July 21, 2011, at B1 (describing the unprecedented settlement struck between the Federal Trade Commission and Countrywide Home Loan for excessive fees during the mortgage crisis); Press Release, Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage Fraud (July 15, 2010), available at <http://sec.gov/news/press/2010/2010-123.htm>; Press Release, FTC Urges Consumers to Cash Restitution Checks Mailed by Wachovia Bank (Jan. 13, 2009), available at <http://www.ftc.gov/news-events/press-releases/2009/01/ftc-urges-consumers-cash-restitution-checks-mailed-wachovia-bank> (describing \$150 million fund established by FTC and OCC settlement with Wachovia Bank for victims of telemarketing fraud).

37. *The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn*, Hearing Before the S. Comm. on the Judiciary, 111th Cong. 4 (2009) (statement of Rita Glavin, Acting Assistant Att’y Gen., Criminal Div., United States Dep’t of Justice) (“Because some financial frauds involve the victimization of hundreds of people, the Department also expends considerable resources finding the victims in the first instance. The Department’s many victim–witness coordinators and law enforcement officials work tirelessly to help ensure that what money is recovered reaches the victims of the crimes.”), available at <http://judiciary.senate.gov/pdf/09-02-11GlavinTestimony.pdf>.

38. See, e.g., *In re W.R. Huff Asset Mgmt. Co., LLC.*, 409 F.3d 555, 563 (2d Cir. 2005) (describing settlement requiring third party releases).

39. Compare, e.g., Notice of Claims Process for Distribution of Restitution Fund (Jan. 2005) (notice for the criminal restitution fund in Computer Associates), available at <http://www.computerassociatesrestitutionfund.com/pdf/carflnot.pdf>, with Proof of Claim and Release (Dec. 2002), available at http://securities.stanford.edu/1010/CA98/2003919_r06x_98CV04839.pdf (notice for the civil class action settlement in Computer Associates).

40. For example, the United States Attorney and SEC picked Kenneth R. Feinberg, recently dubbed by the Wall Street Journal as the “Special Master of America,” to oversee the \$225 million fund for defrauded stockholders in Computer Associates. Ashby Jones, *Spotlight on Ken Feinberg: Special Master of America*, BLOGS.WSJ.COM (Jan. 14, 2010, 11:06 AM), <http://blogs.wsj.com/law/2010/01/14/spotlight-on-ken-feinberg-the-special-master-of-america>. Similarly, in 2002, former New York Attorney General Eliot Spitzer settled civil and criminal charges under New York State’s Martin Act with the nation’s largest investment banks for over \$1.4 billion. Frances McGovern, a well-known scholar in the area of mass torts who has administered many multi-

criminal restitution orders to magistrate judges and special masters, who, in turn, may “require additional documentation or hear testimony” from victims.⁴¹ In cases where courts do not review the settlement agreement at all, prosecutors, agencies, and state attorneys general still may refer cases to a third party.⁴²

Finally, public restitution funds, like class actions, bankruptcies, and other forms of complex private litigation, struggle to serve multiple classes of victims who may have very different interests in the award. After forty-nine state attorneys general unveiled a \$25 billion settlement with the nation’s largest banks to provide mortgage relief to millions of homeowners,⁴³ they also sought to reconcile very different interests.⁴⁴ Those wrongfully forced out of their homes on the basis of forged or “robo-signed” documents sought compensation from their former mortgage servicers.⁴⁵ Others, trapped in homes worth far less than the value of their mortgages, sought refinancing arrangements.⁴⁶ More indirect victims, those living in regions hit hard by the mortgage foreclosure crisis, hoped the settlement would finally stabilize housing prices in their neighborhoods. The final settlement would offer something for all of these parties.⁴⁷

billion dollar settlement funds, was appointed to oversee the distribution. *See* SEC v. Bear, Stearns & Co., Inc, 626 F. Supp. 2d 402, 407 (S.D.N.Y. 2009).

41. 18 U.S.C. § 3664(4)(6); *United States v. Brennan*, 526 F. Supp. 2d 378, 384 (E.D.N.Y. 2007) (referring sufficiency of \$90 million in victim restitution to federal magistrate). *See also* *United States v. Salim*, 287 F. Supp. 2d 250, 258 (S.D.N.Y. 2003).

42. *See, e.g.*, *Deferred Prosecution Agreement, United States v. B.P. Am. Inc.*, No. 07-CR-683, ¶ 13 (N.D. Ill. Oct. 25, 2007), available at <http://www.justice.gov/criminal/vns/docs/2007/oct/10-25-07bpameriac-dpa.pdf> (calling for British Petroleum to appoint a “Third Party Administrator” to be approved by the Department of Justice). *See also* *Deferred Prosecution Agreement, United States v. Beazer Homes USA, Inc.*, 3:09-cv-113-W, ¶ 6(B) (W.D.N.C. July 1, 2009) (requiring the appointment of a Claims Administrator to oversee victim restitution fund to defrauded homebuyers).

43. Joseph Smith, *First Take: Progress Report from the Monitor of the National Foreclosure Settlement*, OFFICE OF MORTGAGE SETTLEMENT OVERSIGHT, 2 (Aug. 29, 2012), available at <https://www.mortgageoversight.com/wp-content/uploads/2012/08/ProgressReport08292012.pdf> (The banks participating in the settlement included Bank of America, CitiMortgage, Ally Financial, J.P. Morgan Chase, and Wells Fargo.).

44. *Id.*

45. Nelson D. Schwartz & Julie Creswell, *Political Push Moves a Deal on Mortgages Inches Closer*, N.Y. TIMES, Jan. 24, 2012, at B1; Gretchen Morgenson, *The Deal is Done but Hold the Applause*, N.Y. TIMES, Feb. 12, 2012, at BU1.

46. Nelson D. Schwartz & Julie Creswell, *Mortgage Plan Gives Billions to Homeowners, But with Exceptions*, N.Y. TIMES, Feb. 10, 2012, at B1.

47. The bulk of the settlement, approximately \$20 billion, went to one million American homeowners who would have their mortgage debts reduced or their loans refinanced at a lower interest rate. Another \$1.5 billion was devoted to the 750,000 people who lost their homes to foreclosure between 2008 and 2011—each receiving checks between \$1,500 and \$2,000. Finally, regulators earmarked more than half of the settlement to homeowners in two states—Florida and California—to reflect the disproportionate number of loans that were delinquent or exceeded the value of the underlying property in those states. *Id.* Banks also received millions in credits for foreclosing on homes

Different public and private law standards for compensation aggravate conflicts between victims. The Federal Trade Commission may choose to compensate both direct and indirect victims of a business practice that violates antitrust law,⁴⁸ even when only direct victims may recover in a private class action.⁴⁹ Under the “relation back doctrine,” all assets involved in the crime become forfeitable assets as of the date of the crime, which, in turn, may compensate all victims injured “as a result of” the crime.⁵⁰ But when that same defendant files—voluntarily or involuntarily—for bankruptcy, a trustee must prioritize the division of assets to very different parties, like secured and unsecured creditors.⁵¹

Conflicts between victims, however, may pale in comparison to the conflicts that victims experience with government attorneys themselves. Politically ambitious attorneys general may prioritize a rapid resolution and big headlines at the expense of victims’ different interests in compensation.⁵² But even the most well-meaning prosecutors may seek deals at odds with victims, to obtain information about other criminal parties or to reduce the collateral impact of a large award on innocent third parties, like employees or shareholders.⁵³

more quickly to stabilize housing markets in distressed neighborhoods. Shaila Dewan & Jessica Silver Greenberg, *Foreclosure Deal Credits Banks for Routine Efforts*, N.Y. TIMES, Mar. 27, 2012, at B1 (observing that banks can erase more than \$2 billion of their obligation under the settlement by “donating or demolishing abandoned houses” and another \$1 million to help defaulted homeowners move out).

48. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999) (holding the FTC may recover the same relief on behalf of indirect consumers). Critics complained that the FTC distribution distorted antitrust law by enlarging the class of victims who could obtain relief. See Roxane C. Busey, Chair, American Bar Ass’n Section of Antitrust Law, *Response to the Commission’s Request for Comment on the Remedial Use of Disgorgement* (Mar. 13, 2002); see also Press Release, Federal Trade Commission, *FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market* (Nov. 29, 2000), available at <http://www.ftc.gov/opa/2000/11/mylanfin.htm> (describing dissenting views of Commissioner Thomas Leary as a “backdoor approach” to monetary recoveries unavailable under antitrust law).

49. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

50. See, e.g., 18 U.S.C. § 3663A (requiring that prosecutors seek restitution for certain crimes whenever “an identifiable victim or victims” suffer any “physical injury or pecuniary loss”).

51. Karen M. Gebbia, *Debt and Crime: Inevitable Bedfellows. The Intersection of Fraud, Bankruptcy and Asset Forfeiture*, 42 GOLDEN GATE U. L. REV. 525 (2012).

52. Perhaps, unsurprisingly, Eliot Spitzer and Christopher Christie, two prosecutor-turned-governors, sought to create massive restitution funds in connection with highly publicized corporate misconduct. See Barbara Moses, *The “Discovery” of Analysts Conflicts on Wall Street*, 70 BROOK. L. REV. 89, 99–105 (2004) (describing the evolution of the global settlement between the investment banks and government actors and former New York Attorney Eliot Spitzer); See also *SEC v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009) (chastising the government in same settlement for “tortured restructuring and embarrassing consequences” that resulted from the failure to identify investor losses). See also Stephanie Saul, *Bristol Meyers Seen Settling Case by U.S.*, N.Y. TIMES, June 6, 2005 (describing terms of Chris Christie’s \$300 settlement with Bristol Meyers), available at <http://www.nytimes.com/2005/06/06/business/06bristol.html>.

53. See, e.g., John Ashcroft, Op-Ed, *Bailout Justice*, N.Y. TIMES, May 5, 2009, at A27 (“Think of the effect on the community if these companies had been shuttered: employees would have lost their

Historically, public and private attorneys occupied distinct roles in enforcement actions. For public attorneys, compensation remained at most a secondary goal to deterring misconduct.⁵⁴ For private attorneys, the class action served both goals,⁵⁵ but when a settlement also involved government lawyers, the class action provided the principal form of compensation. Public regulators sought to ensure compliance with the law and to send a message to other regulated entities; any compensation or restitution flowed to injured parties under the procedural safeguards that existed for the “coattail” class action. This division of responsibility, at least theoretically, minimized the public resources that government lawyers devoted to compensation, while maximizing their influence over decisions about law enforcement and deterrence.

But increasingly, executive actors have begun to forge settlements that look like class actions, after private attorneys have already commenced a class action. This is a result of two trends: (1) the increasing impact of the victims’ rights movement on public laws requiring restitution, and (2) executive branch actors’ evolving role in the regulation of corporate behavior.

B. Settlement Rivalries Rise

The rise of settlement rivalries, as I have discussed elsewhere,⁵⁶ is the product of new developments in public law that have fundamentally changed the role of federal prosecutors, agencies, and state attorneys general.

First, victims’ rights advocates and others successfully convinced public officials to revise their traditional offender-based goals of punishment and deterrence to include restitution for victims. For federal prosecutors, the victim’s rights movement made compensation for victims an important criminal justice priority and pushed Congress to adopt several federal statutes aimed at addressing the role of the victim

jobs, shareholders and pensioners would have lost their savings and countless people in need of hip and knee replacement would have been out of luck . . .”); *Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements Hearing Before the Subcomm. on Commercial and Admin. Law*, 111 Cong. 93 (2009) (statement of former United States Attorney Charles Rosenberg) (“the consequences of corporate crime can touch a staggering number of citizens”), available at http://judiciary.house.gov/hearings/pdf/Rosenberg_090625.pdf.

54. *SEC v. Fischbach Corp.*, 133 F.3d 170, 176 (2d Cir. 1997) (noting that compensatory goals remained secondary to interests of enforcement and that proceeds of disgorgement funds need not be distributed to investors); *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 336 (1980).

55. See, e.g., William B. Rubenstein, *On What a Private Attorney General Is—and Why It Matters*, 59 VAND. L. REV. 2129, 2142–55 (2005) (mapping overlapping public and private interests served by class actions and other lawsuits).

56. See Zimmerman, *supra* note 6; Zimmerman & Jaros, *supra* note 6.

in the criminal justice system.⁵⁷ With each act, Congress encouraged prosecutors to take a more forceful role in recovering victim compensation.

Federal agencies' power to seek restitution, by contrast, flows from their authority to seek injunctive relief in federal court—an outgrowth of New Deal decisions that expanded their regulatory and compensatory role.⁵⁸ But federal agencies only actively began seeking mass restitution under that authority after 2002, also in response to growing calls for victim compensation.⁵⁹

Finally, state attorneys general, at common law, often lacked authority to seek compensation directly for injured parties outside of their “quasi-sovereign interests.”⁶⁰ But Congress, expressly acknowledging the limitations of class actions as a form of victim compensation, expressly granted state attorneys general new authority to recover funds for victims in the Hart–Scott–Rodino Act of 1976. Congress and state legislatures supplemented state attorney general authority to recover compensation for injured consumers, home buyers, and investors.⁶¹ But after the fallout from the 1998 Tobacco Settlement, state attorneys general also made victim compensation a significant component of their settlements with large corporate defendants.

As it happens, public officials started to focus more intently on restitution just when they found themselves in a position to negotiate

57. Chief among these were the Victim and Witness Protection Act of 1982, the Victims' Rights and Restitution Act of 1990, the Mandatory Victims Restitution Act of 1996, and the Crime Victims' Rights Act of 2004.

58. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 400 (1938) (approving delegation of flexible finings power to administrative agencies); *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946) (holding that wartime price administrator may seek restitution against landlords charging excessive rents); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 337 (1960) (holding Secretary of Labor was authorized to seek restitution against employers for lost wages). *See also Zimmerman, supra* note 6, at 520.

59. Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT LAW 189, 209–211 (2014).

60. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

61. Congress, for example, has empowered state attorneys general to seek consumer redress from activities ranging from unlawful fraudulent credit transactions to telemarketing services. *See, e.g.,* 15 U.S.C. § 1679h(c)(1) (authorizing suit for violations of federal law governing credit repair organizations); *id.* § 1681s(c) (2006 & Supp. V 2011) (credit reporting agencies); *id.* § 5712 (2006) (pay-per-call services); *id.* § 6103 (2006 & Supp. V 2011) (telemarketers). Many state statutes specifically authorize the attorney general to sue as *parens patriae* to recover damages for citizens for an even broader range of conduct. FLA. STAT. ANN. § 626.909 (West 2012) (authorizing *parens patriae* actions for damages on behalf of Florida victims of unauthorized insurance transactions); N.J. STAT. ANN. § 2A:53A-21(c) (West 2000) (authorizing *parens patriae* actions on behalf of New Jersey victims of bias crimes); P.R. LAWS ANN. tit. 32, § 3341 (2004) (authorizing *parens patriae* actions for damages on behalf of Puerto Rico consumers); R.I. GEN. LAWS § 40-8.2-6 (2001) (authorizing *parens patriae* actions for damages on behalf of Rhode Island victims of medical assistance fraud); WASH. REV. CODE § 19.86.080 (2010) (authorizing *parens patriae* actions for restitution on behalf of Washington victims of consumer protection violations). *See generally* Lemos, *supra* note 7, at 496–97.

generous compensation awards on behalf of large classes of victims. In response to post-Enron corporate fraud scandals, prosecutors, agencies, and state attorneys general adopted a “bold new prosecutorial mission”⁶² to regulate corporate America by using the threat of indictment to encourage sweeping institutional reforms. The result, as one practitioner complained, is a system that for all practical purposes offers “two ways to settle a class action”—one with a “private attorney general” and the other with the real “attorney general,” herself.⁶³

III. THE COSTS AND BENEFITS OF SETTLEMENT RIVALRIES

A. Rivalries' Benefits

Settlement rivalries offer several theoretical advantages over global settlements managed by a single firm or steering committee. First, private and public actors bring different resources to the table. Before the pleading stage, public actors enjoy more subpoena and coercive power.⁶⁴ After the pleading stage, private actors can often devote more resources to discovery. Rival actions also have more tools to recover funds. Federal agencies, prosecutors, and state attorneys general may have standing to seek funds against third parties that private plaintiffs cannot,⁶⁵ public authorities may attach and collect funds from parties,

62. Garrett, *supra* note 35, at 858.

63. Nate Raymond, *Plaintiffs Lawyers in Muni Bond Derivative MDL Object to UBS Bid-Rigging Settlement*, AMERICANLAWYER.COM (May 11, 2011), <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202493650539>.

64. Unlike private lawyers, who must meet stiff pleading burdens before obtaining discovery, federal agencies and prosecutors can monitor and discover bad acts before discovery using a range of tools. For example, the SEC has long relied on a “Wells Process,” whereby prospective defendants or respondents are afforded an opportunity to submit a writing—essentially a brief—to the Commission and its staff after the staff’s investigation is completed, but before the staff has made a recommendation to the Commission. *See generally* 17 C.F.R. § 202.5(c). Wells submissions provide a way to ensure the SEC possesses information related to an impending enforcement action and that defendants have an opportunity to respond privately to an investigation. Paul S. Atkin et al., *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 8 FORDHAM. J. OF CORP. & FIN. LAW 368, 378–83 (2008) (describing history and basis for Wells Submissions).

65. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that the EEOC can recover damages and other relief on behalf of an employee who could not under a mandatory arbitration agreement); Gilles & Friedman, *supra* note 7, at 642–43 (describing advantages enjoyed by states attorney general in *parens patriae* litigation); Donald C. Langevoort, *Reading Stoneridge Carefully: A Duty-Based Approach to Reliance and Third-Party Liability Under Rule 10b-5*, 158 U. PA. L. REV. 2125, 2127–28 (2010) (“The Court’s choice of reliance as the crucial element indicates the Court’s comfort with having different liability outcomes in Rule 10b-5 cases depending on whether the action is an SEC enforcement or criminal prosecution (where reliance is not required) or private litigation (where it is).”); Zimmerman & Jaros, *supra* note 6 (describing powers enjoyed by prosecutors to pursue restitution from third parties). Indeed, in a new article that comprehensively evaluates every SEC settlement fund established between 2002 and 2013, Professor Urska Velikonja finds that, more than half of the time, the SEC compensates investors for losses where a private lawsuit is either totally

using criminal forfeiture laws that private plaintiffs cannot,⁶⁶ or, in the case of state attorneys general, government attorneys enjoy discretion to pursue actions under either criminal or civil law. Private attorneys, by contrast, may enjoy more private resources, financing, and incentives to pursue corporate wrongdoing.⁶⁷ In the same ways that private and public actors have long complemented each other's efforts to deter wrongdoing, so may their shared attempts to compensate people.⁶⁸

But the rivalry itself between public officials and private attorneys also may offer advantages. Just as proponents of a government-sponsored "public option" for health insurance argued that public insurance plans would pressure private insurers to reduce premiums or increase benefits,⁶⁹ one could imagine that government attorneys impose similar incentives on private collective litigation when they provide a public option for mass compensation. Information gathered about individual claim values in one mass settlement may also inform values in a second, supplemental settlement brokered by public attorneys.⁷⁰

Public and private compensation rivalries also may make an individual's decision to opt out of a class action more meaningful.

unavailable or impractical. Velikonja, *supra* note 10, at 6-7. In other cases, third-party defendants—executives, the auditor, and investment banks—contributed more than \$1.24 billion to SEC settlement funds. *Id.* at 48.

66. Anthony Martucci, *Advocating for Asset Forfeiture in the Post-Madoff Era: Why the Government, Not A Bankruptcy Trustee, Should Be Responsible for Recovering and Redistributing Assets from Feeder Funds and Net Winners*, 63 CASE W. RES. L. REV. 599 (2012) (describing the superior powers of federal prosecutors in collection under federal asset forfeiture laws).

67. Martin Pritinkin & Ezra Ross, *The Collection Gap: Underenforcement of Corporate and White Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453 (2011) (arguing that billions in government fines and restitution are often unrecovered by overburdened government attorneys).

68. For an illustrative example of the interplay between private and public counsel in compensating large groups of victims hurt by a "feeder fund" to investments made by Bernard Madoff, see *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *6-10 (S.D.N.Y. May 9, 2013). There, after private parties filed suit, defendants successfully stayed discovery under the heightened pleading standards that govern securities litigation. Those barriers did not apply to then-Attorney General Andrew Cuomo, who then launched a separate inquiry. His investigation, which involved the production of over 11 million documents and 37 depositions, convinced the NYAG that the feeder fund had fraudulently misled clients about Madoff for more than a decade, while knowing or strongly suspecting that his was not a legitimate operation. However, "once the action was filed, the NYAG effectively stopped doing anything at all." *Id.* at 7. Rather, private parties bore the lion share of the discovery following the government investigation. According to the court, it was the potential cost of dealing with the "multipronged attack from the Private Plaintiffs" that motivated the defendant to return to settlement mode—"a mode from which it had walked away" after the NYAG filed its complaint. *Id.* at *9. See also Alison Frankel, *N.Y. AG Rebuffed in Clash with Private Lawyers on Parallel Claims*, THOMSON REUTERS (May 13, 2013), available at <http://blogs.reuters.com/alison-frankel/2013/05/13/n-y-ag-rebuffed-in-clash-with-private-lawyers-with-parallel-claims/>.

69. Richard H. Thaler, *A Public Option Isn't a Curse, or a Cure*, N.Y. TIMES, Aug. 16, 2009, at BU4.

70. See, e.g., *Dell SEC v. Robert W. Davis*, No. 1:10-cv-01464 (D.D.C. Nov. 15, 2011) (approving SEC "Fair Fund" to automatically supplement funds from private class actions without requiring separate claims for compensation).

Some have questioned whether class actions—which generally require claimants to affirmatively “opt out” of the settlement to preserve their rights—actually offer a real option when claimants cannot afford to litigate their cases individually.⁷¹ A separate, concurrent, settlement forged by a public attorney, by contrast, gives claimants another realistic option outside of the class action settlement.⁷²

More empowered claimants may also help courts and policymakers identify whether a mass settlement, offered by the government or private attorneys, offers real value. When courts certify a private class action for settlement purposes, they often consider the rate at which people opt out to determine whether the settlement is “fair, reasonable and adequate.”⁷³ Public funds, like the September 11 Victim Compensation Fund or the Gulf Coast Compensation Fund, have been evaluated under the same standard.⁷⁴ In both cases, commentators have questioned whether opt out rates provide a meaningful signal about the quality of a settlement, given that people may decide to forgo participating in a settlement for many reasons that have little to do with the fairness of a large settlement fund.⁷⁵ Rival settlements, however, may encourage

71. Compare Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 80 (2007) (gathering cases where courts “find an absence or a small number of objectors to be powerful evidence that the proposed settlement is fair”), with *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (observing as significant that out of 5,000 notices “not a single objection . . . had been received”), and *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 961 (E.D. Tex. 2000) (taking judicial notice that, “despite a potential class of thousands—if not millions—of owners” of Toshiba laptop computers, fewer than 30 objections were filed in response to the “well-publicized announcement of this proposed Settlement Agreement”).

72. Of course, this would be the case only if the public action truly is an “option” the victim can choose, as opposed to something she’s forced into. As set out *infra*, competing public and private settlements also may create a race to the bottom or discourage class litigation entirely.

73. See, e.g., *DeLoach v. Philip Morris Cos., Inc.*, No. 1:00CV01235, 2003 WL 23094907 (M.D.N.C. Dec. 19, 2003) (finding that small number of opt outs warranted higher-than-usual compensation for counsel); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d at 425 (observing as significant that out of 5,000 notices “not a single objection . . . had been received”); *Shaw*, 91 F. Supp. 2d at 961 (taking judicial notice that, “despite a potential class of thousands—if not millions—of owners” of Toshiba laptop computers, fewer than 30 objections were filed in response to the “well-publicized announcement of this proposed Settlement Agreement”).

74. Many commentators considered the September 11 Victim Compensation Fund a success because over 97% of all potential victims chose to join the fund. However, the fund would not have successfully attracted families without separate, organized assistance from private lawyers providing free services. See, e.g., LLOYD DIXON & RACHEL KAGANOFF STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS 40 n.46 (Rand 2004), available at http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG264.pdf (detailing the success of the Fund but observing that over 1,100 attorneys provided free legal services to over 1,700 Fund applicants); Larry S. Stewart, *No Victim Left Behind*, TRIAL MAGAZINE, July 2004 (estimating the value of free legal services at \$350 million).

75. Leslie, *supra* note 71, at 80 (gathering cases where courts “find an absence or a small number of objectors to be powerful evidence that the proposed settlement is fair”); ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:48 (4th ed. 2002) (“Courts have taken the position that one indication of the fairness of a settlement is the lack of or small number of objections.”).

more meaningful settlement decisions by claimants, and accordingly, send a clearer signal to courts that one settlement offers fairer outcomes.

Putting aside opt out rates, rival settlements may also help inform public and private attorneys, as they negotiate awards and procedures in lump-sum settlements. Information gathered about individual claim values in one mass settlement may also inform values in a second, supplemental settlement brokered by public attorneys.⁷⁶ For example, less than two weeks before Merck publicly agreed to pay \$950 million to settle criminal and civil claims brought by the federal government over the company's marketing of the painkiller Vioxx, the private plaintiffs in a parallel Vioxx litigation filed a little-noticed emergency motion to hold back a percentage of the government's award for their own attorney fees. The Court found that there was a significant "disconnect" between the private attorneys' work and the DOJ settlement fund.⁷⁷ But a decent argument could be made that the private bar's well-developed theory of liability, scientific evidence, and individualized settlements in their own cases, likely contributed to the size of the government's \$950 million dollar award.⁷⁸ In the BP litigation, for example, the district court found that the lead plaintiffs in the multidistrict litigation improved transparency, as well as potential awards, in the rival government-created Gulf Coast Claim Facility.⁷⁹ Such information may be particularly useful in settlement-only class actions, where parties cannot easily identify rational settlement amounts and there is little to no chance of litigation.⁸⁰

76. See, e.g., *Dell SEC v. Robert W. Davis*, No. 1:10-cv-01464 (D.D.C. Nov. 15, 2011) (approving SEC "Fair Fund" to automatically supplement funds from private class actions without requiring separate claims for compensation).

77. *In re Vioxx Products Liability Litigation*, MDL No. 1657, 2012 WL 10548, at *3 (E.D. La. Jan. 3, 2012).

78. For example, the civil settlement in Zyprexa had already set aside over \$43 million to reimburse Medicare, Medicaid, and other welfare expenditures by the United States and 49 state governments. See *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 405 (E.D.N.Y. 2009) (describing parallel proceedings and government payouts). When the United States sought to recover similar losses through a criminal restitution agreement with Eli Lilly in another court, it was able to rely on individualized private settlements to estimate its total award. *Id.* Notably, no formal procedures existed to coordinate the criminal and civil actions. Instead, the district court charged by the Judicial Panel for Multi-District Litigation to coordinate all federal civil cases against Eli Lilly, informally worked with the criminal court and other state courts to ensure the civil settlement was fair. See *id.* at 402–08 (describing informal coordination efforts).

79. See, e.g., *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, 2011 WL 6817982 (E.D. La. Dec. 28, 2011). For example, based on an application of the plaintiffs' counsel in the private litigation, the court (1) ordered the GCCF to inform claimants of their right to counsel, (2) to provide translated documents, and (3) to avoid communicating directly with represented parties. The court also noted that the private litigants pressed for a more "liberal causation standard" and for "punitive damages," which also enhanced the "settlement value of compensatory claims" before the GCCF. *Id.* at 2–3.

80. Howard M. Erichson, *The Problem of Settlement Class Actions*, GW. U. L. REV.

Finally, when rivals compete, they improve the chances that smaller groups of people within the large settlement receive adequate representation. Private and public attorneys acting alone—albeit for different reasons—have incentives to ensure that the total settlement is large enough to effectively deter future violations of the law. But rival settlements may also encourage attorneys to tailor their settlement scheme to lure different stakeholders, with different interests, who may not benefit as much from a single, global settlement.

In this regard, settlement rivalries among public and private actors share some of the same advantages as rival class action settlements, where attorneys for putative class members compete in different courts to certify class actions for the same groups of people. Professor John Coffee, for example, once recommended giving claimants more opportunities to drop out of settlement funds they do not like, by permitting rival plaintiff attorneys to organize competing class actions to attract claimants unsatisfied with a class settlement.⁸¹ By way of example, Coffee asks readers to imagine a class settlement where members of an investor class are split into two groups. One group receives 80% of their losses based on a securities fraud claim, while the second group, who purchased stock at a later time, receives half as much, only 40%.⁸²

Assume that the court indicates that it would certify an opt-in class [for the second group] if sufficient investors choose to opt-in. This message is included in the notice mailed to the class in connection with the original proposed settlement. In fact, only a handful of investors choose to opt-out of this new class action On this basis, the small number of opt-outs in the face of a clear alternative might appropriately be taken as an indication of implied consent by investors who purchased during the latter period. In short, implied consent can be fairly implied when there is a real choice, but not when the only choice is a Hobson's choice.⁸³

By creating a rival class action for the second group of investors, so the argument goes, one obtains the advantages of competition and “increases the choices available to class members, without increasing the risks of collusion.”⁸⁴ Coffee's solution assumes that judges and parties can coordinate rival efforts to notify potential claimants—which,

(forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243155.

81. John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 436–37 (2000).

82. Coffee posits that members of the second group may be willing to accept a lower average award because the stock market already priced in much of the bad information by the time they purchased their stock. *Id.* at 434.

83. *Id.*

84. *Id.*

as set forth below, may not always be the case. But his larger point remains: rival settlements may encourage public and private attorneys to maximize the value of a large settlement for different subgroups of victims whose interests may not always be served in a single action.⁸⁵

Thus, rival settlements may, in theory, promise some advantages over global settlements monopolized by a single set of attorneys. First, rival settlements may offer more total compensation, particularly when public and private actors have statutory authority to collect money from different defendants. Second, competition theoretically offers more efficient representation. Duel settlements arguably put downward pressure on the cost of settlement; provide more information to public and private attorneys negotiating over lump-sum awards; and offer claimants more meaningful settlement options. Finally, dueling representation promises more compensation for different subgroups of victims in the settlement—as public and private attorneys vie with each other to represent different stakeholders’ interests in the overall settlement agreement.

B. Rivalries’ Costs

But rival settlements raise different concerns, such as wasting resources, discouraging attorneys from pursuing even meritorious class actions, and confusing claimants. They may also compensate individuals according to different standards than the existing civil system, creating undesirable opportunities for strategic “settlement shopping.”

First, rival settlements risk waste. When parties file two suits seeking relief for the same wrong, they may use scarce public resources on overlapping discovery, expert witnesses, and in very rare cases, duplicative trials.⁸⁶ Preclusion rules in civil procedure, which ordinarily bar subsequent lawsuits arising between the same parties arising out of the same occurrence, do not apply with the same force to public and private lawsuits.⁸⁷ But aside from the traditional costs of duplicative

85. See, e.g., Nancy Morawetz, *Bargaining, Class Representation and Fairness*, 54 OHIO ST. L.J. 1 (1993) (articulating a “mixed-model” of fairness that balances the utilitarian interest in maximizing the total recovery for the class, against the defendants’ costs structure and the need to ensure that the settlement does not unfairly exclude individual members of the class).

86. CHARLES A. WRIGHT ET AL., 18 FEDERAL PRACTICE AND PROCEDURE § 4403, at 15 (2d ed. 2013); *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979) (observing that, for that reason, preclusion doctrine “rests on the finality of judgments in the interest of the end of litigation”); *Mitchell v. Nat’l Broad. Co.*, 553 F.2d 265, 272 (2d Cir. 1977) (without preclusion “the core rationale of the rule of res judicata—repose—would cease to exist”).

87. *Spinelli v. Capital One Bank, USA*, 2012 WL 3609028, at *3 (M.D. Fla. Aug. 22, 2012) (“a state’s sovereign interests cannot be compromised or impeded by a private settlement agreement”); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 308 (2002) (federal agencies’ sovereign interests in

litigation, resource concerns grow more serious when government restitution funds compete with class action settlements, because both class actions and government restitution funds may involve substantial settlement costs.

Large settlement systems require expensive forms of notice, fairness hearings, and private fees.⁸⁸ And while government restitution funds do not necessarily involve the private fees of a class action, they still involve other administrative and opportunity costs. As government attorneys expend limited resources to process claims, federal agencies, state attorneys general, and prosecutors may even retain additional private counsel to distribute publicly obtained awards.⁸⁹ Large funds also require state agents to devote limited government resources away from other criminal and regulatory enforcement matters to mass compensation. For criminal prosecutors, complex restitution schemes can delay sentences, impede criminal investigations, and prevent the prosecutor from obtaining cooperation from other criminal defendants.⁹⁰ For agencies, government funds may divert resources needed to develop regulations, prevent new violations, or commence other enforcement actions.

Competing public and private settlements also may create a race to the bottom or discourage meritorious class litigation. Private attorneys do not control the pace at which the courts entertain an action, and the existence of another simultaneous suit on behalf of the same class before government attorneys—sometimes without any judicial review—makes the race to judgment very risky. Class counsel may decide that it is in her own best interest to settle the action very quickly and for far less than the value of the claim, just to guarantee that she is compensated for her private investment in the dispute. Defendants, aware of the substantial pressure to settle, may respond by “low-balling” class counsel. And whatever gains come from the competition to prosecute the defendant may be lost as defendants agree not to oppose class

providing compensation trump predispute resolution agreement); *In re General Motors Corporation Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979) (striking down a settlement reached with state attorneys general serving on a lead counsel committee with private lawyers that failed to include private counsel in the deal).

88. See *supra* Part II.A.

89. Cf. Roger Fairfax, *The Delegation of the Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 416–19 (2009) (describing the trend of “prosecution outsourcing” to private attorneys); UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE: SEC, ADDITIONAL ACTIONS NEEDED TO ENSURE IMPROVEMENTS IN PLANNED ENFORCEMENT DIVISION ACTIONS 24–29 (Aug. 2007), available at <http://www.gao.gov/new.items/d07830.pdf> (highlighting challenges, administrative costs, and delays associated with SEC collection efforts). But see Velinkonja, *supra* note 10, at 30 (finding that “unlike in private litigation, the cost of distributing the fair fund is often borne by the sanctioned firm” and not the SEC).

90. Zimmerman & Jaros, *supra* note 6, at 1418–19.

counsel's application for a side deal that assures class counsel a hefty fee, if class counsel agrees to the lowball offer.

Concurrent public restitution settlements also introduce new uncertainty in mass litigation that “crowds out” even well-founded class action litigation. When plaintiffs cannot package their claims together as a single unit, they no longer receive the benefits of offering defendants “total peace.”⁹¹ Moreover, public settlements may require that the claimants waive rights to private litigation in exchange for the distribution;⁹² or they may foreclose private class action litigation.⁹³ With respect to the latter concern, courts increasingly refuse to certify class actions when state attorneys general or federal agencies act to address the same harm, on the grounds that the agency action is ostensibly “superior” to a class settlement.⁹⁴ Given that public settlement efforts are growing—in the past six years, the SEC alone recovered ten times the amount of money than a decade ago⁹⁵—such awards increasingly raise concerns for private attorneys who risk investing in even meritorious class action litigation without recovery.⁹⁶

91. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (“From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements.”); *id.* at 313 n.44 (“[T]he settlement amount to which DeBeers has agreed must be based in large part on the number of potential class members and on securing global peace.”); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1185 (2013) (“Defendants want peace—and they are often willing to pay for it. Plaintiffs therefore may stand to gain if they can package all of their claims together and sell them to the defendant (i.e., settle) as a single unit; that is, they can charge a premium for total peace.”).

92. *See, e.g.*, *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (observing in massive EEOC settlements that “[i]t also goes without saying that the courts can and should preclude double recovery by an individual”); *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971) (establishing escrow fund to prevent “double liability”).

93. *See, e.g.*, *Gardner v. First Am. Title Ins. Co.*, No. 00-2176, 2003 U.S. Dist. LEXIS 1815, at *26 (D. Minn. Jan. 27, 2003); *Ford Motor Co. v. Magill*, 698 So. 2d 1244, 1245 (Fl. Dist. Ct. App. 1997) (dismissing purported class action because the National Highway Traffic Safety Administration “accorded present owners of the vehicles a remedy to secure a correction of the problem to their vehicle”).

94. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7AA FED. PRAC. & PROC. CIV. § 1779 (3d ed. 2009) (collecting cases); Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Actions*, 18 GEO. J. LEGAL ETHICS 1419 (2005) (collecting cases); Lemos, *supra* note 7, at 505 (federal courts regularly permit *parens patriae* actions to take the place of class actions, holding that the class mechanism is an “‘inferior method of adjudication’ if the attorney general is pursuing a *parens patriae* action seeking the same sort of remedies from the same defendant”) (collecting cases).

95. *Compare Stoneridge Inv. Partners v. Scientific Atlanta*, 552 U.S. 148, 166 (2008) (observing that between September 2002 and 2008, the SEC has collected “over \$10 billion in disgorgement and penalties, much of it for distribution to injured investors”), with Rory Flynn, *SEC Distribution Plans in Insider Trading Cases*, 48 BUS. LAW. 107, 108 (1992) (finding SEC recovery between 1985 and 1992 totaled \$1 billion).

96. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012); *See also* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 TUL. L. REV. 1809, 1813 (2000).

Moreover, when rival settlements compensate different victims under different standards, they encourage strategic “settlement shopping” and complicate judicial review. Some victims may raise unnecessary objections in civil litigation if they believe they have an edge with the prosecutor, agency, or state attorney general. Strategic behavior may also compromise criminal justice or regulatory goals; prosecutors may not obtain evidence they need to move ahead with a criminal case, particularly if victims believe they stand to benefit monetarily by slowing down the criminal case. Different standards may also complicate judges’ efforts to coordinate review of public restitution and civil damage settlements. Even where a single judge oversees the distribution, multiple standards may unnecessarily complicate the assessment of the overarching settlement between the corporate defendant, prosecuting attorneys, regulatory bodies, plaintiffs’ class counsel, and victims.

In the *Computer Associates* case, for example, the federal prosecutor appointed Kenneth Feinberg as a special master to distribute hundreds of millions of dollars to diverse victims, after a private class action settlement had already disbursed claim checks. Among other things, Special Master Feinberg had to consider who would be eligible to recover from the fund. Some were ineligible to recover in the civil system because their claims were time-barred. Feinberg, however, chose to allow parties with time-barred claims to recover from the criminal restitution fund.⁹⁷ Moreover, payments in civil litigation ordinarily reflect the litigation costs and risks associated with different categories of claims.⁹⁸ However, Feinberg chose to ignore these factors in his distribution plan.⁹⁹ The fact that no rules existed then—or now—to guide a special master in any of these decisions created difficult schisms among the eligible claimants.

Finally, rival settlements may confuse claimants. When public and private attorneys simultaneously create large settlement schemes, the settlement notices rarely alert claimants to the drawbacks and benefits of

97. Just as in civil litigation, however, the Special Master denied claims by those who only held Computer Associate stock. Putting aside the fact only buyers and sellers are ordinarily entitled to recover in a securities case, the Special Master also cited the difficult valuation questions raised by such claims. *Computer Associates*, Plan of Allocation, *supra* note 20, at 2 n.2.

98. See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 cmt. f [hereinafter ALI REPORT] (observing that in conventional and aggregate litigation settlement values reflect “risk aversion, the ability to endure delay and other arbitrary factors”); MANUAL OF COMPLEX LITIGATION, FOURTH § 21.62 (2004) (observing factors in class action settlement may include “probable outcome at trial,” “probable time duration and cost,” “probable resources and ability of the parties to pay, collect or enforce settlement”).

99. The Special Master’s ultimate decision was well-grounded. While courts usually consider such factors in civil class action settlements, crime victims, unlike plaintiffs, do not face the same costs and litigation risks when prosecutors commence criminal actions against defendants.

each respective fund. For example, in the bid-rigging settlement described above, plaintiffs complained that the state attorney general settlement fund failed to describe the basis for the allocation formula, transactions not covered by the settlement, or the comparable remedies available in the rival private class action.¹⁰⁰ Ultimately, the court overseeing the private class action settlement reluctantly intervened¹⁰¹ to review the states' settlement notices and ensure that claimants received adequate notice.¹⁰²

In this way, the problems associated with large public settlement funds mirror the concerns commentators once raised about rival class action settlements.¹⁰³ Rival public and private settlements may waste resources, frustrate incentives to adequately litigate even meritorious collective actions, and finally, may confuse the very claimants they compete to serve. But there are some significant differences between rival class actions and rival public and private settlements. First, unlike rival state or federal class actions, public funds do not present the same risk that plaintiffs may unwittingly waive their rights. Many public actors only have power to form opt in settlements, where, unlike most class actions, the claimants only forfeit the right to litigate when they affirmatively decide to participate in the public settlement. So while public settlements may entice more people away from class action settlement fund, that risk may not be great.

Moreover, public actors involved in rival public settlements have no independent financial stake in the action, unlike their private counterparts in civil litigation. Congress has expressly adopted policies encouraging government lawyers to intervene in class action settlements to ensure the settlements are fair.¹⁰⁴ In the same way, with appropriate

100. Class Plaintiff's Motion to Seek Relief Related to Select State Attorney General's Notice Packet, *In re Municipal Antitrust Settlement*, MDL No. 1950 (June 13, 2011) (on file with author).

101. *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 790 F. Supp. 2d 125, 135 (S.D.N.Y. 2011) ("However pure the intentions of the Settling States may[] be, the Court must ensure that potential class members receive notice of the State Agreement that conveys 'objective, neutral information' about the nature of the claims pending before this Court, the potential remedies available, and the consequences of electing to opt out of the putative class via the State Agreement release.")

102. Even public compensatory funds that follow class action settlements may confuse claimants. The *Computer Associates* settlement between the Securities and Exchange Commission and the Department of Justice strikingly mirrors notice issued to claimants as part of a private class action years earlier. Compare, e.g., Notice of Claims Process for Distribution of Restitution Fund (Jan. 2005) (notice for the criminal restitution fund in *Computer Associates*), available at <http://www.computerassociatesrestitutionfund.com/pdf/car1not.pdf>, with Proof of Claim and Release (Dec. 2002), available at http://securities.stanford.edu/1010/CA98/2003919_r06x_98CV04839.pdf (notice for the civil class action settlement in *Computer Associates*).

103. Wasserman, *supra* note 6, at 462–63 (detailing problems of waste in dueling class actions); Miller, *supra* note 6, at 516.

104. Under the Class Action Fairness Act of 2005, for example, class counsel must distribute copies of any class action notice to the DOJ and all fifty state Attorneys General Offices. The DOJ or

reforms, perhaps rival settlements could provide another way for public attorneys to offer an “extra layer of security for the plaintiffs” and ensure that abusive settlements are not approved without “a critical review.”¹⁰⁵

IV. IMPROVING THE SETTLEMENT RIVALRY

In light of the potential costs of settlement rivalries, many argue that public restitution funds should strive to complement—and not compete with—large private settlements.¹⁰⁶ In other articles, I have argued that government actors should devote their limited resources to victim compensation only in those cases where there are legal or practical obstacles to a civil class action. When many different state laws apply to a business that commits nationwide fraud, attorneys may not be able to certify a class action.¹⁰⁷ In contrast, a federal agency or prosecutor may be able to provide compensation to a large and diverse group of people under a uniform federal criminal restitution law.¹⁰⁸ Employees of a target company may avoid lawsuits under “wage and hour” laws out of a fear of losing their jobs.¹⁰⁹ In such cases, prosecutors or state attorneys general may find that the interest in collectively compensating

the state attorney general then may intervene to ensure greater transparency and fairness in the settlement. See 28 U.S.C. § 1715 (Supp. V 2005).

105. See S. Rep. No. 109-14, at 35 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 34; see also 151 Cong. Rec. S450 (daily ed. Jan. 25, 2005) (statement of Sen. Kohl) (explaining government watchdog provisions in CAFA); 147 Cong. Rec. 22740 (2001) (statement of Sen. Grassley) (same).

106. Professor Winship, for example, proposes that the SEC prioritize Fair Funds when, among other things, defrauded investors have no private legal remedy. See, e.g., Winship, *supra* note 7, at 1139–40; Black, *supra* note 7, at 318 (describing the Fair Fund provision and the SEC’s new role in investor compensation).

107. See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (stating that claims are not manageable if they are to be adjudicated under the laws of the fifty states and multiple territories); *Spence v. Glock*, 227 F.3d 308, 311 (5th Cir. 2000) (observing that variations in the law “may swamp any common issues and defeat predominance” (internal quotation marks omitted)); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743–46 (5th Cir. 1996) (reversing class action certification because of differences in state law).

108. Such a determination may raise federalism concerns that are beyond the scope of this paper. For almost 20 years, class action scholars have debated the merits of a single federal law to permit parties to bring class action claims. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 6.01 cmt. a, at 398–99 (Proposed Final Draft, Apr. 5, 1993) (explaining desirability of applying law of single state to particular issue that is common to all claims); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996); Simon C. Symeonides, *The ALI’s Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843 (1994). It is worth considering whether competing concerns of efficient restitution may, in some cases, override such federalism concerns.

109. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept standard conditions.”); Craig Becker & Paul Strauss, *Representing Low Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Under Enforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1326–28 (2008).

victims is still warranted.

But settlement rivalries offer some significant benefits in terms of settlement value, information, and representation. And, as a practical matter, settlement rivalries will continue into the indefinite future, particularly given the difficulty of imposing a single set of procedures on public actors operating in a range of different jurisdictions and settings—federal and state, judicial and administrative, and civil and criminal. To be sure, those benefits will vary depending on the setting. Rivalries involving large value claims raise arguably more concerns than rivalries involving small value claims. Rivalries between bankruptcy trustees and government attorneys over fixed sums of money to compensate different victims raise more concerns than rivalries between government and class action attorneys over nonfixed sums—where an agency action against third parties supplements available assets to compensate the same victims. Rivalries that purportedly “hijack” claims for compensation at the eleventh hour differ from rivalries where both public and private attorneys openly and concurrently develop parallel litigation. But all such rivalries raise questions about how best to coordinate similar compensation schemes, inform likely stakeholders in the settlement, and divide respective awards.

Accordingly, this Part explores three reforms that build on existing practice by courts and parties to tap the theoretical advantages and persistence of rival settlements, while ameliorating their downsides. First, courts may reduce uncertainty by formally or informally coordinating review over dueling public and private settlements. Second, public actors can reduce strategic behavior among parties by adopting the distribution guidelines proposed by the American Law Institute in large settlements to consistently balance victims competing interests. Finally, courts may use existing authority under the federal rules to reduce confusion or unintended waivers by policing rival notice and opt-out provisions between class action and public settlements.

A. Coordination

With a few exceptions, government actors generally do not attempt to coordinate their actions with private litigation. There are good arguments for this. After all, agencies need discretion to determine when to enforce their own regulations. Constitutional and institutional concerns may limit prosecutors’ ability to consolidate criminal cases into the same court as parallel civil cases. Many criminal cases against corporations involve individual criminal defendants whose constitutional rights limit the prosecutors’ ability to charge in the same

jurisdiction as a private lawsuit.¹¹⁰ Moreover, United States Attorney offices in different jurisdictions have different demands and different case loads. And prosecutors generally have discretion to allocate resources from office to office in light of their disparate needs.

However, when government actors settle and try to compensate large groups of victims, the failure to attempt any coordination with large private settlements raises special problems. A parallel government settlement may crowd out needed private compensation, frustrate finality and peace ordinarily sought in other forms of representative litigation, and confuse victims.

An amendment to the rules governing multidistrict litigation could allow the Judicial Panel on Multi-District Litigation (JPML) to select a single federal judge to coordinate and oversee both a government restitution fund and the pretrial phases of related federal lawsuits. The JPML generally certifies an action for multidistrict litigation on a petition from either plaintiffs or defendants when parties bring lawsuits in many different courts. The JPML has the expertise to evaluate whether a case is large and complex enough to warrant pretrial coordination.¹¹¹

Not all government restitution funds, on their face, will easily fit within the JPML framework. As discussed above, constitutional and institutional concerns may limit a federal prosecutor's ability to shift a criminal case to another court.¹¹² Other constitutional barriers may limit the ability to hail state attorneys general into a single federal forum for violations of state law. But when state attorneys general or prosecutors file in federal court first, an amendment to the JPML could allow courts to consolidate parallel class action litigation in the federal court that handles the criminal, administrative, or attorney general action. A centralized mechanism to coordinate actions would save resources and ensure that criminal and civil class action settlements do not under-

110. U.S. CONST. amend. VI (affording defendants right to trial in the state or district where the "crime [was] committed"). *See, e.g.,* *United States v. Cabrales*, 524 U.S. 1 (1998) (limiting prosecution to the district where alleged money laundering took place). Under the Federal Rules of Criminal Procedure, a defendant can move for a change of venue to avoid prejudice in the district that would deprive the defendant of a fair trial, for the convenience of parties and witnesses, and in the interest of justice. *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240 (1964).

111. *See* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 49 n.3 (2007) (demonstrating the extent to which the MDL statute has been instrumental in disposing of complex cases). The MDL Panel maintains detailed statistical summaries of its activities. *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (2007), available at http://www.jpml.uscourts.gov/General_Info/Statistics/Statistical_Analysis_2007.pdf. According to calculations current through September 30, 2007, there have been 265,269 actions subjected to MDL proceedings since the MDL Panel's inception in 1968. *Id.*

112. *See supra* note 110 and accompanying text.

compensate victims. A single federal court would conduct hearings to assess the adequacy of individual awards from two different settlements, coordinate notice to absent parties, and ensure that private attorneys receive appropriate attorneys fees based on their coordinated efforts with government attorneys to compensate victims.

When private plaintiffs file before the government attorneys, coordination issues in a single federal court become more complicated. Consolidation could still take place, but it would require consent of individual criminal defendants and government attorneys. Individual criminal defendants could raise meritorious objections to transferring venue. Moreover, prosecutors may have institutional and practical reasons to avoid splitting a case across jurisdictions. Finally, the sovereign interests of state attorneys general deserve respect when their claims sound in state law.

But even in cases that proceed on separate tracks, courts may informally coordinate actions across federal and state lines. Such coordination is consistent with judicial efforts to informally coordinate efforts in complex actions between state and federal court.¹¹³ In such cases, government attorneys could be obliged to produce information to the judge overseeing the civil case, including the names of victims scheduled to receive restitution, the basis for the awards, and any other related fines or money awarded to government entities in the public proceeding.¹¹⁴ Such efforts also create opportunities for government attorneys and private lawyers to determine whether to consolidate settlement funds through a single scheme.

Such efforts have already begun—albeit on an ad hoc basis—between private and public attorneys in bankruptcy and criminal proceedings, as well as in antitrust cases, where state attorneys general frequently establish massive settlement funds with defendants under federal law. For example, Judge Rakoff in the Southern District of New York and Stuart Bernstein, the Chief Bankruptcy Judge, recently approved a coordination agreement between the United States Attorney and the assigned bankruptcy trustee that centralized the distribution of artwork and other assets seized by the federal prosecutor in a civil bankruptcy

113. Byron G. Stier, *Resolving the Class Action Crises: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 913–15 (2005) (observing that “many state and federal judges meet and form networked responses” to the challenges of complex litigation); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1690–91 (1992) (same).

114. Such procedures are common when different plaintiff attorneys commence separate actions in different jurisdictions. See MANUAL FOR COMPLEX LITIGATION, FOURTH, § 22.2 (“Courts routinely order counsel to disclose, on an ongoing basis past, and pending related cases in state and federal courts and to report on their status and results.”).

proceeding.¹¹⁵ Similarly, after Eli Lilly reached a \$1.2 billion settlement with 30,000 plaintiffs for side effects associated with its antipsychotic drug, Zyprexa,¹¹⁶ federal prosecutors launched a separate criminal case to recover \$1.4 billion in restitution.¹¹⁷ Both actions sought overlapping monetary damages against the same defendant, for the same conduct. Although no formal procedures existed to coordinate the criminal and state court civil actions,¹¹⁸ Judge Jack B. Weinstein worked informally with the criminal court and other state courts to ensure the civil settlement was fair.¹¹⁹ Finally, in the Apple e-book settlement, plaintiff attorneys worked with state attorneys general to approve a centralized settlement mechanism for consumers.¹²⁰

B. Notice

Even when courts cannot coordinate mass settlements, they can still take steps to ensure that rival settlements do not confuse potential claimants. Even before certification, district courts may, pursuant to Rule 23(d), regulate communications by parties and their counsel with putative class members.¹²¹ When courts police rival settlement notices, courts can both reduce the chance of confusion, as well as promote more meaningful settlement decisions by claimants.

The Supreme Court has long recognized that, given the potential for abuse or confusion, a district court has “both the duty and the broad authority to exercise control over a class action and to enter appropriate

115. See Coordination Agreement in *United States v. Marc Drier*, 09-CR-85 (2009); see also *In re Marc Drier*, 08-BR-15051 (2009) (Dec. 12, 2009) (on file with author).

116. Press Release, Eli Lilly & Company, Lilly and Plaintiffs’ Attorneys Enter into Agreements to Settle Zyprexa Products Liability Litigation (Jan. 4, 2007), available at <http://newsroom.lilly.com/ReleaseDetail.cfm?ReleaseID=224308>.

117. In January 2009, Lilly pled guilty in the Eastern District of Pennsylvania to federal criminal charges of selling misbranded drugs into interstate commerce. Press Release, Eli Lilly & Company, Lilly Resolves Investigations of Past Zyprexa Marketing and Promotional Practices (Jan. 15, 2009), available at <http://newsroom.lilly.com/releasedetail.cfm?ReleaseID=359242>.

118. The civil settlement in Zyprexa had already set aside over \$43 million to reimburse Medicare, Medicaid, and other welfare expenditures by the United States and 49 state governments. See *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 405 (E.D.N.Y. 2009) (describing parallel proceedings and government payouts). However, the United States sought to recover similar losses through a criminal restitution agreement with Eli Lilly in another court. *Id.*

119. See *id.* at 402–08 (describing informal coordination efforts).

120. Alison Frankel, *Are Publishers Using State AG’s to Undermine the E-books’ Class Action*, THOMSON REUTERS, Apr. 20, 2012 (statement by lead counsel observing that “[t]hey want to work with us,” he said. “We’re trying to come up with a cooperative joint prosecution arrangement with a lead counsel committee that would include both AGs and class counsel.”), available at http://newsandinsight.thomsonreuters.com/Legal/News/2012/04_-_April/Are_publishers_using_state_AGs_to_undermine_e-books_class_action/.

121. See *In re Initial Pub. Offering Sec. Litig.*, 499 F. Supp. 2d 415, 418 n.13 (S.D.N.Y. 2007); *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 569 (S.D.N.Y. 2004).

orders governing the conduct of counsel and parties.”¹²² Moreover, a court’s obligation protect the integrity of a potential class settlement is “not limited only to those communications that mislead or otherwise threaten to create confusion and to influence the threshold decision whether to remain in the class.”¹²³ The Third Circuit has made clear that communications that “seek or threaten to influence the choice of remedies are . . . within a district court’s discretion to regulate”¹²⁴

In one case, for example, class counsel successfully petitioned a district court to review notices issued by a state attorney general settlement that would have prevented participants from collecting money from the defendant national banks in a parallel class action.¹²⁵ The court rejected state attorneys general claims that the court could not interfere with their sovereign interests in the final settlement terms. The court questioned whether sovereign immunity presented any obstacle “when the state merely asserts the personal claims of its citizens.”¹²⁶ Just “because a defendant also has engaged in third party negotiations with a sovereign state,” does not prevent the court from regulating communications with class members.¹²⁷ However “pure the intentions of the Settling States may be,” the court felt obliged to review notices from the multistate settlement to ensure it contained “objective, neutral information” about the nature of the private settlement, the potential remedies available, and the consequences of electing to opt out of the putative class.¹²⁸

Reforming notice requirements may be less necessary in securities class actions, where the PLSRA already strictly regulates disclosure and the comparative benefits of settlement. However, in many cases, some centralized form of notice between rival settlements may reduce the confusion and distortion that result when public and private attorneys battle over claimants. Coordinated notice may, in some cases, approach Coffee’s goals for rival settlements—that “one obtains the advantages of competition and increases the choices available to class members, without increasing the risks of collusion.”¹²⁹

122. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). See also *Erhardt v. Prudential Grp. Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) (“It is the responsibility of the court . . . to safeguard [class members] from unauthorized, misleading communications from the parties or their counsel.”).

123. *Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. at 569.

124. *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988).

125. *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 790 F. Supp. 2d 125, 135 (S.D.N.Y. 2011).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Coffee*, *supra* note 81, at 434.

C. Distribution Guidelines

Finally, government actors should consider using discretion in large settlements to divide awards according to what victims would be entitled to recover in civil litigation or bankruptcy. Compensating victims consistent with civil settlement awards may reduce the costs associated with coordinating civil, administrative, and criminal actions involving the same activity; minimize strategic behavior between the parties; and reduce the chances for inconsistent and arbitrary distribution schemes.

As set out above, when public restitution funds and civil class actions compensate different victims under different standards, they risk promoting strategic behavior and complicating judicial review. Even when a single judge oversees the distribution, multiple standards may unnecessarily complicate the assessment of the overarching settlement between the corporate defendant, the prosecuting attorneys, agencies, plaintiffs' class counsel, and victims. Moreover, judges and prosecutors may struggle to apply standards rooted in something *other than* victims' civil losses. Distributing criminal restitution funds based on need, for example, may require difficult valuation decisions, more evidentiary support, and additional administrative cost. Such distributions may also permit prosecutors and judges too much discretion to make subjective distribution decisions.¹³⁰ An equality-based standard, one that pays everyone the same amount, may be easy to administer. However, it may not be just—particularly when victims are harmed in different ways. Distributions involving insolvent parties may frustrate expectations developed in and through the civil bankruptcy system.

In contrast, standards rooted in the civil litigation system more legitimately track existing agency and state criminal restitution laws.¹³¹ Criminal restitution awards already require that prosecutors use concepts familiar to civil litigation. Criminal restitution statutes, for example, require that the defendant “proximately cause” the victim’s harm.¹³² State attorneys general must already compensate victims under federal antitrust laws consistent with their losses. A standard that tracks civil settlements, minimizes strategic behavior, reduces possibility for error and discretion, and accounts for differences in harm based on well-established guidelines seems consistent with existing victim restitution laws.

130. Need-based standards may also be subject to abuse, as certain stakeholders, with more vocal and powerful advocates, may push for awards that compensate certain needs over others.

131. 18 U.S.C. § 3771(a)(6) (stating that victims shall only receive “[t]he right to full and timely restitution as provided in law”) (emphasis added).

132. *Paroline v. United States*, 572 U. S. __ (2014) (criminal restitution is proper “only to the extent the defendant’s offense proximately caused a victim’s losses”).

Public restitution funds, as a result, could consider the American Law Institute's guidelines for distributing awards in complex civil actions. The ALI Report reflects the combined work of class action scholars, litigants, and judges. Some courts have already relied upon draft versions of the ALI Report to make difficult distribution decisions in complex distribution schemes—including the landmark \$1.5 billion settlement forged by former New York State Attorney General, Elliot Spitzer, and the nation's largest investment banks.¹³³ The ALI Report identifies, among other things, a set of principles to govern distribution rules in class actions.

According to the ALI Guidelines, judges, administrators, and lawyers should attempt to distribute awards according to principles of “vertical equity,” “horizontal equity,” and “rough justice.”¹³⁴ That is, parties should be compensated (1) according to the losses they may recover in civil litigation; (2) consistent with similarly situated parties; but (3) mindful of the practical limitations of administering a complex compensation scheme.

Notably, the ALI Report is not a panacea for the many complex issues that confront distributions in public restitution schemes. The ALI guidelines do not address the difficult questions raised when federal law promises to pay according to different standards than state law, or when federal law follows different statutes of limitations. There may be little benefit to evaluating the available claims under state law when federal agencies or prosecutors operate under different statutory authority.¹³⁵ It may also seem strange for prosecutors to include another common feature mentioned in the ALI Report, litigation risks and costs, in settlement calculations. No such costs exist for victims who make claims to a criminal restitution fund. Accordingly, government lawyers must balance broader law enforcement policies against the potential coordination problems that may result when public restitution conflicts with private legal remedies. While some of these questions fall outside the scope of this paper, the ALI guidelines provide a starting point for addressing the distributional questions raised here.

133. *SEC v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 420 (S.D.N.Y. 2009).

134. *See, e.g.*, ALI REPORT, *supra* note 98, at § 1.04 cmt. f (observing that large compensation funds implicate values of merit, equality, and “rough justice . . . where bargaining allows risk aversion, the ability to endure delay and other arbitrary factors to affect claim values”).

135. In the context of civil class actions, some scholars have raised just these federalism concerns when a class action attempts to compensate victims according to a single state's law or federal common law. Kramer, *supra* note 108, at 549; Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027 (2008).

V. CONCLUSION

Mass settlement rivalries form a part of a growing global phenomenon. The new model for mass settlements in the United States and abroad involves many different players—class action lawyers, agencies, prosecutors, nonprofits, and other institutions—all vying to prosecute the same defendant, for the same conduct, and with power to compensate victims on a massive scale. As set forth above, United States litigation increasingly relies on state attorneys general, federal prosecutors, agencies, and legislative compensation funds to compensate victims in ways that look like class actions. Institutional players, like large mutual funds and state retirement systems, relying on changes to United States securities laws in the 1990s, have also taken a larger leadership role in class action lawsuits.¹³⁶ It should come as no surprise that the end result increasingly produces rival funds, each seeking to provide fair and efficient compensation for victims.

The same is true outside the United States. Just as the United Kingdom amended its class action procedures, it also has clarified and expanded the power of its public authority to seek consumer redress under the 2010 Financial Services Act.¹³⁷ As Sweden, Norway, and Denmark adopted class action procedures over the last decade, they also expanded the authority of state agencies, consumer associations, and other nongovernmental organizations to bring “representative actions” on behalf of victims.¹³⁸

Although this Article has focused on the problems rivalries present for compensatory justice, the rise of settlement rivalries raises a host of new questions for those interested in the overlapping role public and private law plays in deterring bad behavior, improving compensation, and punishing unlawful misconduct: What is the best way to comprehensively compensate victims? Is it fair for prosecutors or agencies, whose primary aim has generally been associated with criminal punishment or regulation, to coordinate or compete with private

136. The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 provides that the lead plaintiff—the class member with the largest claimed loss who seeks the position, 15 U.S.C. § 77z-1 (a)(3)(B)(iii)(I)(bb) (2006)—shall select and retain counsel to represent the class. 15 U.S.C. § 77z (a)(3)(B)(v). David H. Webber, *Is “Pay-to-Play” Driving Public Pension Fund Activism In Securities Class Actions? An Empirical Study*, 90 B.U. L. REV. 2031, 2038 (2010) (comprehensively studying public and private institutions after the passage of the PLSRA).

137. Christopher Hodges, *Developments in Collective Redress in the European Union and United Kingdom*, 5–6 (2010), available at <http://globalclassactions.stanford.edu/sites/default/files/documents/1010%20Class%20Actions%20UK%202010%20Report.pdf>.

138. See, e.g., Swedish Group Proceedings Act § 5; Norwegian Dispute Act, Ch. 35, § 35-3(1)(b); Robert Gaudet, *Earth to Brussels: Lessons Learned from Swedish, Danish, Dutch and Norwegian Class Actions*, White Paper (July 14, 2008).

attorneys who seek to compensate victims? In those countries with federal systems, like the United States, how should the federal authorities coordinate with state bodies or private actors to promote optimal deterrence?

But settlement rivalries perhaps raise the greatest challenges for judges charged with overseeing different players, each with different state, institutional, or personal interests in a final resolution. Judges increasingly must determine how to coordinate or consolidate such cases, if at all, with little guidance. No consistent standard of judicial review exists to review settlements brokered by other players in government. In a world where courts must reconcile competing interests of victims, states, agencies, and federal authorities, with different civil, regulatory, and criminal enforcement obligations, courts need guidelines for determining what weight to give each decision maker in settlement.

This Article takes a very small step towards raising some of those questions and suggesting a few possible answers—considering ways courts might build on existing solutions on the ground to improve coordination, notice, and distribution in rival settlements. But those proposals arise within a broader inquiry: as civil, criminal, and administrative actions increasingly overlap, what do we want and expect from our courts? Professor Chayes long ago argued that the growth of civil rights and other public litigation placed increasing pressure on courts to adopt an increasingly public law perspective—taking on more of a “legislative” than “adjudicative” approach to large lawsuits.¹³⁹ Since that time, commentators have alternatively described courts as “managers,” actively overseeing and brokering settlement discussions with the assistance of special masters, or distant overseers of enormous business mergers, where the core judicial function involved is simply “blessing” the transaction.¹⁴⁰ But, as public and private actors increasingly take on overlapping roles, before the same judges, on a global scale, courts may have to adopt yet another model to balance the interests of individual and collective justice in mass litigation.

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

140. See, e.g., William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371 (2001) (class action settlements as “transactions”); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) (describing the “managerial” approach adopted by the Manual for Complex litigation).