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Future Claimants and the Quest for Global Peace

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FUTURE CLAIMANTS AND THE QUEST FOR GLOBAL PEACE

Rhonda Wasserman*

ABSTRACT

In the mass tort context, the defendant typically seeks to resolve all of the claims against it in one fell swoop. But the defendant's interest in global peace is often unattainable in cases involving future claimants—those individuals who have already been exposed to a toxic material or defective product, but whose injuries have not yet manifested sufficiently to support a claim or motivate them to pursue it. The class action vehicle cannot be used because it is impossible to provide reasonable notice and adequate representation to future claimants. Likewise, nonclass aggregate settlements cannot be deployed because future claimants will not have contacted attorneys whose participation is critical to those alternative methods of dispute resolution.

In lieu of class actions and nonclass aggregate settlements, this Article proposes a hybrid public-private claims resolution process designed to provide many of the benefits of global peace, while preserving the constitutional rights of future claimants and ensuring them fair compensation as their injuries manifest. Under this proposal, defendants would secure judicial approval of a fair and reasonable class action settlement of the current claims and then, through an extrajudicial process, make fair offers on comparable terms to future claimants as their claims mature, adjusted to take into account the time value of money and intervening changes in legal doctrine and medical advances. Since the class action settlement would not purport to bind the future claimants, their constitutional rights would be protected. And even though the future claimants would not be bound by the class action

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judgment nor obligated to accept the fair offers on comparable terms, they would have an incentive to accept them, rather than sue in tort, because they would be assured fair compensation without incurring the costs of litigation.

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INTRODUCTION

In the mass tort context—in which many individuals are injured as a result of the defendant’s tortious conduct—the defendant typically seeks to resolve all of the claims against it in one fell swoop.¹ The defendant’s interest in global peace—a once-and-for-all resolution of all of the claims against it—is both intense and understandable.² But whether global peace is attainable depends, in large part, on the nature of the mass tort involved.

As Professor Geoffrey Hazard famously quipped, “there are mass torts, and there are mass torts.”³ Some mass torts, like airplane accidents, occur at one moment in time; in one place; affect a relatively small, discrete, and identifiable group of individuals; and subject them all to one sad fate.⁴ Although doubts were expressed early on about the suitability of the class action device to handle mass torts,⁵ judges have frequently employed class actions to resolve single-incident mass torts of this type.⁶

Other mass torts, such as toxic torts involving exposure to asbestos, environmental contaminants, or drugs with undisclosed side effects, cause harm over extended periods of time to potentially enormous groups of often unidentifiable individuals in differing degrees.⁷ In these cases, class certification may be stymied by the multiplicity of individual issues and

¹ WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 3 (“He has no children. All my pretty ones? Did you say all? what all? oh hell-kite! all? What, all my pretty chickens, and their dam, At one fell swoop?”).

² See *infra* Part I.

³ Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1901 (2000).

⁴ *Id.* at 1901–02.

⁵ See, e.g., FED. R. CIV. P. 23(b)(3) advisory committee’s note (1966) (“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.”).

⁶ 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1783, at 327–28 (3d ed. 2005) (stating that “[t]he argument for class-action treatment is particularly strong in cases arising out of mass disasters such as an airplane or train crash in which there is little chance of individual defenses being presented” and citing opinions that certified class actions in mass accident cases); see also, e.g., *Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505 (D.N.D. 2005) (certifying a class action seeking money damages for both personal injury and property damage arising out of a train derailment that resulted in the release of anhydrous ammonia); *Sala v. Nat’l R.R. Passenger Corp.*, 120 F.R.D. 494, 500 (E.D. Pa. 1988) (certifying a class action on behalf of all passengers who suffered injuries in a train derailment); cf. *Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392, 397, 399 (E.D. Va. 1975) (expressing the view that “under some circumstances mass accident litigation may and probably ought to be maintained as a class action” but declining to certify a class in the case before it because, *inter alia*, many of the plane crash victims were not American citizens and “the conflict of law questions would be extremely complex”).

⁷ Hazard, *supra* note 3, at 1902.

complex choice-of-law questions.⁸ Even more daunting is the prospect of future claimants—those individuals who have already been exposed to a toxic material or defective product but whose injuries have not yet manifested sufficiently to support a claim or motivate them to pursue it.⁹

The question is whether global peace is attainable when mass torts affect not only multitudes of current claimants but also future claimants whose injuries have not yet manifested. This Article maintains that the class action vehicle cannot be used to resolve certain future claims because it will be impossible to provide reasonable notice or adequate representation to those future claimants who are not yet aware of their exposure or whose claims are contingent upon a future event.¹⁰ Nor can nonclass aggregate settlements be used to secure global peace. Unknowing and contingent future claimants will not have retained counsel, whose participation is necessary to a “Vioxx-type” all-or-nothing settlement,¹¹ and they cannot grant the advanced consent contemplated by the *Principles of the Law of Aggregate Litigation* proposed by the American Law Institute (ALI).¹²

If neither class actions nor nonclass aggregate settlements can be used to secure the global peace sought by defendants, the question remaining is whether an alternate mechanism can be crafted to achieve most (if not all) of

⁸ 7AA WRIGHT, MILLER & KANE, *supra* note 6, § 1782, at 320 (“[T]o the extent that different injuries are alleged to have occurred to different class members over different periods of time, it is difficult to show that common issues predominate and that a class action would be superior.”); *see also, e.g.*, 7B *id.* § 1805, at 400 (“[A]ttempts to invoke Rule 23 for mass products-liability claims have met with major difficulties.”).

⁹ *See, e.g.*, Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 811 n.1 (1995) (“‘Future claimants’ includes two groups of people—those who have a matured claim but have not yet asserted it, and those who may have been exposed to a substance but have not yet suffered the harm that gives rise to a tort cause of action.”); Hazard, *supra* note 3, at 1903 (stating that a future claim “is one where a claimant cannot presently prove a causal connection between an injury and a supposed source of injury, but nevertheless suspects or fears that he or she is suffering injury that has its origin in the suspect source”); Diane P. Wood, *Commentary on The Futures Problem, by Geoffrey C. Hazard, Jr.*, 148 U. PA. L. REV. 1933, 1933 (2000) (“[A] futures claim is one based on an event that has already occurred (such as exposure to a toxic material), but whose consequences will not become clear enough to support a legal claim until some time after the statute of limitations (measured from the date of the event) has expired.”); *see also infra* Part II for a discussion of the complexities inherent in the definition.

¹⁰ *See infra* notes 39–44 and accompanying text (describing unknowing, exposure-unaware and contingent future claimants); *see also infra* Part III (analyzing the difficulties in providing reasonable notice and adequate representation to unknowing, exposure-unaware and contingent future claimants).

¹¹ *See infra* Part IV.A.

¹² *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.16(b) (2010) [hereinafter ALI PRINCIPLES] (proposing a modification to the aggregate settlement rule found in MODEL RULES OF PROF'L CONDUCT R. 1.8(g), quoted *infra* note 167); *see also infra* Part IV.B.

the defendant's goals while preserving the constitutional rights of future claimants and ensuring them compensation for their injuries as they manifest.

This Article proposes a hybrid public-private claims resolution process designed to achieve these objectives.¹³ Under this proposal, defendants would secure judicial approval of a fair and reasonable class action settlement of the *current* claims and then, through an extrajudicial process, make fair offers on comparable terms to *future* claimants as their claims mature, adjusted to take into account the time value of money, intervening changes in legal doctrine, and medical and technological advances. Since the judicially-approved class action settlement would not purport to bind the future claimants, their constitutional rights would be protected. And even though the future claimants would not be bound by the class action judgment nor obligated to accept the fair offers on comparable terms, the future claimants would have an incentive to accept them, rather than sue in tort, because they would be assured fair compensation without incurring the costs of litigation.

Part I examines the goal of global peace, unpacking the defendant's multiple objectives and identifying ways in which the claimants and the courts may also benefit from a once-and-for-all resolution of the claims. Part II develops the concept of the future claimant, noting ways in which the category is heterogeneous, fluid, and porous. It observes the movement of individuals between the categories of current and future claimants and the overlap between future claimants and the public at large. Part III questions whether a class action can be deployed to achieve global peace, concluding that certain unknowing and contingent future claimants cannot be notified or adequately represented. Part IV considers but rejects the possibility that innovative nonclass aggregate settlement options, such as "Vioxx-type" all-or-nothing settlements or the advanced consents proposed by the ALI Aggregate Litigation project, can be used to secure a global peace that would bind unknowing future claimants. Finally, Part V outlines the proposal for a hybrid public-private claims resolution process, which would employ a class action to resolve the claims of the *current* claimants followed by an extrajudicial process offering *future* claimants fair offers on comparable terms, adjusted to account for changes in law and science and the time value of money. If structured and administered properly, such a process could yield something approximating a global peace while preserving the future claimants' constitutional rights and ensuring them fair compensation.

¹³ See *infra* Part V.

I. DEFENDANTS' INSISTENCE ON GLOBAL PEACE

The starting assumption in negotiations,¹⁴ in judicial opinions,¹⁵ and in the scholarly literature¹⁶ is that defendants negotiating settlements of mass torts insist upon global peace; they do not want piecemeal settlements that fail to resolve their total liability.¹⁷ Before considering why they are not likely to get they want, let us first unpack their objective.

Defendants want global peace—a once-and-for-all resolution of all claims (and potential claims) against them—for a variety of reasons. First, defendants want to define and cap their total exposure. They want to know what it is going to cost them to resolve *all* claims against them. To achieve this objective, defendants need to eliminate or reduce the opportunity of individual claimants to opt out of the settlement; otherwise, there is a risk that claimants with the strongest claims will opt out and sue separately, while only those claimants with the weakest claims will be bound by the settlement.¹⁸ In addition,

¹⁴ See, e.g., *Juris v. Inamed Corp.*, 685 F.3d 1294, 1303 (11th Cir. 2012) (describing investors' unwillingness "to finance any settlement that would not extinguish substantially all of the breast implant litigation"); Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12 ("Merck . . . wants to settle only if it can buy something like global peace.").

¹⁵ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 601 (1997) (noting that the defendant had indicated in settlement discussions "that it would resist settlement of inventory cases absent 'some kind of protection for the future'" and noting that the defendant had told plaintiffs' attorneys that "once [the defendants] saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases" (citations omitted)); *Ryan v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 781 F. Supp. 902, 919–20 (E.D.N.Y. 1991) ("Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.").

¹⁶ See, e.g., Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 979 (2010) ("Judges, lawyers, and academics largely accept the drive for comprehensive settlements as a given . . ."); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 265, 274 (2011) (stating that "[d]efendants demand closure" and noting that "[f]or the past twenty years, mass tort defendants have searched doggedly for ways to obtain closure"); Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1851–52 (2004) ("It is no secret and no sin that the aim of defendants in mass tort class actions, . . . is 'global peace,' an end to litigation on the matter."); Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 739 (2011) ("[T]he only way [a hypothetical defendant] is likely to settle at all is if that settlement will buy [it] peace."); Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 127 (1997) ("[D]efendants particularly want global peace as a consequence of settling a mass tort."); Wood, *supra* note 9, at 1935 ("[D]efendants want a way to bring closure to their expected liability, and it is often the case that full closure cannot be achieved without some kind of resolution . . . that resolves the claims of 'futures' as well as existing plaintiffs.").

¹⁷ See, e.g., Erichson & Zipursky, *supra* note 16, at 271 ("[P]iecemeal settlements simply do not provide sufficient peace to allow a defendant to put a dispute behind it.").

¹⁸ *Id.* at 268; George Rutherglen, *Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 278–79 (1996) (describing the risk that plaintiffs with "viable" claims

defendants need the settlement to cap their liability even with respect to prospective future claimants¹⁹—those who may have actionable claims in the future arising from the same product or conduct that is the subject of the settlement.²⁰

Second, defendants not only want to define and cap their total exposure but they actually want to reduce it by discouraging prospective claimants who have not yet sued from initiating fresh litigation against them.²¹ Defendants may fear that piecemeal settlements will attract additional claimants,²² so they want to signal to potential follow-up claimants that the proffered global settlement is their best, last, and only chance to receive compensation for the alleged wrong. “If you build it, they will come,”²³ and, defendants hope, if you shut it down, they will go away.

Third, defendants want to reduce their total liability, not only by discouraging the filing of new claims but also by reducing their transaction costs.²⁴ If, for example, there are a thousand claims against the defendant and it will cost a thousand dollars to resolve each claim, the defendant wants to write one check for a million dollars rather than litigate each of those thousand claims to judgment and end up paying a second million dollars or more in attorneys’ fees.²⁵ The amount to be saved by reducing transaction costs can be enormous. For example, a study of asbestos litigation conducted by the RAND Institute for Civil Justice found that defendants spent approximately

will opt out and the defendant will be left “with a judgment that precludes only the smaller and weaker claims”); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760 (1997) (discussing the risk of adverse selection).

¹⁹ See, e.g., *Amchem*, 521 U.S. at 600 (assessing a plan “designed to settle all pending and future asbestos cases”); *Juris*, 685 F.3d at 1308 (describing a class action settlement that purported to bind “all persons . . . who . . . may in the future have any unsatisfied claim . . . involving Inamed Breast Implants” (internal quotation marks omitted)).

²⁰ See *infra* Part II (differentiating among different types of future claimants); see also, e.g., *Amchem*, 521 U.S. at 601 (noting that defendants communicated to lawyers representing individual plaintiffs “that once [they] saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases”).

²¹ See, e.g., Silver & Baker, *supra* note 18, at 761 (describing the “financial exposure defendants face from continued litigation by nonsettling plaintiffs”).

²² Erichson & Zipursky, *supra* note 18, at 271 (“[P]iecemeal settlements may draw more claimants into the litigation, as prospective plaintiffs and attorneys smell blood in the water.”).

²³ The actual quote, “If you build it, he will come,” is from the movie, *FIELD OF DREAMS* (Gordon Company Productions 1989).

²⁴ See, e.g., Erichson & Zipursky, *supra* note 16, at 271 (“When defendants settle mass litigation, they prefer to settle wholesale. . . . [I]ndividual negotiations require greater resource expenditures . . .”).

²⁵ See, e.g., Silver & Baker, *supra* note 18, at 761 (“Defendants . . . prefer broader settlements to narrower ones because broad settlements give them better returns on their sunk transaction costs . . .”).

\$70 billion on asbestos litigation through 2002, of which approximately thirty-one percent, or \$21 billion, was spent on legal fees and expenses.²⁶

Finally, when defendants talk about a need for closure or a need for global peace, they are not just talking about an end to the obvious financial costs of litigation. They want to avoid the distraction from core business functions that litigation entails.²⁷ They want to minimize the public relations disaster caused not just by the litigation but by the underlying product failure.²⁸ And they want to reassure their investors.²⁹

Defendants are not the only parties that benefit from global peace. The judge clears her docket or a colleague's docket and burnishes her reputation as the tenacious judge who helped bring an end to the litigation morass,³⁰ while the judicial system is spared significant costs.³¹ Claimants, too, can benefit from global settlements or global judgments. They can get their money sooner if they settle rather than go to trial. They may get more money if the defendant

²⁶ STEPHEN J. CARROLL, DEBORAH R. HENSLER, JENNIFER GROSS, ELIZABETH M. SLOSS, MATTHIAS SCHONLAU, ALLAN ABRAHAMSE & J. SCOTT ASHWOOD, ASBESTOS LITIGATION 88, 92, 95 (2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.

²⁷ See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147 (S.D. Ohio 1992) (noting that lawsuits "have diverted the attention of many [defendants'] employees away from their usual jobs to deal with the litigation"); *Erichson & Zipursky*, *supra* note 16, at 267 (noting that the Vioxx settlement, discussed *infra* Part IV.A, "removed the distraction and expense of massive litigation and allowed the company to get back to business").

²⁸ See, e.g., *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1264 (S.D. Ohio 1996) (noting that even though the defendant had been successful in getting some cases dismissed and in settling others, "the litigation and attendant poor publicity was nevertheless taking its toll" and that "criticism of the [product] and of the defendants in newspaper articles, television programs and even congressional hearings began to mount").

²⁹ See, e.g., *Juris v. Inamed Corp.*, 685 F.3d 1294, 1303 (11th Cir. 2012) ("[I]nvestors were unwilling to finance any settlement that would not extinguish substantially all of the breast implant litigation. They considered elimination of the enormous costs and risks associated with the implant litigation an essential precondition to the economic turnabout that would be necessary to repay any investment."); *Bowling*, 143 F.R.D. at 147 ("[T]he presence of pending litigation . . . could jeopardize [defendant's] ability to attract investment.").

³⁰ See, e.g., David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1235 ("[T]he court itself has an interest in approving whatever deal is set before it as . . . rejection leaves the matter on its already clogged docket."); Koniak, *supra* note 16, at 1798 (stating that judges have "an even bigger interest in seeing large and cumbersome class actions settle"); Susan P. Koniak and George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 151 (2001) ("Rejecting a settlement that clears not only one's own docket but the dockets of colleagues is not apt to win a judge the praise of fellow judges."); Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889, 934-35 (2012) ("[T]he court has its own incentive to favor class action settlements. If a court approves a class action settlement[. . .] it is freed of the burden of overseeing a large and potentially time-consuming case. It may also gain prestige as the court that oversaw the settlement of a complex class action." (footnotes omitted)).

³¹ *Erichson & Zipursky*, *supra* note 16, at 267 ("[S]ettlement removed a potential enormous drain on judicial resources.").

is able to avoid bankruptcy³² or reduce its transaction costs, or if the claimants' own attorneys' fees and costs are reduced as a result of the settlement.³³ Future claimants in particular may benefit from a global settlement if funds are specifically set aside for their benefit rather than run the risk that the current claimants will exhaust the defendants' resources.³⁴ And of course, both current and future claimants avoid the risk of a total loss at trial.³⁵

Given these benefits, we understand why defendants insist on global peace and how a comprehensive settlement might even benefit other parties. But global peace is often an unattainable goal. It is unattainable because some future claimants cannot be bound by a class action judgment and cannot consent to a nonclass aggregate settlement. To understand why at least certain future claimants cannot be bound, we must first gain a better understanding of the complexities inherent in the definition of "future claimants."

II. THE CATEGORY OF FUTURE CLAIMANTS: HETEROGENEOUS, FLUID, AND POROUS

Judges and scholars sometimes refer to "future claimants" as though they form a discrete, well-defined, and homogeneous group. In fact, however, the category of "future claimants" is heterogeneous, fluid, and porous. Because these characteristics help explain why some future claimants cannot be bound by class action judgments, it is worth our time to explore the nature of, and variations among, future claimants.

³² See, e.g., *Juris*, 685 F.3d at 1304 (noting that class counsel concluded that the "claimants, whether their injuries had manifested or not, had a common interest in securing a certain source of recovery for their claims; none would be well served by the alternatives of default, insolvency, or bankruptcy"); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 358 (N.D. Ohio 2001) (predicting that in the absence of a class action settlement, "at least one of the [defending parties] will go bankrupt, [and] the majority of the class members will not actually receive compensatory relief promptly (if at all)").

³³ If claimants' attorneys' fees and costs can be reduced, the potential savings are enormous. See, e.g., *CARROLL ET AL.*, *supra* note 26, at 88, 103 (finding asbestos "claimants' legal fees and expenses added up to about \$19 billion, 27 percent of the total spending on asbestos personal injury claims through 2002").

³⁴ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (noting that, in the absence of a global resolution of asbestos litigation, "exhaustion of assets threatens and distorts the process; and future claimants may lose altogether" (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (1991)); *id.* at 618 (describing "concerns about . . . the conservation of funds to compensate claimants who do not line up early in a litigation queue").

³⁵ *Erichson & Zipursky*, *supra* note 16, at 267 (noting that the Vioxx settlement provided "substantial compensation" even though "[p]laintiffs had faced a vigorous defense and had seen only mixed success" in court).

As Judge Diane Wood has written, not all future claimants face identical risks. Depending upon the deleterious substance or defective product to which they have been exposed, some future claimants *will* suffer a cognizable injury in the future, while others *may* suffer an injury after a period of time.³⁶ In some cases, an exposed individual may suffer an injury at one point in time but the “injury will not become ascertainable to the claimant until some time in the future.”³⁷ In other words, there may be an anatomical change that causes no immediate effect on a future claimant’s daily life.³⁸

In addition to these differences regarding the likelihood and timing of cognizable injury, there are critical differences among future claimants regarding their awareness of their exposure and the risks they face. Some individuals are well aware of their exposure to a defective product or contaminant. For example, individuals who have had hip socket implants are well aware that they underwent the surgical procedure; the same can be said, for example, of women who had silicone breast implants. They may not know yet whether they will suffer an injury, and to that extent they are “unknowing”,³⁹ but they are aware of their exposure to the deleterious substance or defective product. For that reason, they are both “unknowing” and “exposure-aware” future claimants.

Some exposure-aware future claimants will be known to the defendant. For example, a product manufacturer may have records (or access to records) with the names of all or many individuals who received its product. Once the manufacturer learns of the product’s potential risks, it can notify those

³⁶ Wood, *supra* note 9, at 1933–34; *see, e.g., In re Inter-Op Litig.*, 204 F.R.D. at 336, 341 (noting, in case involving allegedly defective hip socket implants, “some class members may suffer no adverse medical affects [sic], while others may suffer (and have suffered) terribly”).

³⁷ Wood, *supra* note 9, at 1934; *see also In re Agent Orange Prod. Liab. Litig. (Agent Orange II)*, 996 F.2d 1425, 1433–34 (2d Cir. 1993) (concluding that soldiers exposed to Agent Orange were “injured” upon exposure even if they did not manifest symptoms until years later).

³⁸ *See, e.g., CARROLL ET AL., supra* note 26, at 7–8 (explaining that, under the American Medical Association’s definition, an individual with a scar on her lungs would be impaired (or injured) because she would suffer an “abnormality in anatomic structure” but “if there were no abnormality in lung function and no decrease in the ability to perform activities of daily living, the individual would be assigned a 0% impairment rating” (quoting LINDA COCCHIARELLA & GUNNAR B. J. ANDERSSON, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 88 (5th ed. 2001)) (internal quotation marks omitted)). In the RAND report’s language, an individual “who experiences no decrease in the ability to perform the activities of daily life, even if he or she has evidence of an injury,” would be considered “unimpaired.” *Id.* at 8.

³⁹ *See, e.g., Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1086 (1995) (noting that some future claimants can “not be identified by the parties, . . . [and have] not yet manifested injury at the time the action was brought”); *see also infra* note 43 and accompanying text.

individuals known to have received the product and such individuals can seek guidance in an effort to understand the risks they face and the litigation options they have.⁴⁰ Such claimants are “known” and “exposure-aware” but “unknowing” regarding the extent, if any, of their injuries.

Contrast these individuals with, say, shipyard workers thirty or forty years ago, who may not have even realized that they were exposed to asbestos.⁴¹ It would be much more difficult to identify and notify these potential future claimants, and much harder for them to appreciate the risks they face. To make the example even more extreme, imagine the children of those who worked with asbestos, who were exposed only through contact with their parents’ work clothes.⁴² The odds of identifying and notifying them would be even longer, their lack of awareness more obvious, and their ability to understand the risks they face even more doubtful. In Professor Susan Koniak’s words, these future claimants are not just unknown, but “unknowing”; they “[can]not be identified by the parties, . . . [have] not yet manifested injury at the time the action was brought, and . . . *might not have known then or now that they had been exposed to the hazardous product.*”⁴³ In fact, they are both “unknowing” (of the extent of their prospective illness) *and* “unaware” (of their exposure).

Others who were not themselves exposed may have (or acquire) prospective claims by virtue of their relationship (or future relationship) with exposed individuals. For example, individuals who have not yet met workers exposed to asbestos in the workplace may state claims for loss of consortium once they marry, and their yet-to-be-born children may have claims upon birth by virtue of their relationships with their exposed parents.⁴⁴ Thus, at least in

⁴⁰ See, e.g., *Juris v. Inamed Corp.*, 685 F.3d 1294, 1304–05, 1317 n.21 (11th Cir. 2012) (describing the original district court plan, in a (b)(1)(B) limited fund class action, to provide women with Inamed silicone breast implants approximately “the level and quality of notice required by Rule 23(b)(3)” and noting that the trial judge who rejected the plaintiff’s collateral attack distinguished between “exposure-only asbestos tort claimants, who may not know of their exposure until they contract asbestos-related illnesses,” and breast implant recipients, who “know that they have had implants and are capable of being notified,” whether the implants leaked and caused injury or not); *In re Inter-Op Litig.*, 204 F.R.D. at 347 (“[T]here is no question in this case regarding *who* was actually exposed to the defective product.”); see also *infra* Part III.A.

⁴¹ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (“Many persons in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm they may incur.”).

⁴² *Id.* at 602 & n.5 (noting that the complaint defined the class to include “[a]ll persons . . . who have been exposed . . . through the occupational exposure of a . . . household member, to asbestos”).

⁴³ Koniak, *supra* note 39, at 1086 (emphasis added).

⁴⁴ *Amchem*, 521 U.S. at 602 (describing the proposed class and noting that it included persons “whose spouse or family member had been . . . exposed” to asbestos); see also *Meachem v. Wing*, 227 F.R.D. 232, 236–37 (S.D.N.Y. 2005) (describing the “minors or the yet-to-be-born,” who, later in life, might move to New

theory, a class may include not just unknowing claimants but also “contingent” claimants—those whose claims are contingent upon a relationship (or future relationship) with an exposed individual.

Not only are there important differences among future claimants but the boundary between the categories of future claimants and current claimants is porous and fluid as well.⁴⁵ An individual exposed to a deleterious substance who suffers no immediate injury would ordinarily be classified as a future claimant. But once she develops symptoms, she would become a current claimant; thus, she would easily pass from one category to the other. Moreover, a current claimant with specific symptoms and a particular diagnosis at one point in time might develop additional symptoms later on, receiving a new diagnosis.⁴⁶ For example, individuals exposed to asbestos might develop asbestosis first, only to be diagnosed with mesothelioma later in life.⁴⁷ After the first diagnosis but before the second, such individuals could be viewed, simultaneously, as current and future claimants.⁴⁸

Like the boundary between future and current claimants, the boundary between future claimants and the public at large is also porous and fluid. Many individuals exposed to asbestos in the workplace will, following a lengthy latency period, eventually suffer asbestos-related diseases;⁴⁹ they are easily characterized as future claimants. But what about the rest of us? According to a

York City, receive public assistance, and then have a claim challenging the adequacy of the City’s procedures for terminating or reducing such aid, and noting that “[t]hese individuals have no reason to believe that their rights are being adjudicated in the present proceeding”).

⁴⁵ E.g., Deborah R. Hensler, *Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585, 604 (2006) (stating that “the line [between current and future claimants] is blurred and ever changing”).

⁴⁶ See, e.g., Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989, 1989 (1990) (“Victims of toxic torts face the problem that a single exposure to a toxicant may produce both immediate and latent diseases.”).

⁴⁷ *Id.* (“Typically, victims first suffer asbestosis; many years later, some of the same victims also develop cancer.”).

⁴⁸ See also Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 609 (noting that in class actions seeking both money damages and injunctive relief, “members of the class who expect to use the defendant’s product or services will be, in effect, future as well as present claimants”).

⁴⁹ See, e.g., *Amchem*, 521 U.S. at 598 (describing the lengthy latency period and noting that “a continuing stream of [asbestos] claims can be expected” and expressing concern that “future claimants may lose altogether” (quoting REPORT OF THE JUDICIAL CONFERENCE, *supra* note 34, at 2–3)); Samantha Y. Warshauer, Note, *When Futures Fight Back: For Long-Latency Injury Claimants in Mass Tort Class Actions, Are Asymptomatic Subclasses the Cure to the Disease?*, 72 FORDHAM L. REV. 1219, 1221 n.13 (2004) (defining “long-latency future injury plaintiffs” as “those plaintiffs who manifest injuries a long, but indeterminate, amount of time after their exposure to a toxin”).

fact sheet prepared by the National Cancer Institute, “*Everyone* is exposed to asbestos at some time during their life. Low levels of asbestos are present in the air, water, and soil.”⁵⁰ Are we all future claimants?⁵¹

Another simple example, borrowed from Judge Wood,⁵² reinforces this point. Individuals who smoked cigarettes for years but have not (yet) developed lung cancer are fairly classified as future claimants.⁵³ But haven’t all of us (of a certain age) been exposed to second-hand smoke in bars or restaurants (or even at home or in the workplace)?⁵⁴ Since the dividing line between future claimants and the public at large is porous, fluid, and poorly defined, the potential breadth of the future claimants category is breathtaking.⁵⁵

III. CONSTITUTIONAL BARRIERS TO BINDING UNKNOWING, EXPOSURE-UNAWARE, AND CONTINGENT FUTURE CLAIMANTS

The quest for global peace will often be unattainable because courts cannot enter class action judgments that bind unknowing, exposure-unaware, and contingent future claimants regarding claims for money damages. Two constitutional requirements prove insurmountable: notice and adequate representation.

⁵⁰ *Asbestos Exposure and Cancer Risk, National Cancer Institute Fact Sheet*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last updated May 1, 2009) (emphasis added).

⁵¹ *See, e.g.*, Wood, *supra* note 9, at 1934 (“In some cases, . . . it will be nearly impossible to distinguish potential victims from members of society at large, and people will have no idea that they have a potential future claim.”).

⁵² *Id.* (“Who has not breathed in some environmental tobacco smoke?”).

⁵³ *See, e.g.*, *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 5, 28, 29 (D. Mass. 2010) (certifying a class of long-term smokers who had not yet developed lung cancer); *cf.* *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 548 (D. Minn. 1999) (declining to certify a proposed class that included, among others, current and former smokers “who do not currently suffer from smoking-relat[ed] illnesses but who are at an increased risk of suffering from such illnesses”).

⁵⁴ *See, e.g.*, *Secondhand Smoke (SHS) Facts, Smoking & Tobacco Use*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/ (last updated April 11, 2014) (“Since 1964, 2.5 million nonsmokers have died from exposure to secondhand smoke. . . . An estimated 88 million nonsmokers in the United States were exposed to secondhand smoke in 2007–2008. . . . Today about half of the children between ages 3 and 18 in the U.S. are exposed to cigarette smoke regularly, either at home or in places such as restaurants that still allow smoking.” (citations omitted)).

⁵⁵ *See, e.g.*, *Meachem v. Wing*, 227 F.R.D. 232, 234 (S.D.N.Y. 2005). In *Meachem*, the court declined to approve a settlement in a (b)(2) class action of the claims of persons who were not then eligible for public assistance but who, in the future, would receive it, and concluded “that a wide swath of the living population potentially may be part of this class. . . . The class definition is both ‘sprawling’ and ‘amorphous.’” *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622, 628 (1997)).

A. Inability to Provide Reasonable Notice

The Due Process Clause of the Fourteenth Amendment bars the state from depriving persons of property through adjudication without notice and an opportunity to be heard.⁵⁶ Without adequate notice, the opportunity to be heard in court would be useless.⁵⁷ In the class action context—where absentees typically sit back and allow others to represent their interests—notice is principally intended “to alert class members to their right to ‘opt out’”⁵⁸ and to pursue their individual interests in litigation they initiate on their own. In the settlement context, notice is necessary to enable absent class members to gauge the adequacy of the settlement and decide whether to opt out or to object to the settlement.⁵⁹

In class actions predominantly for money damages—such as Rule 23(b)(3) class actions—both Rule 23 and due process require notice satisfying the *Mullane* test.⁶⁰ Rule 23(c)(2)(B) requires the court in (b)(3) class actions to

⁵⁶ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). See generally RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 129–34, 147–53 (2004) (discussing *Mullane* and notice in the class action context).

⁵⁷ *Mullane*, 339 U.S. at 314 (“This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”). Under *Mullane*, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314. But “when notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* at 315.

⁵⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (“[Rule 23](b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory”); accord 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 8:3, at 242–43 (5th ed. 2013) (suggesting that “the mandatory nature of [(b)(1) and (b)(2)] cases may be precisely why class members would want to know of them—such notice would better enable them to monitor class counsel’s pursuit of their rights and/or to intervene to protect their interests” but also noting that “the importance of providing individualized notice recedes” if class members “share the same interests”); cf. Rutherglen, *supra* note 18, at 272 (questioning the proposition that (b)(1) and (b)(2) class members are not entitled to notice and arguing “when exit is not a possibility, the choice between voice and loyalty becomes all the more important” and suggesting class members “are entitled to notice so that they have an opportunity to object to the class attorneys’ performance”).

⁵⁹ 3 RUBENSTEIN, *supra* note 58, § 8:14, at 270–72.

⁶⁰ *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 811–12 & n.3 (1985) (holding that in class actions that “seek to bind known plaintiffs concerning claims wholly or predominately for money judgments” who are beyond the jurisdictional reach of the court, due process requires notice, an opportunity to be heard, a right to opt out, and adequate representation); see also *Wal-Mart*, 131 S. Ct. at 2559 (identifying “the serious possibility” that the Due Process Clause may require notice and the right to opt out even “where the monetary claims do not predominate”).

“direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”⁶¹ According to the 1966 Advisory Committee note, the Rule’s notice requirement “is designed to fulfill requirements of due process to which the class action procedure is of course subject.”⁶² The Advisory Committee reinforced its conclusion that the Due Process Clause underlies the individual notice requirement by citing to *Mullane* and *Hansberry v. Lee*, among other sources,⁶³ and the Supreme Court has affirmed that conclusion.⁶⁴

While scholars have questioned whether due process requires individual notice in class actions presenting negative-value claims,⁶⁵ few if any doubt the

⁶¹ FED. R. CIV. P. 23(c)(2)(B).

⁶² FED. R. CIV. P. 23(d)(2) advisory committee’s note (1966).

⁶³ *Id.* (citing, *inter alia*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974) (“The Committee explicated its incorporation of due process standards by citation to [*Mullane*] and like cases.”).

⁶⁴ For example, in addressing the due process protections to which absent class members who lack minimum contacts with the forum are entitled, the Court in *Shutts* held that,

If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

472 U.S. at 811–12 (quoting *Mullane*, 339 U.S. at 314–15) (footnote omitted)); *see also* *Eisen*, 417 U.S. at 176–77 (rejecting the argument that “adequate representation, rather than notice, is the touchstone of due process in a class action” and hinting that the Due Process Clause itself might require individual notice to identifiable class members by noting “quite apart from what due process may require, the command of Rule 23 is clearly to the contrary” (emphasis added)); *cf.* *Agent Orange II*, 996 F.2d 1425, 1435 (2d Cir. 1993) (concluding with respect to “persons who are unaware of an injury” that notice “would probably do little good” and their “rights are better served, we think, by requiring fair and just recovery procedures . . . and by ensuring that they receive vigorous and faithful vicarious representation” (internal quotation marks and citation omitted)). According to Professor George Rutherglen, in *Shutts*, “the issue of adequate notice was tied up with the issue of personal jurisdiction over members of the class. The statements in the opinion endorsing individual mailed notice as a constitutional requirement must be interpreted in this light.” Rutherglen, *supra* note 18, at 265 n.24 (citation omitted).

⁶⁵ *See, e.g.*, Cramton, *supra* note 9, at 824 (“[O]pting out of [a negative-value] class is neither feasible nor practical. . . . [F]urthermore, an individual claim worth so little need not receive the same due process protection as a substantive tort claim worth many thousands of dollars.”); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 6 (2001) (proposing the elimination of “the requirement of individual notice in consumer class suits” because “it seems . . . absurd to require individual notice in a type of case in which . . . prosecution by individual actions would be a practical impossibility”); 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, 28, 31 (1991) (maintaining that in “large-scale, small-claim class action [cases] . . . the members of the plaintiff class would

importance of individual notice in class actions presenting positive-value claims,⁶⁶ where the rights to opt out and object are meaningful and individual notice is necessary to protect them. To facilitate the exercise of these rights in the settlement context, the class action notice must be “sufficiently clear and informative”⁶⁷ to enable class members to gauge the adequacy of the settlement and to decide whether to object or opt out (assuming a back-end opt-out right is afforded).

The question here is whether notice satisfying due process can be provided to unknowing and contingent future claimants. In addressing this question, it may help to differentiate between known, exposure-aware claimants, on the one hand, and contingent, exposure-unaware claimants, on the other. Notice can be mailed to known, exposure-aware claimants, and some courts have concluded that such claimants can understand the benefits they will receive under the settlement and the risks they will face by remaining in the class. In fact, several courts have certified positive-value class actions seeking money damages on behalf of unknowing but exposure-aware future claimants.⁶⁸ For example, in a class action against the manufacturer of a prosthetic hip socket, the district court approved a preliminary notice plan, which provided for individual notice by first class mail “to all Class Members who can be

ordinarily be far better off dispensing with notice” and arguing that “due process should not require individualized notice of small claimants prior to judgment or settlement in this specialized class action context”); Rutherglen, *supra* note 18, at 289 (opining that “[i]ndividual notice and the right to opt out should be saved for the cases in which it really matters to the class members themselves,” i.e., where class members have positive-value claims); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 936–37 (1998) (questioning the sense of providing individual notice to all claimants in negative-value class actions and suggesting that “flexible notions of due process” do not require it).

⁶⁶ See, e.g., Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 758 n.19, 762 (2007) (describing positive-value class actions as “those class actions where individual claims are sufficiently large so that ‘each claim would be independently marketable even in the absence of the class action device’” (quoting John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 905 (1987))).

⁶⁷ 3 RUBENSTEIN, *supra* note 58, § 8:17, at 277.

⁶⁸ See, e.g., *In re Certaineed Fiber Cement Siding Litig.*, —F.R.D.—, 2014 WL 1096030 (E.D. Pa. 2014) (approving the settlement of consolidated class actions filed on behalf of property owners whose fiber cement siding was allegedly defective, including owners whose siding had not yet failed); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 338–49 (N.D. Ohio 2001) (granting motion for conditional class certification and preliminary approval of a proposed settlement, which would bind persons with manufactured hip implants that had not yet failed); *Bates v. Tenco Servs., Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990) (certifying a class action pursuing property damage and personal injury claims resulting from ground water contamination and seeking recovery for harm suffered “now, in the past and *in the future*” (emphasis added)); *cf. supra* note 40 (discussing *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012)).

identified through reasonable efforts.”⁶⁹ Even those class members whose prosthetic hip socket implants had not yet failed could be identified through reasonable effort and notified.⁷⁰ The court found that they could understand the risk of implant failure and the consequences of such a failure.⁷¹ The range of possible outcomes was limited—either the implant would fail, or it would not, and if it did, the individual would be medically eligible for surgery to replace it, or she would not. Each class member would know whether her implant would fail within a discrete period of time—approximately two years.⁷² The unknowing future claimants could understand the benefits offered to them under the settlement and the risks they assumed (and potential advantages they might gain) if they opted out and preserved the right to sue separately.⁷³ Therefore, the court concluded, the due process concerns were not deemed insurmountable.⁷⁴

Other courts have questioned whether notice satisfying due process can be provided to unknowing but exposure-aware future claimants. For example, in a class action brought on behalf of patients who took a drug for epilepsy and who had or *would* develop liver failure as a result, the Ninth Circuit Court of Appeals expressed concern that “notice may be problematic” because “many potential members of the classes cannot yet know if they are part of the class. We therefore have *serious due process concerns* about whether adequate notice under Rule 23(c)(2) can be given to all class members.”⁷⁵ Likewise, in a class action brought on behalf of past or current users of an anti-depressant who had or *would* suffer severe withdrawal symptoms before the conclusion of the litigation, the United States District Court for the Central District of California noted: “Due process concerns abound as well. Since many Paxil users cannot know if they will be part of the class at this time, the Court doubts that those users can be provided notice adequate to allow them to make an informed decision whether to opt out.”⁷⁶ Even if they are aware of their

⁶⁹ Proposed Joint Plan for Preliminary Notice of Pendency of Class Action and Proposed Settlement at 2, *In re Inter-Op Hip Prosthesis Liab. Litig.*, MDL Docket No. 01-CV-9000 (N.D. Ohio Sept. 18, 2001), ECF No. 73.

⁷⁰ *In re Inter-Op Litig.*, 204 F.R.D. at 347 (“[T]here is no question in this case regarding *who* was actually exposed to the defective product.”).

⁷¹ *Id.*

⁷² *Id.* at 335–36.

⁷³ *Id.*

⁷⁴ *Id.* at 348–49.

⁷⁵ *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (emphasis added) (vacating an order certifying a class).

⁷⁶ *In re Paxil Litig.*, 212 F.R.D. 539, 545 (C.D. Cal. 2003) (citing *Valentino*, 97 F.3d at 1234).

exposure and receive notice of the class action, future claimants who suffer no present injuries may not pay sufficient attention to the notice received and may not have the information they need to make an informed decision whether or not to opt out.⁷⁷

If there is doubt that adequate notice can be provided in positive-value class actions to known but unknowing, exposure-aware future claimants, those doubts are greatly magnified regarding unknown, exposure-unaware, and contingent future claimants. The Supreme Court has addressed this issue, either directly or obliquely, in three landmark cases. First, *Mullane* acknowledged that when conditions do not permit notice that “is in itself reasonably certain to inform those affected,”⁷⁸ due process requires “that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.”⁷⁹ More specifically, the Court sanctioned notice by publication:

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.⁸⁰

In *Mullane* itself, the Court upheld notice by publication to beneficiaries whose interests were conjectural or future, to contingent beneficiaries, and to those “whose interests or addresses [were] unknown to the trustee.”⁸¹ Having already acknowledged the futility of notice by publication alone,⁸² the *Mullane*

⁷⁷ *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 622 (3d Cir. 1996) (identifying the objectors’ concerns regarding notice), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 632 (1997); *see also, e.g., Cramton, supra* note 9, at 836 (“Even if [unknowing future claimants] see or read [broadcast notices], the lack of a specific injury denies them the opportunity to make an informed opt-out choice.”); *Koniak, supra* note 39, at 1087 (“[H]ow does one provide notice and the opportunity to opt out to the unknowing? It cannot be done, if notice means apprising those people that an action is pending that affects them. . . . [T]hose class members cannot *know* in any meaningful sense that they are members of the class.”); *Koniak, supra* note 16, at 1830 n.230 (questioning the adequacy of notice to one who is not yet sick).

⁷⁸ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

⁷⁹ *Id.*

⁸⁰ *Id.* at 317.

⁸¹ *Id.* at 318.

⁸² *Id.* at 315–16. Of course, notice by publication today can include radio and television advertisements, internet postings, notices on social media platforms like Facebook, and other means not contemplated by the *Mullane* Court in 1950, which may improve its efficacy. *See, e.g., In re Certaineed Fiber Cement Siding Litig.*, —F.R.D.—, 2014 WL 1096030, at *14–15 (E.D. Pa. 2014) (finding notice by regular mail email and

Court nevertheless approved it regarding the future and contingent beneficiaries in light of the state's "insistent" and customary interest "in providing means to close trusts that exist[ed] by the grace of its laws and [were] administered under the supervision of its courts."⁸³ In other words, where the state itself has an interest in securing closure and enacts a law to achieve that objective—for example, where it adopts a statute to facilitate the administration of estates or trusts established under its laws the beneficiaries of which may be absent from the state for lengthy periods⁸⁴—it may provide notice by publication to unknown and unknowing persons as long as the statute adopts safeguards to protect their interests. But it is difficult to extrapolate from *Mullane* the authority to enter judgments depriving unknown and exposure-unaware individuals of positive-value monetary claims in the absence of meaningful notice, other meaningful safeguards to protect their interests, or an insistent state interest in closure and a statute enacted to further that interest.

Second, while the Court in *Shutts* explicitly held that due process requires individual notice in (b)(3) class actions, at least regarding absentees beyond the court's jurisdictional reach, it limited its holding "to those class actions which seek to bind *known* plaintiffs concerning claims wholly or predominately for money judgments."⁸⁵ Thus, *Shutts* expressly declined to address whether the Due Process Clause permits judgments that purport to bind unknown future claimants regarding monetary claims, and if so, the type of notice to which they are entitled.⁸⁶

"publication by newspaper, radio, television and the internet" was adequate); Koniak, *supra* note 39, at 1086–87 (conceding that unknown plaintiffs can be notified through television, radio, and newspaper advertisements as long as they are aware of their exposure, especially if their injuries have already manifested).

⁸³ *Mullane*, 339 U.S. at 313, 317–18.

⁸⁴ See, e.g., *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 469 (1905) ("[T]he right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments . . ."), cited in *Mullane*, 339 U.S. at 317.

⁸⁵ *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985) (emphasis added).

⁸⁶ In the Agent Orange litigation, the Second Circuit initially refused to extend *Shutts*'s holding (requiring individualized notice) to unknown and unknowing future claimants and affirmed a judgment binding absent future class members who received no individualized notice and who were not informed of their opportunity to opt out. See *In re Agent Orange Prod. Liab. Litig. (Agent Orange I)*, 818 F.2d 145 (2d Cir. 1987). Here, the Second Circuit found that the "creative approach" to notice adopted by the district court was "appropriate to this unique case." *Id.* at 167. While the court acknowledged that "the claims of the plaintiffs are highly individualistic in a number of respects," the court concluded that "[t]he interests of all of the plaintiffs are identical . . . with regard to the facts and the law relevant to the military contractor defense. The class members with actual notice therefore would have represented the interests of the class members unaware of the action." *Id.* at 169. The court also noted that since no "comprehensive list" of all veterans who served in

Third, if the Court in *Shutts* mentioned class actions with unknown class members only in passing, it dealt with one head-on in *Amchem Products, Inc. v. Windsor*.⁸⁷ *Amchem* involved a massive class action brought on behalf of individuals who had not yet filed suit against the former-asbestos-manufacturer defendants but who had been exposed to asbestos in the workplace or through the occupational exposure of a spouse or household member as well as those whose spouse or household member had been so exposed.⁸⁸ After identifying several reasons why the “sprawling class” could not be certified under Rule 23,⁸⁹ the Court turned to the “[i]mpediments to the provision of adequate notice.”⁹⁰ The Court acknowledged the Third Circuit’s concern that many future class members “may not even know of their exposure, or realize the extent of the harm they may incur.”⁹¹ Even if notice reached these unknowing and exposure-unaware class members and they “fully appreciate[d] the significance of class notice, those without current afflictions [might] not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.”⁹² The Court conceded the impossibility of reaching “future spouses and children of asbestos victims,” who obviously “could not be alerted to their class membership.”⁹³ While declining to “rule, definitively, on the notice given” in *Amchem*, the Court “recognize[d] the gravity of the question whether class action notice sufficient under the Constitution . . . could ever be given to

Vietnam could have been compiled there was “no feasible alternative to the notice plan adopted by the district court.” *See id.*

In a collateral attack on the judgment filed by Vietnam veterans whose illnesses manifested only after the settlement was approved, the Second Circuit again concluded that individual notice to all of the veterans was not required. The court “again decline[d] to extend the *Shutts* holding into situations such as this.” *See Agent Orange II*, 996 F.2d 1425, 1435 (2d Cir. 1993). The court noted the flexibility of due process and the lack of an “easily accessible list of veterans.” *Id.* (quoting *Agent Orange I*, 818 F.2d at 169) (internal quotation marks omitted). The court concluded that “society’s interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good.” *Id.*

Only after the Supreme Court decided *Amchem*, discussed *infra* at notes 87–94 and accompanying text, did the Second Circuit conclude, in yet another collateral attack on the *Agent Orange* judgment—this one filed by claimants whose injuries manifested after the settlement fund had been exhausted—that the “plaintiffs likely received inadequate notice.” *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 n.8 (2d Cir. 2001); *see also infra* notes 112–22 and accompanying text.

⁸⁷ 521 U.S. 591 (1997).

⁸⁸ *Id.* at 602 & n.5 (describing and quoting the class action complaint).

⁸⁹ *Id.* at 622–28.

⁹⁰ *Id.* at 628.

⁹¹ *Id.* (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996)).

⁹² *Id.*

⁹³ *Id.*

legions so unselfconscious and amorphous.”⁹⁴ Lower courts have declined to certify (or affirm the certification of) positive-value class actions on behalf of unknowing or contingent future claimants at least in part because of doubts regarding the adequacy of notice,⁹⁵ and scholars have shared these doubts.⁹⁶

If the purpose of notice in positive-value (b)(3) class actions is to afford class members the information they need to decide whether to opt out and sue separately, object, or sit back and rely on the named representatives and class counsel to represent their interests, it cannot fulfill this purpose regarding contingent and exposure-unaware future claimants. Certainly, the contingent claimants—the future children and spouses of the exposed individuals—cannot be provided with meaningful notice. Obviously, notice to the unborn is entirely out of the question. Even if contingent future spouses happened to see a notice of the suit, its potential impact on their lives would be unfathomable to them. Likewise, if exposure-unaware future claimants happened to receive notice of the suit, it would be of no value to them; they would have no reason to pay it any attention whatsoever.⁹⁷ In sum, because the due process notice requirement

⁹⁴ *Id.* The Court likewise declined to decide the notice question in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841 n.19 (1999) (“Since satisfaction or not of a notice requirement would not affect the disposition of this case, we express no opinion on the need for notice or the sufficiency of the effort to give it in this case.”).

⁹⁵ *See, e.g., Georgine*, 83 F.3d at 623, 633–34 (expressing “serious concerns as to the constitutional adequacy of class notice” in a class action filed on behalf of those exposed to asbestos but declining to rule on the issue, stating that “[i]t is unrealistic to expect every individual with incidental exposure to asbestos to realize that he or she could someday contract a deadly disease and make a reasoned decision about whether to stay in this class action” and concluding, “if this class action settlement were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action”); *see also* *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 259–61 & n.8 (2d Cir. 2001) (concluding that absent class members, whose identities were not known at the time of the settlement and whose injuries did not manifest until after the settlement fund had been exhausted, were not bound by a prior class action settlement because their interests had not been adequately represented and noting that “plaintiffs likely received inadequate notice”); *supra* note 86.

⁹⁶ *See, e.g.,* Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1975 (2000) (“[T]he difficulty of [providing] satisfactory notice may defeat the attempt to bind future claimants by the proceeding.”); Cramton, *supra* note 9, at 835 (“[Unknowing class members] cannot be given notice. They will not recognize that any notice applies to them, whatever the manner by which it is broadcast. Unknowing future claimants have [no] effective opportunity to opt out during the notice period”); Koniak, *supra* note 39, at 1089 (“How do we convince people who discover five years from now that they are sick from exposure to some product that it was fair to have disposed of their claim years earlier without their knowledge?”); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 478 (1996) (suggesting that notice to future claimants in “environmental toxin cases . . . is by its nature futile in some circumstances”).

⁹⁷ *See, e.g.,* Koniak, *supra* note 16, at 1830 n.230 (questioning whether one who is not sick would pay any attention to a class action notice and doubting the efficacy of “[n]otice of hypothetical involvement”).

cannot be satisfied, contingent and exposure-unaware future claimants cannot be bound by class action judgments.⁹⁸

B. Inability to Ensure Adequate Representation

Concerns regarding notice are compounded by concerns regarding the adequacy of representation for unknowing and contingent future claimants. Just as Rule 23(c)(2)'s notice requirement protects the due process rights of absent class members,⁹⁹ so too does Rule 23(a)(4)'s requirement that the class representatives "fairly and adequately protect the interests of the class."¹⁰⁰ As the Supreme Court noted in *Hansberry v. Lee*, due process requires that the interests of the absentees and those of the class representatives must be "of the same class" and that the latter must "fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest."¹⁰¹

In assessing the adequacy of representation, courts must gauge both the competence of class counsel and the "stature and interest" of the named representatives.¹⁰² Courts must determine whether the named representatives have the character and the means to vigorously prosecute the litigation;¹⁰³

⁹⁸ See Rutherglen, *supra* note 18, at 267 ("Different forms of notice at different stages in the proceedings can . . . satisfy due process if the preclusive effects of the resulting judgment are suitably limited.").

⁹⁹ See *supra* notes 62–64 and accompanying text.

¹⁰⁰ FED. R. CIV. P. 23(a)(4); see also 1 RUBENSTEIN, *supra* note 58, § 3:50, at 320–21 (5th ed. 2011) (noting that "the Constitution's Due Process Clause and the rules of class action procedure both insist that the class be 'adequately' represented" and that adequate representation has "dual bases in the Constitution and Rule 23"); 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1765, at 317 ("The binding effect of all class-action decrees raises substantial due-process questions that are directly relevant to Rule 23(a)(4).").

¹⁰¹ 311 U.S. 32, 41 (1940).

¹⁰² 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1766, at 346–47; see also, e.g., 1 RUBENSTEIN, *supra* note 58, § 3:50, at 321 (noting adequacy's "dual requirement of competent class representatives and class counsel"); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1698–99, 1703–05, 1716 (2004) (describing the "hornbook" versions of the factors considered in assessing the adequacy of class counsel and the class representative; contrasting two competing views of the representative's role: the "potted plant" view and the active fiduciary view). Mullenix maintains that, in practice, courts "routinely, reflexively, and presumptively certify proposed class counsel as adequate without a sufficiently probing inquiry" and "virtually ignore the class representative altogether." Mullenix, *supra*, at 1699, 1703 (footnote omitted). She also expresses concern that "the adequacy requirement is taken even less seriously when certification occurs at the back end of class litigation, especially in the context of settlement-only classes." *Id.* at 1716.

¹⁰³ 1 RUBENSTEIN, *supra* note 58, §§ 3.68–3.69 (discussing the representative's credibility, integrity, and financial resources); 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1766, at 352, § 1767, at 381–85.

ensure that their interests do not conflict with those of the absentees;¹⁰⁴ scrutinize their relationships with others to protect against collusion;¹⁰⁵ screen for potential conflicts between class counsel and the represented class;¹⁰⁶ and consider the competency, resources, experience, and potential conflicts of interest of class counsel.¹⁰⁷ This last factor is critical because, as one leading treatise put it, “it is primarily class counsel, not the class representative, who controls the class’s interest. The quality of that counsel is therefore paramount.”¹⁰⁸

In class actions that aim to bind both current and future claimants, conflicts between class representatives—who are typically current claimants—and the absent future claimants are particularly concerning. As the Supreme Court explained in *Amchem*,

[N]amed parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.¹⁰⁹

¹⁰⁴ 1 RUBENSTEIN, *supra* note 58, §§ 3:58–3:65; 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1768, at 389; *see also* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”); *Hansberry*, 311 U.S. at 42–43 (stating that absent class members “may be bound by the [class action] judgment where they are in fact adequately represented”).

¹⁰⁵ 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1768, at 394; *see also* 1 RUBENSTEIN, *supra* note 58, § 3:70, at 390–91 (describing the need to scrutinize the representative’s close relationship with class counsel to ensure that the representative will not “be more interested in ensuring counsel’s fee than in protecting the class’s interests”).

¹⁰⁶ 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1768, at 423, § 1769.1, at 455.

¹⁰⁷ *Amchem*, 521 U.S. at 626 n.20 (“The adequacy heading also factors in competency and conflicts of class counsel.”); 1 RUBENSTEIN, *supra* note 58, §§ 3:72–3:78; 7A WRIGHT, MILLER & KANE, *supra* note 6, § 1769.1, at 442–43 (stating that “attorneys for the class perform a major role in assuring that the representation satisfies due-process standards” and noting that the court must “consider the quality and experience of the attorneys for the class”); Mullenix, *supra* note 102, at 1735–38; *see also* FED. R. CIV. P. 23(g)(1)(A) (identifying four criteria that courts must consider in appointing class counsel, including “the work counsel has done in identifying or investigating potential claims in the action” and “counsel’s knowledge of the applicable law”); 1 RUBENSTEIN, *supra* note 58, §§ 3:80–3:88 (analyzing Rule 23(g)).

¹⁰⁸ 1 RUBENSTEIN, *supra* note 58, § 3:72, at 394. This view, regarding the primacy of effective counsel, may explain why courts typically give very short shrift to the adequacy of the class representative. *See* Mullenix, *supra* note 102, at 1709–11.

¹⁰⁹ *Amchem*, 521 U.S. at 626; *cf. Hansberry*, 311 U.S. at 44 (noting that “[t]hose who sought to secure” the “benefits” of the racially-restrictive covenant “by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance”).

The failure of the *Amchem* representatives to negotiate a settlement that protected future claimants from the risk of inflation reflected this conflict of interest and the named parties' inability to represent those whose interests were different from their own.¹¹⁰ The district court's willingness to approve the settlement notwithstanding these (and other) problems illustrates the lack of rigor with which many courts scrutinize the adequacy of representation in class actions.¹¹¹

Likewise, in *Stephenson v. Dow Chemical Co.*, the Second Circuit Court of Appeals concluded that absent future claimants were not bound by a prior class action settlement because their interests had not been adequately represented.¹¹² An earlier class action settlement of Vietnam veterans' claims for injuries allegedly caused by Agent Orange had specifically purported to bind "persons who have not yet manifested injury."¹¹³ The settlement, which the district court approved in 1984 and which the Second Circuit affirmed in 1987,¹¹⁴ provided for payments to be made over a ten-year period, ending December 31, 1994.¹¹⁵ When veterans whose injuries had not manifested by the time the settlement was approved later challenged it, both the district court and the court of appeals concluded that the challengers were bound by the settlement because future claimants like them had been part of the class and

¹¹⁰ *Amchem*, 521 U.S. at 627 (noting that "the settlement includes no adjustment for inflation"); see also, e.g., *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014) (identifying as a red flag the settlement's treatment of customers who had already replaced their defective windows and those who had not as a single class; stating that "the adversity among subgroups requires that the members of each subgroup cannot be bound by a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups" (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2d Cir. 1992)) (internal quotation marks omitted)).

¹¹¹ See, e.g., Mullenix, *supra* note 102, at 1692 ("[C]ourts pay lip service to the concept of adequate representation but fail to robustly engage in any meaningful inquiry to establish the existence of such adequate representation."). In her article, Professor Mullenix also advocates for "a more robust, meaningful set of standards to govern courts in the adequacy determination . . . [and] a more robust, vigorous judicial scrutiny of the adequacy requirement" and elaborates on concerns regarding judicial scrutiny of adequacy. *Id.* at 1692–93, 1696–1733.

¹¹² 273 F.3d 249, 259–61 (2d Cir. 2001); see also *supra* note 86. For far more thorough analyses of the Agent Orange litigation, see, for example, PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); Koniak, *supra* note 16, at 1817–36; Mullenix, *supra* note 102, at 1718–33; Linda S. Mullenix, *Apocalypse Forever: Revisiting the Adequacy of the Agent Orange Settlement, Twenty-Five Years Later*, 2003 PREVIEW U.S. SUP. CT. CAS. 274.

¹¹³ *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 865 (E.D.N.Y. 1984) (quoting the Settlement Agreement).

¹¹⁴ *Agent Orange I*, 818 F.2d 145, 163–74 (2d Cir. 1987) (approving the class certification and the settlement).

¹¹⁵ *Stephenson*, 273 F.3d at 253 (describing the settlement).

their interests had been adequately represented.¹¹⁶ In particular, the district court noted that “like all class members who suffer[ed] death or disability before the end of 1994, [these plaintiffs were] eligible for compensation from the Agent Orange Payment Fund.”¹¹⁷ Thus, because the future claimants were entitled to the same recovery that had been made available to the current claimants under the settlement agreement, no conflict of interest actually materialized. Like the district court, the Second Circuit rejected the plaintiffs’ argument regarding the adequacy of representation, echoing the district court’s finding that “the conflict between the interests of present and future claimants [was] more imagined than real.”¹¹⁸

In *Stephenson*, on the other hand, the veterans who sought to collaterally attack the judgment were *not* eligible for compensation from the fund because their injuries had not manifested until after the ten-year pay-out period had expired.¹¹⁹ “Because the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between [the challengers] and the class representatives [had become] apparent.”¹²⁰ The Second Circuit cited *Amchem* and *Ortiz*¹²¹ for support for the now-apparent proposition that “a class [that] purports to represent both present and future claimants may encounter internal conflicts.”¹²²

Steps can be taken to protect against obvious conflicts of interest between current and future claimants. Structural protections can be provided, such as subclasses represented by individuals looking out “solely [for] the members of

¹¹⁶ *Agent Orange II*, 996 F.2d 1425, 1435–37 (2d Cir. 1993) (affirming that the representation of the absent class members had been “more than adequate”); *Ryan v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 781 F. Supp. 902, 919 (E.D.N.Y. 1991).

¹¹⁷ *Ryan*, 781 F. Supp. at 919.

¹¹⁸ *Agent Orange II*, 996 F.2d at 1435 (quoting *Ryan*, 781 F. Supp. at 919).

¹¹⁹ *Stephenson*, 273 F.3d at 251, 257–58.

¹²⁰ *Id.* at 260.

¹²¹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); see *infra* notes 124–25 and accompanying text.

¹²² *Stephenson*, 273 F.3d at 261 & n.9.

Even in a (b)(2) class action, with its presumption of cohesion, the district court in *Meachem v. Wing* declined to approve a settlement that purported to bind unknowing future claimants—those who were not then receiving public assistance from New York City but who would receive benefits in the future and would have a claim against the City regarding allegedly deficient procedures for the termination or reduction of such benefits. 227 F.R.D. 232 (S.D.N.Y.), *reconsideration denied*, 227 F.R.D. 237 (S.D.N.Y. 2005). Because the defendants’ obligations under the proposed settlement terminated after a fixed period of time but the class members’ claims were “forever discharge[d],” the court found “subtle” potential conflicts between the current recipients who served as class representatives and the absent future claimants; their interests were “not fully aligned.” *Id.* at 236.

their respective subgroups,”¹²³ who have separate counsel.¹²⁴ According to the Supreme Court in *Ortiz v. Fibreboard Corp.*, “it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.”¹²⁵

Class action scholars have echoed these recommendations. For example, while they were both still with Public Citizen Litigation Group, Professors Brian Wolfman and Alan Morrison called for the appointment of separate counsel to represent future claimants, who would have authority to retain consultants and medical experts to help inform the relief sought on behalf of the future claimants.¹²⁶ Separate counsel for future claimants would presumably negotiate terms such as inflation protection and back-end opt-out rights¹²⁷ to protect future claimants whose problems might not manifest for some time.¹²⁸ Wolfman and Morrison also advocated discovery by objectors to assess the fairness of the settlement,¹²⁹ authority in the trial court to make internal reallocations of settlement funds to cure conflicts of interest,¹³⁰ an obligation on the part of the trial court to perform a substantive review of the

¹²³ *Amchem*, 521 U.S. at 627 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742–43 (2d Cir. 1992)) (internal quotation marks omitted). For example, the trial court in *Mullane v. Central Hanover Bank & Trust Co.*, which was not prosecuted as a class action, nevertheless appointed separate guardians to protect the interests of the interest beneficiaries, on the one hand, and the principal beneficiaries, on the other. 339 U.S. 306, 310 (1950).

¹²⁴ See, e.g., *Ortiz*, 527 U.S. at 856.

¹²⁵ *Id.* (citing, *inter alia*, *Amchem*, 521 U.S. at 627).

¹²⁶ Wolfman & Morrison, *supra* note 96, at 477–80, 495 (specifying that counsel for the future claimants should represent no “presently injured” claimants).

¹²⁷ See, e.g., FED. R. CIV. P. 23(e)(4) (“If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”); Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 WM. & MARY L. REV. 373, 383–85 (2007) (describing four different circumstances in which absent class members have been afforded a delayed opportunity to opt out).

¹²⁸ See, e.g., Wolfman & Morrison, *supra* note 96, at 478 (“[T]he appointment of counsel dedicated to representing future class members will, in itself, go a long way to correcting the worst abuses. Such counsel would not . . . have agreed to a thirty-year settlement without some type of built-in inflation factor. . . . [C]ounsel for future class members might insist on a viable back-end opt out”); see also, e.g., Cramton, *supra* note 9, at 828 (“[A] court-approved settlement committee that is broadly representative of the class should negotiate class action settlements affecting the rights of future tort claimants, or, alternatively, adequate representation should be provided to subclasses by separate designation and representation.”).

¹²⁹ Wolfman & Morrison, *supra* note 96, at 485–90.

¹³⁰ *Id.* at 490–95.

settlement to ensure its fairness to future claimants,¹³¹ and a presumption that settlements purporting to bind future claimants must provide for inflation protection.¹³²

But while subclasses with separate representation may be able to alleviate conflicts between current and future claimants in some cases, they may not be able to assure adequate representation to exposure-unaware and contingent future claimants. Several impediments exist. First, it will be impossible to find representatives for the unaware or contingent future claimants who are members of their respective subclasses.¹³³ After all, by definition, unaware future claimants do not know of their exposure, let alone the extent of their injuries, if any.¹³⁴ Since current case law requires that a class representative be a member of the represented class,¹³⁵ it will be impossible to find an individual who is herself unaware of her exposure who can serve as a representative for the exposure-unaware future claimants. Even more obvious, it will be impossible to find a representative for the unborn future children of those exposed or for the future spouses who have not yet met their partners if such representatives must themselves be members of their respective subclasses.

It might be possible to amend Rule 23 to permit either the appointment of a representative of a class or subclass of future claimants who is not herself a member of the class *or* the appointment of an attorney to represent a class of future claimants without a class representative in place. Professors Jonathan Macey and Geoffrey Miller have argued that the class representative plays no meaningful role (in negative-value class action litigation) and should be dispensed with since it is the skill, integrity, and motivation of class counsel that determines the quality of representation afforded the absentees.¹³⁶ But

¹³¹ *Id.* at 495 (“In addition, we believe that the Rule should be changed to require the court to undertake a substantive evaluation of the settlement’s fairness to subgroup members, particularly those with potential future claims.”).

¹³² *Id.* at 478, 495–98.

¹³³ See Cramton, *supra* note 9, at 835 (“Unknowing future claimants have . . . [no one] who can embody their interests in the settlement negotiation or its review by the court.”); Koniak, *supra* note 16, at 1842 n.278 (“[T]here are real questions about whether [future claimants] can ever be adequately represented, particularly if adequate representation includes a named representative who can fairly stand in for them . . .”).

¹³⁴ See *supra* notes 41–43 and accompanying text.

¹³⁵ See, e.g., *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (“[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)) (internal quotation marks omitted)).

¹³⁶ Macey & Miller, *supra* note 65. Macey and Miller posit that “the named plaintiff has little control over how the suit is conducted, [so] the analysis should focus not on the appropriateness of the named plaintiff but rather on the reliability and competence of the plaintiffs’ attorney” and recommend that “actual, identified named plaintiffs not be required in large-scale, small-claim litigation. Instead, a plaintiffs’ attorney should be

Article III requires that at least one named plaintiff have an actual “case or controversy” with the defendant,¹³⁷ and Macey and Miller concede that Article III demands at least “*some* individual class members who have a concrete stake in the outcome sufficient to satisfy traditional justiciability requirements.”¹³⁸ If, as several lower courts have held, Article III requires that each subclass have a representative with standing,¹³⁹ it will be impossible to certify a subclass of contingent and exposure-unaware future claimants.¹⁴⁰

Second, even if an attorney or a representative who was not herself a member of the futures class or subclass could be appointed to represent exposure-unaware and contingent future claimants, it would be hard for her to

allowed to bring ‘Jane Doe’ or ‘Richard Roe’ complaints on behalf of a class or corporation.” *Id.* at 5–6; *see also id.* at 61–96 (elaborating on their critique of the named representative); Miller, *supra* note 48, at 620 (“Given the minimal nature of the representative plaintiff’s role, it is not clear that combining the roles of named plaintiff and class counsel would have a discernible negative effect.”). *But see, e.g.,* Mullenix, *supra* note 102, at 1733–34 (advocating a rigorous assessment of the adequacy of the named representative and rejecting the “view that treats class representatives as ‘standing’ ciphers or potted plants”). Professor Mullenix also advocates for the development of “meaningful standards for the assessment of this requirement.” *Id.* at 1734.

¹³⁷ O’Shea v. Littleton, 414 U.S. 488, 493–94 (1974) (concluding that the complaint failed to satisfy Article III and maintaining that “if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other members of the class”); *see also, e.g.,* Sw. Bell Yellow Pages, Inc. v. Waterin Hole, Inc., No. 03-96-03348-CV, 1997 WL 124110, at *3 (Tex. App. Mar. 20, 1997) (maintaining, as a matter of Texas law, that “class representatives themselves, as well as counsel, [must] avidly pursue the claims of the class members” and “the class is entitled to more than adequate counsel”).

¹³⁸ Macey & Miller, *supra* note 65, at 83 (“[Article III policies underlying standing and mootness doctrine are] quite adequately served as long as (1) there exist *some* individual class members who have a concrete stake in the outcome sufficient to satisfy traditional justiciability requirements, and (2) class . . . counsel who effectively control the litigation have framed the issues so as to create the requisite degree of adversary testing and protection against collusive litigation. It should not be necessary . . . that there by *any* named plaintiff at all.”).

¹³⁹ *See* 3 RUBENSTEIN, *supra* note 58, § 7:31, at 162 n.40 (“Several district courts have required that subclass representatives have Article III standing to bring the claims asserted by the subclasses they purport to represent.” (citing McDonough v. Toys R Us, Inc., 638 F. Supp. 2d 461, 473 (E.D. Pa. 2009); Susan J. v. Riley, 254 F.R.D. 439, 451 (M.D. Ala. 2008); Caranci v. Blue Cross & Blue Shield of R.I., 194 F.R.D. 27, 32 (D.R.I. 2000))).

¹⁴⁰ *See, e.g.,* Linda S. Mullenix, *Back to the Futures: Privatizing Future Claims Resolution*, 148 U. PA. L. REV. 1919, 1927 (2000) (“Objectors in latent injury mass tort cases have argued that future claimants have no actual injury and therefore can have no standing, an Article III ‘case and controversy’ objection.” (footnote omitted)). The Supreme Court declined to address the standing issue in both *Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). *Cf. Hazard, supra* note 3, at 1910 (“[I]f individual claims cannot be specified in terms of the identity of claimants and the factual basis of their claims, then there is simply no basis for ‘adjudication’ of unknown claims on the part of unknown claimants.”).

adequately represent the interests of the absentees.¹⁴¹ Given the length of some latency periods, a class action could be litigated or settled decades before the future claimants would become ill.¹⁴² But medical science and technology advance with such rapidity that it would be difficult, if not impossible, for the representatives to anticipate future discoveries that would be made only years or decades in the future and their potential impact on the claims of future claimants.¹⁴³ For example, doubts about causation may justify smaller compensatory awards today,¹⁴⁴ but future medical discoveries may establish causation with (greater) certainty, thereby supporting much larger awards for future claimants tomorrow.¹⁴⁵ Lacking a crystal ball, representatives of future claimants would have a very hard time knowing if the terms of the settlement reached today would be fair to the absentees when they manifest symptoms tomorrow. Likewise, there may be treatment options available tomorrow that a representative today could not even anticipate. And the inability to predict legal developments between the time of the class action settlement and the

¹⁴¹ See, e.g., Hensler, *supra* note 45, at 604–08 (identifying “myriad reasons to believe that future representatives will not be adequate to the task of representing the interests of future claimants,” including cognitive biases).

¹⁴² See, e.g., *Amchem*, 521 U.S. at 598 (noting that the latency period for asbestos-related diseases may be as long as forty years); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013) (describing the “latent and progressive nature of black lung disease” and affirming an award of disability benefits notwithstanding a denial forty years earlier because “a claimant’s physical condition may be different at entirely different times, and thus, the claims are not the same”), *cert. denied*, 134 S. Ct. 898 (2014).

¹⁴³ See, e.g., *Agent Orange I*, 818 F.2d 145, 160 (2d Cir. 1987) (discussing the district judge’s refusal to certify a class action against the government and noting his concern “that class certification would unfairly preclude children with birth defects from bringing suit were future scientific studies to establish the validity of their claims against the government”); *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 6, 30 (D. Mass. 2010) (discussing the advent of Low-Dose Computed Tomography (LDCT) scans, which identify lung cancer at a much earlier stage than prior technologies such as x-rays and noting that “no form of precancerous screening for lung cancer was an accepted standard of care until now”); *cf. Agent Orange II*, 996 F.2d 1425, 1436–37 (2d Cir. 1993) (“[D]espite continuing research, the crucial issue of ‘general causation’ . . . remains unsettled. . . . Notwithstanding the . . . scientific developments of the past nine years, the chances of recovery are nearly as speculative today as they were at the time of settlement.”).

¹⁴⁴ See, e.g., *Agent Orange I*, 818 F.2d at 171–74 (describing the difficulties that plaintiffs would face in seeking to prove that their ailments were caused by exposure to Agent Orange; concluding that these “formidable hurdles” supported the conclusion that the settlement was reasonable); *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 242–43 (S.D. W. Va. 2005) (citing “uncertainties regarding causation” and describing a “reasonable compromise of causation issues”). The court in *Serzone* also noted that claimants’ “pre-existing liver conditions . . . further complicate issues of causation” and concluded that the settlement’s objective criteria “save claimants the burden of establishing causation as a matter of certainty while preventing undesirable recoveries for groundless claims.” 231 F.R.D. at 243.

¹⁴⁵ *Cf.* Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment*, 80 CORNELL L. REV. 1037, 1038 (1995) (maintaining that the tort process “is far less suited for scientific determinations of causation in long-latency illness and disease cases involving clinical, epidemiological, and statistical analysis”).

development of the future claimants' injuries, which could bear on the strength of their claims, could exacerbate these difficulties in providing adequate representation to unknowing future claimants.¹⁴⁶

In sum, neither meaningful notice nor adequate representation can be provided to unknowing, exposure-unaware, or contingent future claimants. Thus, it will be difficult, if not impossible, to secure global peace through a class action judgment or settlement that is binding on future claimants.

IV. NONCLASS AGGREGATE SETTLEMENTS

In light of the constitutional challenges that bedevil mass tort class actions, attorneys handling mass torts have largely abandoned class actions as the principal vehicle for achieving global peace and have turned to nonclass aggregate settlements instead.¹⁴⁷ We will focus on two particular nonclass aggregate settlement innovations to determine whether they might be employed to achieve global peace and bind future claimants. One type, epitomized by the Vioxx settlement, secures the commitment of all attorneys representing eligible claimants to recommend the settlement to their clients and to withdraw from representing any clients who reject the settlement. The other

¹⁴⁶ *Agent Orange II*, 996 F.2d at 1436–37 (noting that “the scope of the government contract defense [which had rendered the class claims weak] has been somewhat limited” by an intervening change in Supreme Court precedent, but concluding that “there is a reasonable probability that it would apply, barring any recovery by the plaintiffs” and rejecting plaintiffs’ challenges to the adequacy of representation); *see also* Alex Raskolnikov, Note, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 YALE L.J. 2545, 2576 (1998) (“Because the values of current claims are based on existing legal rules, future change in those rules will make the values obsolete.”).

¹⁴⁷ *See, e.g.*, Erichson & Zipursky, *supra* note 16, at 267, 272 (“[Since *Amchem* and *Ortiz*,] mass tort lawyers largely abandoned any hope that settlement class actions would be the key to finding closure. Nonclass aggregate settlements have filled this void After *Amchem* and *Ortiz*, lawyers understood that Rule 23 was not an easy avenue for global settlements”); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 217 (“[In the Vioxx case,] a class action was too unwieldy because of the elevated burdens on organizing a class after *Amchem* and *Ortiz* . . .”).

“A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.” ALI PRINCIPLES, *supra* note 12, § 3.16(a). The resolution of multiple claims is interdependent in two circumstances: if “the defendant’s acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims” or if “the value of each claimant’s claims is not based solely on individual case-by-case facts and negotiations.” *Id.* § 3.16(b)(1)–(2). The *Principles* refer to these circumstances as “collective conditionality”—“a defendant condition[s] its acceptance of a settlement on a specified number or percentage of claimants agreeing to the settlement”—and “collective allocation”—the claimants’ claims are assigned monetary values through a process *other than* claim-by-claim analysis of each claim’s respective merits. *Id.* § 3.16 cmts. b & c; *see also* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784 (2005) (coining the phrases “collective conditionality” and “collective allocation”). I served on the Members’ Consultative Group for the *ALI Principles* discussed here and *infra* Part IV.B.

type, proposed in section 3.17(b) of the *Principles of the Law of Aggregate Litigation* (the *ALI Principles* or the *Principles*) adopted by the ALI in 2009, secures the prior consent of all claimants to be bound by a settlement approved by a supermajority of the claimants.¹⁴⁸ As we will see, unaware, unknowing and contingent future claimants who cannot be bound by class action judgments likewise cannot participate in, take advantage of, or be bound by either of these nonclass aggregate settlement options. Thus, our analysis of nonclass aggregate settlements reinforces our pessimistic conclusion that global peace may be unattainable.

A. *Vioxx-type “All-or-Nothing” Settlements*

The agreement negotiated in the Vioxx case epitomizes the “all-or-nothing” settlement agreement.¹⁴⁹ The Vioxx agreement sought to resolve all claims against the manufacturer Merck arising from the extended use of the painkiller Vioxx, which allegedly heightened the users’ risk of heart attack and stroke.¹⁵⁰ Eighteen bellwether trials against Merck were conducted, with five plaintiff verdicts awarding large compensatory and punitive damages awards and thirteen plaintiff losses.¹⁵¹ These trials motivated lawyers for both sides to attempt to reduce their risks by negotiating a global \$4.85 billion settlement, which sought to resolve the claims of approximately 50,000 users.¹⁵²

Rather than contend with the procedural hurdles to class certification and a judicially-approved settlement,¹⁵³ however, Merck and a group of plaintiffs’ attorneys with Vioxx clients negotiated a nonclass settlement. The settlement

¹⁴⁸ ALI PRINCIPLES, *supra* note 12, § 3.17(b).

¹⁴⁹ See Erichson, *supra* note 16, at 981 (defining an “all-or-nothing” settlement as one that explicitly conditions the agreement on the participation of all attorneys representing all (or nearly all) claimants regarding a particular product failure or mass disaster or a settlement that otherwise “reveal[s] an expectation of full participation or create[s] pressure to bind every member of the claimant group”).

¹⁵⁰ Issacharoff, *supra* note 147, at 215–16; see also, e.g., Liptak, *supra* note 14, at A12.

¹⁵¹ Erichson & Zipursky, *supra* note 16, at 278; Issacharoff, *supra* note 147, at 216. Four of the plaintiffs’ verdicts were vacated or reduced on appeal. See Erichson & Zipursky, *supra* note 16, at 278 (citing Alexandra D. Lahav, *Rediscovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2394 nn.106–07 (2008) (reviewing the Vioxx trial outcomes)).

¹⁵² Erichson, *supra* note 16, at 1000; Erichson & Zipursky, *supra* note 16, at 279; see also Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, § 11.1, at 41–42 (Nov. 9, 2007), available at <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> [hereinafter Vioxx Settlement Agreement]; Amendment to Settlement Agreement (Jan. 17, 2008), available at <http://www.officialvioxxsettlement.com/documents/Amendments%20to%20Master%20Settlement%20Agreement.pdf>.

¹⁵³ See, e.g., Issacharoff, *supra* note 147, at 217 (“A publicly ordered settlement through the use of a class action was too unwieldy because of the elevated burdens on organizing a class after *Amchem* and *Ortiz* . . .”).

was between Merck and the plaintiffs' attorneys, rather than between Merck and the claimants themselves.¹⁵⁴ In the agreement, Merck offered to settle Vioxx users' claims on specified terms,¹⁵⁵ but it committed to do so only if at least eighty-five percent of all claimants accepted the terms of the offer.¹⁵⁶ Otherwise, Merck could, in the language of the agreement, "walk away."¹⁵⁷

Several features made the settlement agreement particularly noteworthy and controversial. As mentioned above, the agreement was between the defendant Merck and the plaintiffs' attorneys rather than the plaintiffs themselves, even though the attorneys had no personal claims against Merck.¹⁵⁸ One may wonder how an agreement that did not purport to bind the claimants could be expected to resolve their claims against Merck.¹⁵⁹ Two features of the agreement help answer this question. First, the agreement required plaintiffs' attorneys and law firms to recommend acceptance of the offer to *all* of their eligible clients (the mandatory recommendation provision).¹⁶⁰ Second, if less than all of a firm's Vioxx clients agreed to participate, the firm had to withdraw from representation of the nonparticipating clients (the mandatory withdrawal provision).¹⁶¹ As the journalist Adam Liptak explained, "what lawyers promise[d] to do is settle on behalf of all of their clients or none of them. That is, a lawyer with 100 clients can participate in the settlement only if all 100 agree or if the lawyer fires those clients who will not go along."¹⁶² From the perspective of an individual claimant, these terms were coercive because, as Professor Howard Erichson put it, "Any client who declined the settlement faced the prospect of losing a

¹⁵⁴ Vioxx Settlement Agreement, *supra* note 152, at 1 (identifying the parties to the agreement); *see also* Liptak, *supra* note 14, at A12.

¹⁵⁵ Vioxx Settlement Agreement, *supra* note 152, §§ 3.1–4.4, at 14–22 (describing claim valuation and payment to qualified claimants).

¹⁵⁶ *Id.* § 11.1, at 41–42; *see also* Erichson, *supra* note 16, at 1000–01; Issacharoff, *supra* note 147, at 218.

¹⁵⁷ Vioxx Settlement Agreement, *supra* note 152, § 11.1, at 41; *see also* Erichson & Zipursky, *supra* note 16, at 279.

¹⁵⁸ *See* Vioxx Settlement Agreement, *supra* note 152, §§ 3.1–4.4, at 14–22.

¹⁵⁹ Erichson & Zipursky, *supra* note 16, at 266.

¹⁶⁰ Vioxx Settlement Agreement, *supra* note 152, § 1.2.8.1, at 5; *see also* Erichson, *supra* note 16, at 1001; Erichson & Zipursky, *supra* note 16, at 280, 283–84 (critiquing the mandatory recommendation provision).

¹⁶¹ Vioxx Settlement Agreement, *supra* note 152, § 1.2.8.2, at 5–6; *see also* Erichson, *supra* note 16, at 1001; Erichson & Zipursky, *supra* note 16, at 280–81.

¹⁶² Liptak, *supra* note 14, at A12; *see also* Vioxx Settlement Agreement, *supra* note 152, § 1.2.7, at 5 ("The parties agree that a key objective of the Program is that, with respect to any counsel with an Interest in the claims of any Enrolled Program Claimant, all other Eligible Claimants in which such counsel has an Interest shall be enrolled in the Program.").

lawyer and finding that every other lawyer handling Vioxx claims was unavailable.”¹⁶³

While wildly effective—99.79% of eligible claimants enrolled in the settlement¹⁶⁴—the Vioxx settlement was castigated by legal ethicists, who claimed that the agreement conflicted with the plaintiffs’ attorneys’ ethical obligations to their clients.¹⁶⁵ Among other contentions, the critics argued that the mandatory recommendation provision “violated the duty to give independent and loyal advice,”¹⁶⁶ while the mandatory withdrawal provision “violate[d] the bar on practice restrictions, the constraints on terminating the lawyer-client relationship, and the principle that the decision to accept or reject a settlement belongs to the client.”¹⁶⁷ At least one state bar ethics committee concluded that the mandatory recommendation and mandatory withdrawal provisions violated the Rules of Professional Conduct.¹⁶⁸

¹⁶³ Erichson, *supra* note 16, at 1001.

¹⁶⁴ *Id.*; Erichson & Zipursky, *supra* note 16, at 266; *see also* Minute Entry for December 19, 2008 at 6, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. Dec. 19, 2008), ECF No. 17578, available at <http://www.laed.uscourts.gov/vioxx/Orders/me121908.pdf>.

¹⁶⁵ *See, e.g.*, Erichson, *supra* note 16, at 1006–22 (identifying seven problems that arise from all-or-nothing settlements); *see* Erichson & Zipursky, *supra* note 16, at 292 (summarizing the ways in which the Vioxx settlement “violated well-established principles of legal ethics”).

¹⁶⁶ Erichson, *supra* note 16, at 1003. In support of this argument, Erichson cites Rules 1.7(a)(2) and 2.1 of the Model Rules of Professional Conduct. *Id.* Rule 1.7(a)(2) provides that a lawyer “shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client,” and Rule 2.1 provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” *See* MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2), 2.1 (2013). For a further discussion, *see* Erichson & Zipursky, *supra* note 16, at 283–84, discussing these Rules as well as Rule 1.4 of the Model Rules of Professional Conduct. Rule 1.4 provides in part that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2013).

¹⁶⁷ Erichson & Zipursky, *supra* note 16, at 292; *see also id.* at 284–92 (elaborating upon the ethical problems posed by the mandatory-withdrawal provision); Erichson, *supra* note 16, at 1003. In *The Trouble with All-or-Nothing Settlements*, Erichson also points to various provisions of the Model Rules of Professional Conduct in support of this proposition, including Rules 1.2(a), 1.8(g), 1.16, and 5.6(b). *See* Erichson, *supra* note 16, at 1003. Rule 1.2(a) provides in part that “[a] lawyer shall abide by a client’s decision whether to settle a matter.” Rule 1.8(g) provides in part that “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.” Rule 1.16 prescribes the circumstances in which attorneys must, may and may not withdraw from the representation of a client. Finally, Rule 5.6(b) provides in part that “[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.” *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(a), 1.8(g), 1.16, 5.6(b) (2013).

¹⁶⁸ *See* Connecticut Bar Ass’n Comm. on Prof. Ethics, Informal Op. 08-01 (Feb. 20, 2008), available at forclawyers.com/wp-content/uploads/2008/04/08-01-final-signed.pdf (concluding that the agreement deprived

The point here is not to elaborate upon the criticisms of the Vioxx settlement or to demonstrate why an all-or-nothing settlement on behalf of future claimants would be unethical. Rather, the point is simply to note that a Vioxx-type settlement seeking to resolve the claims of exposure-unaware and contingent future claimants would be *impossible*. As Professors Erichson and Zipursky put it, “Obtaining closure without Rule 23 or bankruptcy depends on . . . knowing who the claimants are.”¹⁶⁹ By definition, that knowledge is unavailable regarding unknown, unaware, and contingent future claimants. Put differently, a Vioxx-type settlement binds the defendant and the claimants’ attorneys; but individuals who are unaware of their exposure, or of a relationship they may enter into with an exposed individual in the future, do not seek legal advice regarding their potential or contingent claims. In the absence of attorneys retained by these unaware or contingent future claimants, there would be no attorneys to make the types of promises—to recommend the settlement to their clients and to withdraw from representing those who decline it—upon which a Vioxx-type settlement is predicated. Thus, an “all-or-nothing” Vioxx-type settlement cannot be used to secure a global peace resolving the claims of exposure-unaware or contingent future claimants.

B. Section 3.17(b)-type Settlements

Nor can a nonclass aggregate settlement of the type proposed in section 3.17(b) of the *ALI Principles* be deployed to bind unknowing and contingent future claimants in an effort to secure global peace.¹⁷⁰ To understand the innovation proposed by the ALI in section 3.17(b), recall that a nonclass aggregate settlement is ordinarily binding only if each claimant agrees in writing to be bound by its terms after learning what all other claimants will receive.¹⁷¹ This principle, referred to as the “aggregate-settlement rule,” is codified in Rule 1.8(g) of the Model Rules of Professional Conduct,¹⁷² a version of which has been adopted in all fifty states and the District of Columbia.¹⁷³ The aggregate-settlement rule is designed to ensure that

clients of the independent advice of their attorneys, interfered with the clients’ decisions whether to settle, and created conflicts of interest among clients and between the attorney and client).

¹⁶⁹ Erichson & Zipursky, *supra* note 16, at 275.

¹⁷⁰ See ALI PRINCIPLES, *supra* note 12, § 3.17(b).

¹⁷¹ See *supra* note 167.

¹⁷² MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2013), quoted *supra* note 167.

¹⁷³ ALI PRINCIPLES, *supra* note 12, § 3.17 cmt. A; see also *State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Dec. 14, 2014).

claimants have the information they need to assess the adequacy of a proposed settlement and the fairness of its allocation among multiple claimants.¹⁷⁴

While section 3.17(a) of the *ALI Principles* approves nonclass aggregate settlements that comply with the aggregate-settlement rule,¹⁷⁵ the drafters of the *Principles* maintained that compliance with the rule is unduly cumbersome in cases with many claimants.¹⁷⁶ Moreover, they expressed concern that under the aggregate-settlement rule, individual claimants can “hold out” to secure a premium for their approval.¹⁷⁷ To address these concerns, the drafters included section 3.17(b) as an alternative to the aggregate-settlement rule for cases involving large amounts in controversy and many claimants.¹⁷⁸ Under section 3.17(b), “individual claimants may, *before* the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a *substantial-majority vote* of all claimants concerning an aggregate-settlement proposal.”¹⁷⁹ In other words, rather than make individual decisions whether to accept an aggregate settlement upon learning its terms and the allocation among claimants, claimants can agree, *in advance*, to accept a settlement if a “substantial majority”¹⁸⁰ of the claimants accept it; they would waive the rights they

¹⁷⁴ See, e.g., Nancy J. Moore, *The American Law Institute’s Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 406–09 (2008) (describing the role of the aggregate-settlement rule in protecting against inadequate awards and unfair allocations).

¹⁷⁵ ALI PRINCIPLES, *supra* note 12, § 3.17(a) (“[Attorneys] who represent two or more claimants on a non-class basis may settle the claims of those claimants on an aggregate basis provided that each claimant gives informed consent in writing. Informed consent requires that each claimant be able to review the settlements of all other persons subject to the aggregate settlement or the formula by which the settlement will be divided among all claimants. Further, informed consent requires that the total financial interest of claimants’ counsel be disclosed to each claimant.”).

¹⁷⁶ *Id.* § 3.17 cmt. c (“[L]arge-scale settlements . . . may have been impeded by the mechanical application of the aggregate-settlement rule to a substantial multiparty settlement.”); see also Silver & Baker, *supra* note 18, at 735–36, 763–67 (arguing that “the aggregate settlement rule is a complication that often gets in the way” of settling mass lawsuits and elaborating on the expense and delay occasioned by the rule in the mass lawsuit context). *But see* Moore, *supra* note 174, at 404 (“[A]ttorneys can—and do—keep their clients informed by using a combination of group meetings, mass emails, dedicated websites, toll-free numbers, and paralegals.”).

¹⁷⁷ ALI PRINCIPLES, *supra* note 12, § 3.17 cmt. b; see also Silver & Baker, *supra* note 18, at 760 (“[A] unanimity rule . . . enables a single dissenter to block a group deal.”). *But see* Moore, *supra* note 174, at 402–04, 420 (questioning the ALI Reporters’ premise that individual claimants can veto an aggregate settlement by holding out and noting that the ALI Reporters “have yet to demonstrate that this problem alone is sufficiently serious to warrant abrogation of the aggregate settlement rule”).

¹⁷⁸ ALI PRINCIPLES, *supra* note 12, § 3.17(c).

¹⁷⁹ *Id.* § 3.17(b) (emphasis added).

¹⁸⁰ *Id.* § 3.17(c).

otherwise would have under the aggregate-settlement rule.¹⁸¹ In particular, claimants would waive the right to see the terms of the settlement and the allocation of the proceeds before agreeing to be bound.¹⁸² Recognizing that settlement agreements may treat different groups of claimants differently, section 3.17(b) requires “a separate substantial-majority vote of each category of claimants” if the “settlement significantly distinguishes among different categories.”¹⁸³

Under the *ALI Principles*, section 3.17(b) settlements are binding only if they are both “substantively fair and reasonable”¹⁸⁴ and “fair and reasonable from a procedural standpoint.”¹⁸⁵ Further, in an apparent effort to avoid the coercive pressure a Vioxx-type settlement exerts, section 3.17(b)(4) requires attorneys to explain to all claimants that they may insist upon compliance with the aggregate-settlement rule, and it bars attorneys from withdrawing from representation solely because a client declines to sign a 3.17(b)-type agreement.¹⁸⁶

But while section 3.17(b) may avoid some of the ethical problems raised by Vioxx-type settlements,¹⁸⁷ it too has been subject to substantial criticism. Perhaps the most vocal critic has been Professor Nancy Moore, who has expressed concern that unsophisticated clients may not understand the risks they would assume by waiving their rights under the aggregate-settlement rule.¹⁸⁸ In Moore’s view, “it can hardly be said that clients who agree to

¹⁸¹ *Id.* § 3.17 cmt. b (describing subsection (b) as “propos[ing] a contractual-waiver mechanism for settling aggregate cases”).

¹⁸² *Id.* (noting that “claimants . . . need not know, and typically will not know, the terms of a proposed settlement” when “subjecting their control of the settlement decision to majority rule”).

¹⁸³ *Id.* § 3.17(b).

¹⁸⁴ *Id.* § 3.17(e).

¹⁸⁵ *Id.* § 3.17(d).

¹⁸⁶ *Id.* § 3.17(b)(4); *see also id.* cmt. b (“This requirement . . . is designed to eliminate any possibility that a claimant may feel improperly pressured to follow the approach in subsection (b) in order to secure his or her preferred choice of counsel.”).

¹⁸⁷ The Reporters to the Project believed that section 3.17(b)’s advanced consent provision “would have avoided many of the ethical difficulties in the Vioxx case.” *See Discussion of Principles of the Law of Aggregate Litigation*, 85 A.L.I. PROC. 27, 102 (2008) (quoting Professor Samuel Issacharoff); *see also* Erichson & Zipursky, *supra* note 16, at 299 (stating that the “advance-consent approach is transparent and noncoercive”). *But see* Morgan, *supra* note 16, at 751 (concluding that an attorney who represents both clients who give advanced consent to a 3.17(b)-type settlement and those who prefer the aggregate-settlement rule will face “conflict of interest issues that the *Principles* do not effectively address” if “there is not an unlimited sum available to pay claims”).

¹⁸⁸ Moore, *supra* note 174, at 395 & n.1, 401, 419 (criticizing preliminary drafts of section 3.17(b) and opining that it is “difficult to imagine that attorneys could provide disclosures at the outset of their

relinquish their right to reject a proposed settlement, having no idea what their claim is worth or how it compares to the claims of others, have done so in a manner that is fully consensual.”¹⁸⁹ In Moore’s view, even a supermajority vote would not protect against the risks of an inadequate settlement, an unfair allocation, or opportunism on the part of the attorney representing the claimants because the claims of the supermajority may not be representative of all claims.¹⁹⁰ Nor would such a vote preserve individual clients’ autonomy or their ability to effectuate their idiosyncratic preferences.¹⁹¹

Professors Howard Erichson and Benjamin Zipursky, too, critique section 3.17(b). Like Moore, they question whether claimants, at the time they sign retention agreements, can understand the consequences of waiving their individual right to accept or reject a settlement once it is negotiated.¹⁹² Apart from problems posed by the lack of sophistication of many tort victims, Erichson and Zipursky question whether the conflicts inherent in an aggregate settlement can be properly understood before the terms of the settlement are known.¹⁹³ They also fear that if advance waivers are permitted, lawyers will refuse to represent clients who decline to sign them. If the alternative to consent is to have no lawyer at all, the “consent” of clients to waive their rights would be inauthentic.¹⁹⁴ On a more basic level, Erichson and Zipursky view the ALI proposal as elevating closure over client consent, while in their view (and mine), it is “[c]onsent—not closure—[that] determines legitimacy.”¹⁹⁵

Courts, too, have expressed deep skepticism of presettlement agreements that purport to bind groups of clients by settlements approved by less than all

representations that would be adequate for unsophisticated mass tort clients to reasonably understand the material risks of such waivers”).

¹⁸⁹ Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 181 (1999); accord Ass’n of the Bar of the City of New York Comm. on Prof’l & Jud. Ethics, Formal Op. 2009-6 (2009), available at <http://www.nycbar.org/ethics/ethics-opinions-local/2009-opinions/792-aggregate-settlements> [hereinafter NYC Formal Op. 2009-6] (“In most cases, at the outset of an engagement, and indeed at any point prior to an actual settlement negotiation, it may be difficult, if not impossible, for a lawyer to possess, and therefore disclose, enough information to enable the client to understand the risks of waiving the right to approve a settlement following disclosure of all material facts and terms. The client therefore would be in no position to intelligently evaluate the waiver of the right.”).

¹⁹⁰ Moore, *supra* note 174, at 409–11 (arguing that the supermajority provision provides insufficient protection to claimants who are not part of the supermajority).

¹⁹¹ *Id.* at 414–15.

¹⁹² Erichson & Zipursky, *supra* note 16, at 301–03 (describing the problem of “inauthentic consent”).

¹⁹³ *Id.* at 306.

¹⁹⁴ *Id.* at 302–03.

¹⁹⁵ *Id.* at 269; accord Mullenix, *supra* note 140, at 1928 (“[A]ny resolution of future tort claims must be based on consent. Constitutional due process requires no less.”).

of them.¹⁹⁶ And an ethics opinion issued by the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York in 2009 rejected section 3.17(b)-type agreements, concluding that the benefits of the aggregate-settlement rule outweigh any burdens an attorney might face in securing the necessary consents of all jointly-represented clients.¹⁹⁷ It must be noted, however, that these judicial and ethics committee opinions were assessing the contractual arrangements before them under existing professional norms, whereas section 3.17(b) proposes an adjustment of these norms.

Whether one views section 3.17(b) as a sensible innovation to facilitate nonclass aggregate settlements or an unwise departure from the tried-and-true aggregate-settlement rule, advance agreements to be bound by a settlement approved by a supermajority of the claimants cannot be employed with respect to exposure-unaware or contingent future claimants. There are both logistical problems and more basic fairness concerns. From a logistical perspective, unaware or contingent future claimants will have no occasion to retain counsel to represent them regarding claims they are unaware they have; there will be no attorney in place to secure the informed consents of future claimants to be bound by settlements approved by a substantial majority of the claimants. Thus, the same logistical hurdles that render Vioxx-type settlements unavailable to resolve the claims of unaware and contingent future claimants likewise undermine the utility of section 3.17(b) to resolve their claims.¹⁹⁸

From a fairness perspective, just as class representatives who are aware of their exposure and the extent of their injuries cannot adequately represent the

¹⁹⁶ See, e.g., *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975) (“[H]old[ing] that the arrangement presented allowing the majority to govern the rights of the minority is violative of the basic tenets of the attorney-client relationship [I]t is essential that the final settlement be subject to the client’s ratification particularly in a non-class action case”); *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046, 1051 (D. Colo. 1999) (finding that a retainer agreement that allowed a minority of the plaintiffs in the case to accept or reject a settlement on behalf of all of the plaintiffs was void, unethical, and unenforceable); *In re Hoffmann*, 883 So. 2d 425, 433 (La. 2004) (“The requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement.”); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 514–15 (N.J. 2006) (finding that New Jersey’s Rule 1.8(g) of the Rules of Professional Conduct “forbids an attorney from obtaining advance consent from his clients to abide by the majority’s decision about the merits of an aggregate settlement”).

¹⁹⁷ NYC Formal Op. 2009-6, *supra* note 189 (“[A] client may not waive her individual right to approve the terms of a proposed aggregate settlement that would, if accepted, bind her along with other parties jointly represented by the same counsel.”); see also *Erichson & Zipursky*, *supra* note 16, at 296 (“Every court and ethics committee that has considered the issue has concluded that advance consent cannot satisfy the aggregate settlement rule.”).

¹⁹⁸ See *supra* note 169 and accompanying text.

interests of future claimants who are unaware of their exposure and who have not yet manifested any injuries,¹⁹⁹ a group of current plaintiffs with known injuries cannot be expected to consider the interests of those not yet injured in deciding whether or not to approve the settlement. While the *Principles* provide for separate supermajority votes for each category of claimants contemplated by the settlement, this provision does not ameliorate the fairness problem. Separate votes are required only “if the settlement significantly distinguishes among different categories of claimants.”²⁰⁰ But settlements that allocate funds pursuant to a matrix may not be deemed to create different categories of claimants and may not differentiate among present and future claimants.²⁰¹ And, again, even if they did, there would be no unaware or contingent future claimants among those voting to look out for the interests of the group. Thus, the risks of inadequate settlements and unfair allocations that the aggregate-settlement rule is designed to protect against would be greatly exacerbated if section 3.17(b)-type agreements were employed to resolve the claims of unknowing, unaware, and contingent future claimants.

If, as posited in Part III of this Article, unknowing, unaware, and contingent future claimants cannot be bound by a class action judgment, and if they cannot be bound by the types of nonclass aggregate settlements described in this Part, then it appears unlikely that defendants can bind future claimants before their claims accrue. Thus, the type of global peace that defendants insist upon will be unattainable in cases involving unknowing, unaware, and contingent future claimants. The question remaining is whether an alternate mechanism can be crafted that would protect the constitutional rights of future claimants and ensure them fair compensation for their injuries while nevertheless providing the defendant with at least some of the benefits it seeks from a global peace.²⁰² In other words, if defendants can’t get what they want, can they get what they need?²⁰³

¹⁹⁹ See *supra* Part III.B.

²⁰⁰ ALI PRINCIPLES, *supra* note 12, § 3.17(b).

²⁰¹ Accord Moore, *supra* note 174, at 410 (“[A]ggregate settlements that are unfairly biased in favor of some clients do not necessarily identify separate categories of cases.”).

²⁰² See *supra* Part I.

²⁰³ See THE ROLLING STONES, *You Can’t Always Get What You Want*, on LET IT BLEED (London Records 1969).

V. A HYBRID PUBLIC–PRIVATE CLAIMS RESOLUTION PROCESS

Building on the work of Professors Deborah Hensler²⁰⁴ and Linda Mullenix,²⁰⁵ I propose a hybrid public–private claims resolution process that should achieve most, but not all, of the defendants’ goals for global peace without violating the constitutional rights of future claimants. Like Professor Mullenix, I propose to sever the resolution of the future claimants’ claims from those of the current claimants.²⁰⁶ Like Professor Hensler, I propose to provide future claimants with payments that are comparable to those received by similarly-situated current claimants under the class action settlement.

Under my proposal, defendants would secure judicial approval of a fair and reasonable class action settlement of the *current* claims and then, through an extrajudicial process, make fair offers on comparable terms to *future* claimants as their claims mature, adjusted to take into account the time value of money and intervening changes in legal doctrine and medical knowledge. Since the judicially-approved class action settlement would not purport to bind the future claimants, their constitutional rights would be protected. Even though they would not be bound by the class action judgment nor obligated to accept the defendant’s extrajudicial offers, the future claimants would have an incentive to accept them, rather than sue in tort, because they would be assured compensation on comparable terms to the judicially-approved class action settlement, as adjusted, without incurring the costs of litigation.

A. A Fair and Reasonable Class Action Settlement with Current Claimants

First, my model contemplates a fair and reasonable class action settlement with the *current* claimants, who would be represented by one or more vigorous class representatives and able class counsel. The current claimants would receive notice of the action²⁰⁷ and an opportunity to opt out after disclosure of

²⁰⁴ Hensler, *supra* note 45, at 589 (proposing class action settlements that bind “both current and future plaintiffs to the same remedies”).

²⁰⁵ Mullenix, *supra* note 140, at 1925 (proposing “to privatize the resolution of future claims”); *id.* at 1925–31 (sketching out a proposal for privatization).

²⁰⁶ *Id.* at 1925 (proposing to “sever future claims from current claims resolution”). In Mullenix’s view, the current claimants and their attorneys lack both the incentive and the ability to adequately represent the future claimants. *Id.* at 1928; *supra* Part III.B. Therefore, she maintains, separate treatment of the current and future claims is needed to “avoid any possibility of conflicts of interest, sell-outs, or taint of collusion,” and to protect the constitutional rights of the future claimants. Mullenix, *supra* note 140, at 1925, 1928.

²⁰⁷ FED. R. CIV. P. 23(c)(2)(B) (describing the notice required in a (b)(3) class action).

the terms of the settlement.²⁰⁸ In negotiating the terms of the class action settlement with the current claimants, the defendant would recognize the prospect of claims by future claimants and reserve sufficient funds to satisfy those claims once presented²⁰⁹ but would not seek to resolve the future claims in the class action settlement.²¹⁰ The class action settlement of the current claims would be approved by the district court following a fairness hearing.²¹¹ The settlement agreement likely would include a matrix or grid that would specify a fixed amount or range of amounts that each claimant would recover depending upon her specific diagnosis and other variables.²¹² Alternatively, it could provide for individual meetings between the claimants and a court appointed Special Master or claims administrator to determine each claimant's individual recovery.²¹³ Presumably, the settlement would be negotiated only after a number of individual trials were conducted, giving the parties a reasonable idea of the risks they would incur, including the size of likely jury verdicts, if they declined to settle.

B. Fair Offers on Comparable Terms

While I accept as a central tenet of my proposal Professor Mullenix's premise that the future claims should be resolved outside the class action brought by the current claimants, I reject her proposal that the judge overseeing the class action should "refer the future claims to 'future claims vendors' for a bidding process" and later assess the "substantive and procedural sufficiency" of the selected vendor's bid to assume the defendant's liability to the future

²⁰⁸ FED. R. CIV. P. 23(e)(4) (granting the court the authority to decline to approve a settlement "unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so"). While the Rules do not require a back-end opt-out right, my proposal contemplates one to ensure that the underlying settlement with the current claimants is fair and reasonable. *See supra* note 127 and accompanying text (discussing back-end opt-out rights); *see also, e.g.,* Cramton, *supra* note 9, at 836 ("Providing class members with a back-end opt-out goes a long way toward meeting the due process requirements of notice and consent . . .").

²⁰⁹ *See infra* notes 228–36 and accompanying text.

²¹⁰ *See infra* Parts V.B–C (proposing that in negotiating the class action settlement, the defendant would retain experts to estimate the number of prospective future claimants and project the size of their claims and the amount needed to be held back from the class action settlement to satisfy them); *see also* Mullenix, *supra* note 140, at 1925 (suggesting that the prospect of future claims "must be identified early" in the class action litigation with the current claimants but that such claims should be severed and resolved separately).

²¹¹ FED. R. CIV. P. 23(e)(2).

²¹² *See, e.g.,* 2 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 16:31 (2013) (describing matrix settlements); Erichson, *supra* note 147, at 1789–90 (describing settlements that establish formulae or matrices).

²¹³ *See, e.g.,* Erichson, *supra* note 147, at 1790–92 (describing a "claims facility or arbitration process for assigning values" or individual negotiations with each plaintiff).

claimants and administer the claims process.²¹⁴ Just as I question whether individual representatives or class counsel could adequately represent the interests of unknowing, unaware, or contingent future claimants,²¹⁵ I doubt that a court-appointed guardian or fiduciary, charged with reviewing the vendor's bid, could do so. On a more basic level, I question the fairness of implying the "[c]onsent of future claimants to a fair, court-approved future claims fund"²¹⁶ and the proposal to absolve the defendant of liability to the future claimants based upon a process in which the future claimants play no role.²¹⁷ In lieu of this court-supervised transfer of the defendant's liability to a private third-party vendor, I propose a model that would preserve the future claimants' legal claims against the defendant but facilitate their private extrajudicial settlement.

In particular, after judicial approval of the class action settlement with the current claimants (and exhaustion of any appeals), my model contemplates the defendant offering future claimants fair settlement terms once their injuries manifest. To qualify as "fair," an offer to settle the claim of a future claimant would have to be on terms comparable to the judicially-approved class action settlement with the current claimants, as adjusted to take into account medical and legal developments since the date of the settlement, as well as the time value of money.

The "comparable terms" portion of my proposal builds on two points made by Professor Hensler: first, "in many circumstances, current claimants are the best proxies for future claimants,"²¹⁸ and second, "[t]he key to allowing such proxy representation is to prevent current claimants from grabbing all of the defendants' assets for themselves, leaving little (or much less) for those who will file claims in the future."²¹⁹ Let me explain the nature and extent of my agreement on these points and use them as points of departure for the rest of my proposal.

²¹⁴ Mullenix, *supra* note 140, at 1925, 1929.

²¹⁵ See *supra* Part III.B.

²¹⁶ Mullenix, *supra* note 140, at 1929.

²¹⁷ *Id.* ("[Proposing that] when the defendant has accepted and the court has approved a vendor's bid, the defendant would deposit the agreed fund and be relieved of any further obligation to future claimants. Future claimants could not sue the defendant in the tort system but rather would be referred to the vendor.").

²¹⁸ Hensler, *supra* note 45, at 588; see also *id.* at 604 ("In negotiating remedies that fit their different situations today—severely or moderately injured, slightly injured now but at risk of greater injury in the future, not injured yet but likely to suffer serious injury in the future—current claimants may be the best representatives of future claimants, who will be similarly diversely positioned.").

²¹⁹ *Id.* at 604.

Professor Hensler is skeptical of representatives appointed specifically to represent future claimants.²²⁰ Instead, she maintains that current claimants will often be the best representatives for future claimants.²²¹ By negotiating the best possible terms for themselves, Hensler claims, current claimants (and their counsel) can capably represent others who already suffered the same type of injury *and* those who will suffer the same type of injury in the future.²²² The key, Hensler maintains, is to ensure that the settlement “contain[s] identical provisions for current and future claimants”²²³—what she calls the equivalency requirement.²²⁴ Individuals with comparable injuries would receive comparable recoveries regardless of when their claims matured.

Hensler’s equivalency requirement makes good sense. If the future claimants had known of their injuries at the time the class action settlement was approved, they would have been bound by the class action judgment (unless they had opted out). The named representatives and class counsel would have represented their interests and the court would have scrutinized the settlement to ensure that it was “fair, reasonable, and adequate.”²²⁵ I adopt Hensler’s equivalency requirement as an integral part of my proposal.

Hensler’s second point recognizes that the current claimants will receive their payments soon after approval of the class action settlement while future claimants will have to wait until their injuries manifest.²²⁶ Thus, steps need to be taken to ensure that the fund is not depleted by current claimants; sufficient funds have to be set aside or guaranteed to enable the defendant to make payments on comparable terms to future claimants as their injuries become known.²²⁷

²²⁰ See *id.* at 604–08 (identifying “myriad reasons to believe that future representatives will not be adequate to the task of representing the interests of future claimants”); see also *supra* notes 133–46 and accompanying text.

²²¹ Hensler, *supra* note 45, at 604, 609.

²²² *Id.* at 604.

²²³ *Id.* at 609 (emphasis omitted); see also Cramton, *supra* note 9, at 831 (“A sound general principle is that individuals who have similar claims against the same defendants should be treated similarly.”).

²²⁴ Hensler, *supra* note 45, at 609.

²²⁵ FED. R. CIV. P. 23(e)(2).

²²⁶ Hensler, *supra* note 45, at 604.

²²⁷ *Id.* at 609 (“Settlement funds intended to compensate all future claimants should extend through the expected latency period of the diseases that are eligible for compensation.”); see also Mullenix, *supra* note 140, at 1925 (“If a latent injury mass tort involves future claims, that fact must be identified early in the litigation . . .”).

Ensuring sufficient funds to provide compensation on comparable terms to future claimants may be harder than it seems, even if the claims of the current and future claimants are resolved simultaneously (as Hensler proposes), because of the difficulty of estimating the number of future claimants and the nature and extent of their injuries. Hensler identifies two options to protect against the risk of underestimation if the claims of the future claimants are resolved as part of the class action settlement: the defendant can agree to satisfy all claims on comparable terms without a cap on total compensation—an option the defendant may reject²²⁸—or the defendant can reserve “a potentially disproportionate amount of funds” for future claimants.²²⁹ To pursue this second option, the defendant could pay current claimants less than they would have received if the initial estimate of the future claims were presumed to be correct, with a subsequent pro rata distribution of excess funds to all claimants after the close of the settlement period.²³⁰ This approach might be impractical if the latency period were very long, as it might be difficult and expensive to track down claimants entitled to a portion of the undistributed funds.²³¹ If the estimates regarding the number and size of future claims were way off and the fund proved inadequate to pay future claimants, Hensler suggests that they be permitted to “exit to the tort system[,] . . . unless defendants agree[d] to top up the fund.”²³²

If, as I propose, the offers to settle with future claimants are made *outside* the class action, it will be harder still for the defendant to cap its overall cost, ensure it has sufficient funds to offer comparable terms to future claimants, or shift a portion of the risk of underestimation onto the current claimants. To minimize the risk of underestimation at the time it negotiates the class action settlement with the current claimants, the defendant should employ epidemiologists, statisticians, and others to estimate the number of both current and anticipated future claimants, the range of their expected injuries, the time frame in which the future claimants’ injuries will manifest, and the cost of

²²⁸ An uncapped settlement would not provide defendants with the type of global peace they seek. See *supra* Part I.

²²⁹ Hensler, *supra* note 45, at 610.

²³⁰ *Id.*

²³¹ *Id.* As an alternative, Hensler suggests that unclaimed funds could be “contributed to a suitable charity.” *Id.* at 610–11. For a critical analysis of such cy pres distributions, see, e.g., Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413951.

²³² Hensler, *supra* note 45, at 611.

compensating them on comparable terms.²³³ The defendant should hold back sufficient monies from the class action settlement fund to offer comparable terms to future plaintiffs as their injuries manifest.

Professor Mullenix suggests that some entity other than the claimants or those retained to act on their behalf “should be responsible for determining the number of future claimants. If we have learned anything from three decades of mass tort litigation, it is that the actors involved in latent injury mass torts have proven to be notoriously bad at estimating the universe of future claimants.”²³⁴ I agree that when the parties seek to resolve the claims of both the current and future claimants simultaneously within the context of a single class action settlement, the defendant’s incentive will be to minimize the estimate of the number and size of future claims, secure experts to support the low estimate, convince the court to approve the settlement, and cap its overall liability.²³⁵ But if, as I propose, the defendant were to remain ultimately liable to the prospective future claimants and could not limit or cap that liability through the class action settlement, the defendant should be genuinely committed to reserving adequate funds to offer comparable terms to the future claimants. If it retained competent, objective experts charged with making accurate predictions, it is not clear why those experts would be less able to do so than other experts. The key would be to ensure that the experts were not only competent and objective but convinced of the primacy of reserving sufficient funds for future claimants.²³⁶

There are two important points on which I disagree with Professor Hensler. The first is whether future claimants can be part of the represented class and bound by the class action judgment, as Hensler posits.²³⁷ For reasons elaborated upon above, I believe they cannot be bound;²³⁸ I will not belabor that point here.

²³³ *Id.* (“Estimates of the size of the fund necessary to compensate all claimants should factor in the probability distribution of different numbers of claimants with claims of different magnitudes coming forward over time.”).

²³⁴ Mullenix, *supra* note 140, at 1925.

²³⁵ *Id.* at 1926 (“The major motivation for providing a reasonably plausible estimate of future claims is to induce the court’s approval of the settlement. However, hardly anyone involved in a mass tort settlement (other than an objector or a guardian *ad litem* for future claimants) has a great incentive to challenge the estimate. After the court approves a settlement, if the money runs out, neither the parties nor the court especially cares about the future claimants.” (footnote omitted)).

²³⁶ *See id.* (“[A]ny system for dealing with future claims must include some mechanism for inducing the most accurate estimate of the universe of future claimants.”).

²³⁷ Hensler, *supra* note 45, at 596–610.

²³⁸ *See supra* Part III.

The second point of disagreement is whether the terms of the settlement (to be extended to future claimants under the equivalency requirement) should be adjusted to take into account significant intervening changes in medicine and law. While we agree on the need to protect against the risk of inflation,²³⁹ Professor Hensler maintains that “as a normative matter, it is not clear why [future] claimants should receive the benefit of [changes in scientific evidence or legal doctrine] if current claimants with the same disease symptoms are denied these benefits.”²⁴⁰ For reasons I will explain in the next subpart, I believe the offers to future claimants should be adjusted to take these intervening changes into account.

C. Adjustments to Account for Significant Changes in Medicine and Law and the Time Value of Money

Before turning to this point of disagreement, let me first emphasize our agreement regarding the need to adjust payouts to future claimants to account for inflation. It should go without saying that a payment deemed “fair, reasonable, and adequate”²⁴¹ today will not be adequate ten years from now when some future claimants may first be entitled to compensation from the defendant due to the effects of inflation.²⁴² Yet the *Amchem* settlement, which purported to bind future claimants, neglected to account for inflation²⁴³—one of many clues that the representation provided by the named plaintiffs and class counsel in that case was inadequate.²⁴⁴ Under my proposal, the offers that the defendant would make to future claimants to settle on comparable terms would need to be adjusted to account for the time value of money.

In my view, the terms of the offers made to future claimants should also be adjusted to take into account significant changes in medical knowledge or legal doctrine. Let me begin with two examples, both from the Agent Orange litigation, before elaborating upon my position. Veterans who had been

²³⁹ Hensler, *supra* note 45, at 611 (“[F]und designers must grapple with estimating inflation and discount rates and determine how fast the fund needs to accrue, among other knotty economic issues.”); *accord* Mullenix, *supra* note 140, at 1929 (suggesting that payments to future claimants should be “based on current values for like claims resolved in the tort system, and adjusted for the time value of money (or inflation or escalation)”).

²⁴⁰ Hensler, *supra* note 45, at 610.

²⁴¹ FED. R. CIV. P. 23(e)(2).

²⁴² See, e.g., Aswath Damodaran, *A Primer on the Time Value of Money*, DAMODARAN ONLINE, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/PVPrimer/pvprimer.htm (last visited Dec. 14, 2014).

²⁴³ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 606, 627 (1997).

²⁴⁴ *Id.* at 625–28 (analyzing the adequacy of representation).

exposed to the defoliant Agent Orange in Vietnam and their family members filed suits against manufacturers of the product and the federal government, claiming that the veterans' exposure to the product had caused a host of medical problems, including birth defects in their children.²⁴⁵ Serious doubts abounded regarding causation: the trial court concluded that "there is as yet no epidemiological evidence that paternal veteran exposure to Agent Orange causes birth defects or miscarriages,"²⁴⁶ and the Second Circuit stated that "the clear weight of scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings."²⁴⁷ Nevertheless, in declining to certify a class action against the federal government, the district court noted:

[S]tudies are continuing. Certifying a class would give *res judicata* effect to this court's granting of summary judgment in favor of the government. *It would be unfair to preclude children with birth defects—both born and unborn—from someday using studies that may possibly establish the validity of their claims against the government.*²⁴⁸

Likewise, in ruling on the claims of individual children, the district court in *Agent Orange* declined to grant the government's motion for summary judgment, which had argued that the plaintiffs lacked proof of causation.²⁴⁹ Instead, the district court dismissed the children's claims without prejudice, thereby preserving their right to sue "if evidence subsequently shows that they have a valid claim against the government."²⁵⁰ The court thought it "both reasonable and fair" to preserve the claims of children—both born and unborn—in case medical, epidemiological, or other scientific evidence regarding causation later developed that would strengthen them.²⁵¹

²⁴⁵ *Agent Orange I*, 818 F.2d 145, 148–49 (2d Cir. 1987) (providing an overview of the claims).

²⁴⁶ *In re Agent Orange Prod. Liab. Litig.*, 603 F. Supp. 239, 246 (E.D.N.Y. 1985).

²⁴⁷ *Agent Orange I*, 818 F.2d at 149.

²⁴⁸ *In re Agent Orange*, 603 F. Supp. at 242 (emphasis added).

²⁴⁹ *Id.* at 247–48.

²⁵⁰ *Id.* at 247.

²⁵¹ *Id.*; see also *Agent Orange I*, 818 F.2d at 160 (discussing the district judge's refusal to certify a class action against the government and noting his concern "that class certification would unfairly preclude children with birth defects from bringing suit were future scientific studies to establish the validity of their claims against the government").

Ordinarily, the statute of limitations on a child's claim is tolled until the child reaches the age of majority. See 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 11:3, at 851–52 (rev. 2d ed. 2005). Thus, a decision excluding unknowing, exposure-unaware, or unborn children from a class action, or dismissing their claims without prejudice, would ordinarily give them years, or even decades, in which to await medical research that might strengthen their claims. But tort claims against the federal government are governed by a two-year statute of limitations, see 28 U.S.C. § 2401(b) (2012), which is *not* tolled during a child's minority. See, e.g., *Fernandez v. United States*, 673 F.2d 269, 271 (9th Cir. 1982); 1 KRAMER, *supra*, § 11:6, at 868.

The second example, also drawn from the Agent Orange litigation, illustrates the potential role that a change in the law can play in assessing the strength of future plaintiffs' claims. The private defendants in the case—the manufacturers of Agent Orange, who sold the product to the federal government for use in the Vietnam War—invoked the military (or government) contractor defense, which shields from liability manufacturers who supply products to the government pursuant to validly authorized government contracts.²⁵² In affirming the district court's approval of the class action settlement, the Second Circuit expressed its view that the military contractor defense posed an "impossible" hurdle that undermined the plaintiffs' claims against the manufacturers.²⁵³ In later reviewing a collateral attack by veterans whose injuries had not been known at the time the settlement was approved but which manifested before the payout period expired,²⁵⁴ the Second Circuit considered the plaintiffs' argument that an intervening change in Supreme Court precedent had altered the scope of the military contractor defense, thereby strengthening their claims:

[D]espite some intervening changes in the law, serious obstacles to recovery remain. Thus, although the scope of the government contract defense has been somewhat limited by the Supreme Court's decision in *Boyle v. United Technologies Corp.*, under proper circumstances the defense is still available to government contractors. There is more than a mere possibility that such circumstances exist in the instant case.²⁵⁵

Following further analysis of the facts of the case, which distinguished it from *Boyle*, the court concluded that "the availability of the government contract defense might not be a foregone conclusion, [but] there is a reasonable

Nevertheless, the *Agent Orange* decision declining to certify a class and dismissing the children's claims without prejudice instead gave at least the unborn children and the infants a period of time (i.e., the time remaining under the statute of limitations) in which to see if stronger proof regarding causation developed.

²⁵² See, e.g., *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940) ("[I]f this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."); *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 792, 796–97 (E.D.N.Y. 1980) (stating that, as applied to the Agent Orange litigation, the government contract defense would "avoid manufacturer liability on the ground that the circumstances surrounding Agent Orange's manufacture and use were controlled and dictated by the United States government acting in a capacity in which the government is protected from liability" and denying the defendants' motion for summary judgment on the defense because questions of fact existed).

²⁵³ *Agent Orange I*, 818 F.2d at 173.

²⁵⁴ See *supra* notes 86, 112–22 and accompanying text.

²⁵⁵ *Agent Orange II*, 996 F.2d 1425, 1436 (2d Cir. 1993) (citing, *inter alia*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988)).

probability that it would apply, barring any recovery by the plaintiffs.”²⁵⁶ In light of this legal hurdle and other significant problems with the plaintiffs’ case, the court ultimately rejected the plaintiffs’ collateral attack, finding that the representation afforded them in the class action had been “more than adequate.”²⁵⁷ What is important to note here is that the Second Circuit credited the possibility that a significant change in the legal landscape *could* have altered the conclusion that the future claimants had been adequately represented by the current claimants.

These examples support my view that medical, epidemiological, and scientific discoveries as well as changes in legal doctrine may require adjustments to the terms of the offers to be made to future claimants under my proposal. Ordinarily plaintiffs sue only after they learn of the nature and extent of their injuries. Their claims are then adjudicated or settled in light of current medical and legal understandings. It is reasonable, then, if not ineluctable, to assess the fairness of a settlement binding *current* claimants against the backdrop of current medical knowledge and legal precedent. But since unknowing future claimants would not ordinarily sue before learning the nature and extent of their injuries, it would not make sense to determine their recoveries against the backdrop of medical knowledge and legal precedent that existed years, if not decades, before their injuries became known. Thus, my proposal contemplates offers by the defendant to future claimants, as their injuries become known, that are equivalent to the offers made to current claimants in the class action settlement, adjusted for inflation *and* for changes in medical knowledge and legal doctrine.

An extrajudicial system of fair offers on comparable terms to future claimants, adjusted as recommended, will be practicable only if the adjustments are made at relatively infrequent intervals. If the defendant were to provide notice of its offers on an annual or semiannual basis, as recommended in Part V.D below, it would not be too difficult to adjust the amounts offered by the inflation rate each time a notice were issued. While it would be more difficult to determine whether medical or legal developments since the date of the class action settlement (or the most recent offer to future claimants) required an adjustment in the amount of the offers (and if so, by what amount), it would be in the defendant’s interest to undertake the scientific and legal research needed to determine if an adjustment were required. After all, future

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1437.

claimants would neither be bound by the class action judgment nor required to accept the offers on comparable terms. If the future claimants could do significantly better suing the defendant in tort at the time their injuries manifested (because of changes in the medical or legal landscape), they would sue. If the defendant wished to resolve all the future claimants' claims against it without individual lawsuits, as we posited at the outset,²⁵⁸ then its periodic offers would have to take these developments into account. To ensure that the adjustments made are fair (and will garner acceptance by future claimants), the defendant should confer and negotiate with several plaintiffs' attorneys that specialize in this type of litigation when it revises the size of the offers in light of these changes in legal doctrine and medical knowledge.²⁵⁹ The cost of an annual or semiannual review of the scientific literature and recent judicial decisions, and the associated cost of recalibrating the size of the offers, with feedback from plaintiffs' counsel, would presumably be far less than the cost of defending a multitude of fresh lawsuits.

In dismissing the need to adjust future claimants' recoveries in light of changes in medical knowledge and legal precedent, Professor Hensler notes the possibility that changes in medicine or law "might *disfavor* future claimants, in which case the settlement negotiated today will provide better remedies than would be available to them in the future."²⁶⁰ I concede this possibility and the logic of permitting defendants to make downward adjustments: just as future plaintiffs would be entitled to an upward adjustment to account for changes in science or law that would strengthen their claims, defendants would have reason to make downward adjustments if the changes in medical knowledge or legal precedent significantly undercut the strength of the future plaintiffs' claims. Since the future plaintiffs would be under no obligation to accept the offers, however, the defendant would have reason to consult with plaintiffs' attorneys on the downward adjustments and resist the temptation to make unreasonable adjustments, or the plaintiffs would reject them and sue in tort.

This final point about reducing the size of the offers to take into account changes in medicine or law provides an opportunity to address a potential criticism of my proposal. One might argue that the proposal would permit a type of one-way intervention reminiscent of the pre-1966 version of

²⁵⁸ See *supra* Part I.

²⁵⁹ See *infra* notes 264–65 and accompanying text.

²⁶⁰ Hensler, *supra* note 45, at 610; see also *id.* at 610 n.111 (citing the silicone gel implant litigation as an example of a case in which the plaintiffs' evidence of causation became weaker as new studies were completed).

Rule 23²⁶¹: if future plaintiffs like the fair offers on comparable terms derived from the class action settlement, as adjusted, they will accept them and “take advantage” of the settlement; if they do not like the terms (and the size of the adjustments), they will reject the offers and sue in tort. But the future plaintiffs’ freedom to reject a settlement offer differs significantly from the ability of absent class members pre-1966 to avoid the binding effect of a judgment. After all, settlements, by their very nature, contemplate the consent of both parties.²⁶² The plaintiff is bound only if she accepts the defendant’s offer, and the defendant is bound only if its (voluntary) offer is accepted by the plaintiff. The one-way intervention under the pre-1966 Rule 23, on the other hand, allowed absent claimants to avoid judgments that were rendered against the class while binding the defendant by judgments that favored the class. This type of one-way intervention was unfair because the plaintiffs’ freedom to reject the judgment was not shared by the defendant. Here, there does not seem to be any unfairness in allowing future claimants to reject settlement offers they deem inadequate.

D. Notice to Future Claimants of the Offer to Settle on Comparable Terms

To notify future claimants of its offer to settle on comparable terms (as adjusted), the defendant should initially notify law firms specializing in the type of case presented—firms that presumably represented class members in the class action or opt-out plaintiffs in independent actions—supplemented by notice by publication. The defendant would have the option of following up directly with individual future claimants, subject to the strictures of the Model Rules of Professional Conduct,²⁶³ in the event the law firms provided the defendant with the individuals’ contact information.

²⁶¹ See, e.g., FED. R. CIV. P. 23(c)(3) advisory committee’s note (1966) (using the phrase “one-way intervention” to refer to the possibility, under the pre-1966 version of the rule, that “class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision”).

²⁶² See, e.g., Cramton, *supra* note 9, at 835 (“A settlement cannot bind a tort claimant unless that person has consented to it.”); Erichson & Zipursky, *supra* note 16, at 312–18 (describing the importance of consent in settling tort claims, especially positive-value claims).

²⁶³ While Model Rule 4.2 would bar defendant’s counsel from communicating directly with future claimants known to be represented by counsel (without such counsel’s consent), see MODEL RULES OF PROF’L CONDUCT R. 4.2 (2013), the Rule would not bar the defendant itself from communicating with the claimants. Alternatively, since the defendant would presumably obtain the names of and contact information for future claimants from the claimants’ attorneys, the defendant could request permission from such attorneys for defendant’s counsel to transmit the settlement offers to the claimants directly.

Providing initial notice to attorneys specializing in the type of claim presented in the class action would be a sensible way to reach future claimants as such attorneys would have relevant experience, and future claimants might well approach them as their claims matured if the attorneys were known in their respective communities for handling that type of case.²⁶⁴ Such attorneys might also engage in advertising to reach prospective future claimants as they learned of their exposure and as their injuries manifested.²⁶⁵ The defendant should be able to send notice via email to attorneys with whom it dealt regarding current claimants, thereby reducing the cost of providing notice. Attorneys would be obligated to relay notice of the offers to their clients and could secure permission from them to provide client contact information to the defendant.

Notice to plaintiffs' attorneys specializing in this type of case would be supplemented by notice by publication. Internet notice, including notice on Facebook, Twitter, and other social media platforms, would be relatively inexpensive. Notice by publication in national newspapers, and on television and radio, would be far more expensive so its use would have to be judicious. Likewise, if law firms provided contact information for their clients or if the defendant knew the identities and whereabouts of the future claimants, it could provide direct notice via email at a reasonable cost; notice by first-class mail would be more costly but advisable.

Since the goal would be to ensure that, as their injuries manifest, future claimants receive notice of the defendant's settlement offer—either through counsel, the media or directly—the defendant should reissue notice on a periodic basis. The frequency of the notice would be determined, in part, by the length of the latency period or the time period in which future claimants would be expected to learn of their injuries. With a very lengthy latency period, like the decades-long period for asbestos-related disease,²⁶⁶ notice should be provided regularly to law firms and through the media, perhaps once a year. With a shorter latency or other time period—such as the two-year window during which those with manufactured hip socket implants would

²⁶⁴ See, e.g., Hensler, *supra* note 45, at 588 (“[M]ost mass tort claimants will be represented by attorneys who specialize in litigating on behalf of large groups of plaintiffs . . .”).

²⁶⁵ *Id.* at 598 (“Mass tort plaintiffs are solicited through mass advertising, increasingly via the Internet, by individual law firms, groups of firms that have affiliated with each other for the purpose of soliciting plaintiffs, and legal marketing services that identify potential plaintiffs and refer them to law firms for a fee.”).

²⁶⁶ See *supra* notes 37, 49.

likely learn if their implants would fail²⁶⁷—notice should be provided more frequently, perhaps twice a year. Given the significant cost of notice in national newspapers, and on television and radio, such notice might be provided less frequently than notice by email and internet. Likewise, while notice by first-class mail has long been viewed as a preferred means of providing individual notice,²⁶⁸ it would not make sense to use it on a regular basis to reach future claimants whose injuries might not manifest for years to come, especially given its relatively high cost. Notice by first-class mail or email to individuals who seek legal counsel regarding their illness, on the other hand, would be well worth the cost.

The defendant would have a real incentive to provide effective notice of its offer to future claimants because it would prefer to settle with them on comparable terms rather than face fresh litigation. But if notice did not reach all future claimants, no constitutional problem would arise because no claimant would be bound by the proposed settlement offer in the absence of actual consent. Thus, the constitutional problems that bedevil class actions with future members would not complicate the hybrid public–private claims resolution process proposed here.

E. Can Defendants Get What They Need?: The 9/11 Victim Compensation Fund Example

My proposal would not give defendants what they want—global peace—because future claimants would neither be bound by the class action judgment nor obligated to accept the fair offers on comparable terms, as adjusted, that defendants would make. Thus, my proposal would not cap defendants’ total exposure. The question is whether the proposal nevertheless would provide defendants with enough of what they need—a likely end to the steady stream of new claims, a significant reduction in transaction costs, and freedom from the distractions of litigation²⁶⁹—while preserving future claimants’ constitutional rights and their freedom to accept or reject the settlement offers once they know the nature and extent of their injuries. To answer this question, one must assess the likelihood that future plaintiffs with *strong* claims would be inclined to accept extrajudicial settlement offers on comparable terms. If all the claimants with weak claims were to accept the offers while all or most of

²⁶⁷ See *supra* note 72.

²⁶⁸ See, e.g., FED. R. CIV. P. 23(c)(2)(B); *Eisen v. Carlisle*, 417 U.S. 156, 174–75 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

²⁶⁹ See *supra* Part I.

the claimants with strong claims were to reject them and sue in tort, obviously defendants would not get what they need.

The 9/11 victim compensation fund, created by Congress to compensate the families of the deceased victims and the survivors of the infamous terrorist acts of September 11, 2001,²⁷⁰ is one of the best-known and most successful extrajudicial settlements (at least if success is measured in terms of participation rate). Some ninety-seven percent of the eligible families made claims against the fund rather than sue in tort.²⁷¹ While there certainly are important differences between a government-funded settlement like the 9/11 victim compensation fund and the defendant-funded claims resolution process contemplated here,²⁷² the 9/11 fund provides a useful benchmark both because it achieved such a high participation rate and because the report of the Special Master, Kenneth Feinberg, identified five principal factors that contributed to its success:

First, the alternative of litigation presented both uncertainty and delay. Second, the Fund took extraordinary steps to assure that families could obtain detailed information about their likely recovery from the Fund. Third, the Fund took a proactive approach—personally contacting each claimant, ensuring that claimants were able to obtain and present the best information in support of the claim; assisting claimants to obtain helpful information; explaining to claimants information that would assist the Fund in maximizing the computation of economic loss and resolving uncertainties in favor of the claimant. Fourth, the Fund offered in-person informal meetings along with hearings so that claimants could “have their day in court” and explain the magnitude of their loss and their views about the way in which the Fund should treat their particular situation. Fifth, the

²⁷⁰ See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, tit. IV, 115 Stat. 230, 237–41 (2001).

²⁷¹ 1 KENNETH R. FEINBERG, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, 1 (2004) (“[T]he Fund was an unqualified success: 97% of the families of deceased victims who might otherwise have pursued lawsuits for years have received compensation through the Fund.”).

²⁷² Among the most obvious are, first, the difference between the vast, virtually limitless resources available to the federal government to settle the claims, *id.* at 4; § 406(b), 115 Stat. at 240, and the more limited resources available to any private company; second, the 9/11 fund was the product of federal legislation, whereas the vast majority of mass tort cases are not governed by special legislation; and third, the federal legislation barred consideration of negligence or liability and the award of punitive damages, § 405(b)(2), (5), 115 Stat. at 238–39, whereas fault is usually a predicate to recovery in mass tort litigation and punitive damages are available where warranted.

Fund offered certainty without significant delay, allowing families the option of a type of “closure.”²⁷³

With these factors in mind, we can attempt to assess the efficacy of the public–private hybrid system proposed here and the likelihood that future claimants with strong claims would accept the offers. First, just as surviving family members who opted out of the 9/11 victim compensation fund faced the prospect of uncertain and protracted litigation, so too would prospective future claimants face the vagaries and expense of litigation if they were to reject the fair offers on comparable terms proposed here.

Second, according to Feinberg, the transparency of the 9/11 compensation fund and its methodology enabled the families of victims to determine in advance their likely recoveries. The ability of families to make such predictions was very important because the filing of a claim with the 9/11 compensation fund constituted a waiver of the right to sue.²⁷⁴ In other words, families had to decide whether to seek recovery from the fund or sue without a firm settlement offer in hand. To enable families to predict the likely amounts of their recoveries, fund administrators employed objective factors, such as a decedent’s age, number of dependents, and earnings history to determine economic loss, subject to adjustments for extraordinary circumstances,²⁷⁵ and made awards for pain and suffering pursuant to a simple formula.²⁷⁶ Because it would have been much more difficult to predict the outcome of a lawsuit and to estimate the size of any award a lawsuit might produce, the transparency of the 9/11 compensation fund and its methodology encouraged participation in the settlement.

Under my proposal, if the defendant revealed the grid or matrix it employed in the class action settlement and the formula for or extent of the adjustments to be made (for inflation, or changes in either medical knowledge or legal precedent), the hybrid system proposed here would be equally transparent. Indeed, it would be more transparent because future claimants

²⁷³ 1 FEINBERG, *supra* note 271, at 1; cf. Linda S. Mullenix, *Designing Compensatory Funds: In Search of First Principles*, 3 STAN. J. COMPLEX LITIG. (forthcoming 2015) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466301 (scrutinizing the goals of funds like the 9/11 fund and suggesting “that certain types of mass disaster events ought not to be resolved through fund auspices at all”).

²⁷⁴ § 405(c)(3)(B)(i), 115 Stat. at 239–40 (“Upon the submission of a claim[,]. . . the claimant waives the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.”).

²⁷⁵ 1 FEINBERG, *supra* note 271, at 7–8.

²⁷⁶ *Id.* at 9.

could wait to receive actual offers from the defendant before deciding whether to accept the offer or reject it and sue in tort. The transparency of the process, the certainty of the settlement offer, and the relative speed of the process should encourage future claimants to forego litigation and accept the settlement offers.

Third, the 9/11 compensation fund staff was proactive and supportive. Staff members reached out personally to the families of the victims and helped them secure the information they needed to make the strongest cases possible, resolving doubts in favor of the families. The system of notice proposed in Part V.D above also contemplates proactive contact with law firms likely to represent future claimants as their injuries manifest as well as proactive notice by publication. The 9/11 experience suggests that defendants seeking very high participation rates should also secure contact information for individual claimants from the law firms (or otherwise) and reach out to the future claimants personally.²⁷⁷

Even if private defendants were proactive and creative in reaching out to prospective future claimants, one may question whether they would be as solicitous or helpful as the 9/11 compensation fund staff members were, or as willing to resolve uncertainties in favor of the claimants. Several differences between the two scenarios provide reason for doubt. While the 9/11 victim compensation fund was uncapped,²⁷⁸ and staff members could resolve doubts in favor of the families without fear of bankrupting the government, private defendants cannot match the government's resources, and one of their principal goals is to cap their overall liability.²⁷⁹ Therefore, financial constraints could limit the extent of the defendant's outreach, the solicitude of the claims administration staff, and the generosity of the offers. All of these factors, in turn, could reduce the participation rate. Differences in the number of claimants, too, could make it hard for private defendants to match the solicitude, patience, and individual attention provided to the families by the 9/11 fund staff. It is one thing to provide such personal attention to thousands of individuals; it is another to do so regarding hundreds of thousands or even millions of prospective claimants. Regardless of the reasons, if the administrators handling the claims resolution process contemplated here were

²⁷⁷ See *supra* note 263 and accompanying text.

²⁷⁸ See *supra* note 272; see also § 406(b), 115 Stat. at 240 ("This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.").

²⁷⁹ See *supra* notes 18–20 and accompanying text.

considerably less supportive than the 9/11 staff, the participation rate could suffer.

Fourth, Feinberg maintained that his staff offered the families the opportunity to meet with the decisionmakers in informal meetings and more formal hearings, thereby affording family members something akin to “their day in court.”²⁸⁰ The families could present the strongest case possible to the decisionmakers and experience the catharsis of describing, in person, “the magnitude of their loss.”²⁸¹ In Feinberg’s words, “the Fund empowered claimants.”²⁸² He viewed this level of access, personal participation and investment in the process by the families as central to the 9/11 fund’s success.²⁸³

There are at least two reasons why private defendants might be less inclined to offer future claimants access to the decisionmakers and the opportunity to make their strongest case in person. First, if the point of such personal meetings is to enable the claimant to influence the decisionmaker to make more generous awards, and if private defendants are trying to limit their overall liability, they may not be inclined to provide such access. Second, even apart from the potential impact that such meetings could have on the size of claimants’ awards, private defendants may be leery of the added cost of providing personal meetings. On the other hand, if the mere opportunity to tell their story gives claimants an opportunity for catharsis and if their participation increases their investment in the process, they might be more likely to accept the offers (regardless of whether they actually influence the decisionmakers).²⁸⁴ Thus, the cost–benefit analysis of deciding whether to permit claimants to meet with the decisionmakers could be complex.

²⁸⁰ 1 FEINBERG, *supra* note 271, at 1 (internal quotation marks omitted).

²⁸¹ *Id.*

²⁸² *Id.* at 2.

²⁸³ *Id.* (“Claimants had a personal stake and involvement in the process. Had the Fund opted to curtail access or failed to offer explanations of the manner in which the Fund would treat each individual’s situation, some portion of claimants would likely have been sufficiently uncomfortable or uncertain to commit to the Fund.”).

²⁸⁴ *See, e.g.,* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 44 (1992) (“When a remedy results from reasoned, voluntary consent, the parties may view the outcome as more valid and legitimate than one imposed after adjudication and enforced by the sheriff.”); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985) (“Solutions to disputes can be tailored to the parties’ polycentric needs and can achieve greater party satisfaction and enforcement reliability” (footnotes omitted)).

Feinberg's final factor emphasized the certainty and speed of the 9/11 victim compensation fund relative to litigation. The fair offers on comparable terms proposed here should offer claimants a faster and more certain recovery than litigation. Like the 9/11 families, the future claimants likely would prefer a certain amount of cash in hand today to an uncertain amount, if any, years in the future. Moreover, if the future claimants' attorneys could be convinced to accept less than their standard percentage of the recovery in attorneys' fees (given their limited role in the process), future claimants would benefit even more. In light of the speed, certainty and reduced cost of a settlement relative to litigation, prospective future claimants might be receptive to fair settlement offers on comparable terms.

CONCLUSION

Unknowing, exposure-unaware, and contingent future claimants cannot be bound by class action judgments or settlements because they cannot be notified of the litigation and cannot be adequately represented. Conflicts of interest between present and future claimants are likely to arise that even subclasses with separate representation cannot cure. Class counsel will not be able to identify members of the subclasses of exposure-unaware and contingent future claimants to serve as representatives, and even if nonclass members could be appointed to represent the subclasses, those persons would not be able to anticipate changes in medical knowledge and legal precedent that could occur before the future claimants' injuries manifested. In the absence of adequate representation, future class members cannot be bound.

Nor can the nonclass aggregate settlement alternatives used in the Vioxx litigation or proposed in the *ALI Principles* be deployed to resolve the claims of exposure-unaware or contingent future claimants. Vioxx-type all-or-nothing settlements cannot be used because they depend upon the consent of claimants' attorneys; but neither exposure-unaware nor contingent future claimants will have occasion to consult counsel until their injuries manifest or their claims mature. The ALI's advanced consent proposal, too, depends upon attorneys, in this case to secure the claimants' advanced consents to be bound by a settlement approved by a substantial majority. For the reasons outlined above, unaware and contingent future claimants will not have consulted attorneys by the time the consents are solicited. Even if these logistical hurdles could somehow be overcome, the risks of inadequate settlements and unfair allocations would remain because those voting and deciding the fate of *all* claimants would not include (or look out for) the unknowing.

In lieu of class actions or nonclass aggregate settlements, the hybrid public–private mechanism proposed here contemplates judicial approval of a class action settlement with the *current* claimants, followed by fair offers to *future* claimants, as their injuries manifest, through an extrajudicial claims resolution process. To be fair, the offers would have to be made on terms comparable to those provided to the current claimants in the class action settlement, adjusted to take into account the time value of money and significant intervening changes in legal precedent or medical knowledge.

The ultimate question is whether such a hybrid system would secure enough “global peace” to meet the defendant’s needs while at the same time protecting the constitutional rights of future claimants and affording them fair compensation. The proposal would not formally cap the defendant’s liability because the class action settlement would not bind the future claimants, and they would be free to reject the offers on comparable terms and sue independently. But the defendant would have a strong incentive, at the time it negotiated the class action settlement with the current claimants, to accurately estimate the number of prospective future claimants; to negotiate terms that it could afford to offer to current and future claimants alike; and to reach out to future claimants, as their claims mature, in a proactive, transparent, and receptive manner. If most of the future claimants with strong claims accepted the offers, there would be little follow-up litigation, and the system would provide the defendant with a de facto cap.

In addition, the proposed system should reduce the defendant’s attorneys’ fees and other costs by minimizing litigation with future claimants. While the defendant would incur the costs of providing notice, performing the research needed to adjust the offers periodically, and hiring a plan administrator to run the program, its attorneys’ fees, which make up the vast majority of litigation costs, would be greatly reduced. If most of the future claimants accepted the offers, the proposed scheme would allow the defendant to reassure its shareholders and others in the market and refocus on core business functions.

If the future claimants’ principal goal were to secure fair compensation for their injuries, they would have an incentive to accept the offers as their claims mature since they would receive as much as the class action plaintiffs had, and even more if intervening changes in law or medical knowledge enhanced the strength of their claims. The future claimants would be able to avoid uncertain and protracted litigation by accepting the offers, and they might be able to significantly reduce their costs if they could convince their counsel to reduce

their fees given the limited role such counsel would play in guiding claimants through this extrajudicial process. Of course, if future claimants sought more than fair compensation—if they wanted a court to articulate the law or announce a change in the law, or if they sought a public apology from the defendant²⁸⁵—this process might not serve their needs and they might reject the fair offers on comparable terms.

Depending upon the goals of the future claimants, the fairness of the offers extended to them, and the degree of transparency, solicitude, and personal participation afforded, the hybrid claims resolution process proposed here might be able to achieve something approximating global peace.

²⁸⁵ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (rejecting “that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis” and viewing settlement as “the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done”).