

**2012 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL SYMPOSIUM
THE FUTURE OF CLASS ACTIONS AND ITS ALTERNATIVES**

April 13, 2012

**Keynote Address:
Is the Class Half-Empty or Half-Full?**

Remarks of Kenneth R. Feinberg*

Thank you very much. I'm thrilled to be here. I must say, I don't know how the *Law Journal* pulled this off, but there are phenomenal people here today who I know personally and with whom I have worked. For one, Dean Klonoff is here. You can't study class actions and their future without having his textbook at your side.¹ Then you've got Alexandra Lahav from the University of Connecticut who will speak today about procedural due process in aggregative litigation.²

* Kenneth R. Feinberg founded Feinberg Rozen, LLP in 1992. He is best known for serving as the Special Master of the Federal September 11th Victim Compensation Fund of 2001. A few years later, Mr. Feinberg became Fund Administrator for the Hokie Spirit Memorial Fund following the tragic campus shooting at Virginia Tech. Most recently, Mr. Feinberg was the administrator of the BP Oil Spill Fund. He also has had a distinguished teaching career as an Adjunct Professor of Law at Georgetown University, the University of Pennsylvania, Columbia University, New York University, and the University of Virginia.

Mr. Feinberg's remarks were given as the keynote address on April 13, 2012, at the *Loyola University Chicago Law Journal's* 2012 Annual Symposium, "The Future of Class Actions and Its Alternatives."

1. Robert Klonoff is Dean and Professor of Law at Lewis & Clark Law School. Dean Klonoff formerly served as an Assistant United States Attorney, an Assistant to the Solicitor General of the United States, and an Associate Reporter for the American Law Institute's *Principles of the Law of Aggregate Litigation*. See generally AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Dean Klonoff also has served as a class action expert witness on many occasions, is the co-author of the first casebook on class actions, and is the author of over twenty articles and book chapters, including *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533 (2012).

2. Alexandra Lahav is a Professor of Law at the University of Connecticut School of Law. Professor Lahav was a teaching fellow at Stanford Law School and was most recently a visiting professor at Columbia Law School. She is a co-author of a leading civil procedure casebook, CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT (4th ed. 2012), and the author of numerous law review articles, including *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545 (2012).

Sam Issacharoff from NYU is also here. Professor Issacharoff, who dons many hats—academic, ALI Reporter, and practitioner—is a mainstay in the fields of complex litigation and class actions.³ Judge Walker can tell you all there is to know about the federal court approach to class actions and how he witnessed its revolution on the bench.⁴ Judge Martinotti, who labors every day in the aggregative litigation vineyard, is here to discuss New Jersey state court alternatives to the class action.⁵ All in all, Loyola University Chicago is the place to be today in terms of studying federal and state class actions from A-to-Z.

Now, what do I bring to this? Well, fortunately, the title of the Symposium is “The Future of Class Actions and Its Alternatives,” because what I’ve really done, with one thirty-year-old exception, is talk about, and *do*, aggregative justice and its alternatives.

As we kick off the day, it is very (very) important to consider that every once in a while in this country—rarely, but every so often—policy makers decide, following some event, that the event was unique and that the remedy ought to be unique. In other words, they decide to think outside the box of traditional litigation instruments.

After the 9/11 attacks, Congress passed a law, signed by the President,⁶ which simply stated that any person who wanted to voluntarily opt out of the regular legal system in favor of a statutorily created alternative—the 9/11 Victim Compensation Fund—could do so.⁷ You did not have to opt out. You could file your lawsuit against

3. Samuel Issacharoff is the Reiss Professor of Constitutional Law at New York University School of Law. His research focuses on issues in civil procedure, especially complex litigation and class actions; law and economics; constitutional law, particularly with regard to voting rights and electoral systems; and employment law. He is the author of more than 100 books, articles, and other academic works, including *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369 (2012).

4. Honorable Vaughn R. Walker (Ret.) served as a federal judge of the United States District Court for the Northern District of California from 1989 to 2011. Nominated by President George H.W. Bush, Judge Walker served as Chief Judge of the court from 2004 to 2010, and retired from the bench on February 28, 2011. Judge Walker is the author of *Class Actions along the Path of Federal Rule Making*, 44 LOY. U. CHI. L.J. 445 (2012).

5. Honorable Brian R. Martinotti was appointed to the Superior Court of New Jersey in February 2002, where he served in the Family Part in Bergen County until March 2006. Judge Martinotti then served in the Civil Division, and he was the Environmental and Mt. Laurel Judge until August 2011. In August 2009, the Chief Justice of the Superior Court of New Jersey designated Judge Martinotti as one of the state’s three Mass Tort Judges. Judge Martinotti is the author of *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561 (2012).

6. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (codified as amended at 49 U.S.C. § 40101 (Supp. II 2002)). Congress passed this law on September 22, 2001, eleven days after the 9/11 attacks. *Id.*

7. *Id.* § 405(c)(3)(B).

the World Trade Center, United, Continental, Boeing, the security guard companies, the Port Authority of New York, Massport, etc. It would not be easy to win; but if you would rather go into an alternative, no-fault, administrative compensation system, you could certainly do it.

Almost *everybody* did it. Ninety-seven percent of all families that lost a loved one on 9/11 selected the alternative.⁸ Ninety-four families opted out of the 9/11 Fund and litigated the traditional way.⁹ They all settled; there was never a trial.¹⁰ So, the 9/11 Fund was an alternative to the class action, or even better, an alternative to the traditional litigation system.

After the recent BP oil spill,¹¹ Congress didn't even need to pass a law. President Obama called the BP Chairman, among others, into the Roosevelt Room at the White House. At the end of that meeting, the President announced that anyone who wanted to voluntarily receive compensation for their loss arising out of the oil spill could do so by entering into a no-fault administrative alternative.¹² The BP Fund was

8. See Press Release, September 11th Victim Compensation Fund, U.S. Dep't of Justice, Closing Statement from the Special Master, Mr. Kenneth R. Feinberg, on the Shutdown of the September 11th Victim Compensation Fund (Apr. 1, 2004), available at <http://www.justice.gov/archive/victimcompensation/closingstatement.pdf>; KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 161 (2005) [hereinafter FEINBERG, WHAT IS LIFE WORTH?]. ("By midnight on December 22, 2003, 97 percent of eligible families had decided to opt into the fund; thousands of the injured also signed up.").

9. See, e.g., Terry Carter, *Master of Disasters: Is Ken Feinberg Changing the Course of Mass Tort Legislation?*, A.B.A. J. (Jan. 1, 2011), http://www.abajournal.com/magazine/article/master_of_disasters/ (identifying Marc Moller, a New York City-based partner at Kreindler & Kreindler, as plaintiffs liaison counsel for the ninety-four families that sued airlines and others).

10. The final wrongful death lawsuit remaining from those families that opted out of the Compensation Fund was settled on September 19, 2010, just more than ten years from the date of the attacks. See *Last Wrongful Death Lawsuit from 9/11 Settled*, WALL ST. J., Sept. 19, 2011, <http://online.wsj.com/article/APe1b3c39d889543f68ab31368d9517e3b.html>.

11. BP, formerly known as British Petroleum, is a British multinational oil and gas company. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 2 (2011) [hereinafter OIL SPILL COMMISSION REPORT], available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf. On April 20, 2010, the BP oil-drilling rig, Deepwater Horizon, suffered an explosion that killed eleven of its crew members, initiating an oil spill that would ultimately grow to be the largest marine oil spill in U.S. history. See *id.* at vi ("Eleven crew members died, and others were seriously injured, as fire engulfed and ultimately destroyed the rig."); *id.* at 173 ("The *Deepwater Horizon* blowout produced the largest accidental marine oil spill in U.S. history."); Campbell Robertson & Clifford Kraus, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 2, 2010, <http://www.nytimes.com/2010/08/03/us/03spill.html>.

12. See Katelyn Sabochik, *The President's Meeting with BP Executives: "An Important Step Towards Making the People of the Gulf Coast Whole Again"*, THE WHITE HOUSE BLOG (June 16, 2010, 3:51 PM), <http://www.whitehouse.gov/blog/2010/06/16/important-step-towards-making-people-gulf-coast-whole-again> ("Earlier today President Obama met with BP Chairman Carl-

merely an option. Alleged victims could of course litigate their individual claims against BP and its cohorts. However, a separate facility—an alternative—was created to evaluate their claims, calculate damages, and compensate the oil spill victims who sought alternative compensation like 9/11.

Now, the 9/11 and BP Funds are two examples when you ponder “The Future of Class Actions and Its Alternatives.” These are two stark, contrasting alternatives, both of them established not by me, but by policy makers. In the BP case, by a handshake between President Obama and BP executives; after 9/11, by Congress through swift and popular legislative action. Those two alternatives fall into the First Bucket of class action alternatives.

But there’s a Second Bucket. On April 16, 2007, a deranged gunman at Virginia Tech shot and killed thirty-two people: twenty-seven students and five faculty members. Forty-five others found themselves physically injured from jumping out of windows or enduring bullet wounds, and many students suffered from mental disorders, such as PTSD, following the massacre.¹³ Soon after, eight million dollars in unsolicited charitable contributions poured into Virginia Tech from all over the country.¹⁴ In the aftermath of the tragedy, the University

Henric Svanberg and other BP [executives] in the Roosevelt Room at the White House . . . [to discuss] the ongoing efforts to stop the oil leaking into the Gulf of Mexico and BP’s responsibility not only to pay for the cost of the cleanup of the oil spill, but also to compensate residents and businesses that have suffered financially as a result of the oil spill.”). Under the Oil Pollution Act of 1990, enacted following the 1989 Exxon Valdez oil spill, a \$75 million dollar cap exists on how much oil companies are, under certain circumstances similar to the 2010 BP spill, required to pay for economic damages resulting from a spill. See 33 U.S.C. § 2704(a)(3) (2006) (“[T]he total of the liability of a responsible party [pursuant to the elements of liability] under section 2702 of this title . . . shall not exceed . . . for an offshore facility except a deepwater port, the total of all removal costs plus \$75,000,000 . . .”); *Oil Pollution Act Overview*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oem/content/lawsregs/opaover.htm> (last visited July 24, 2012) (“The Oil Pollution Act . . . was signed into law in August 1990, largely in response to rising public concern following the Exxon Valdez incident.”).

13. See John M. Broder, *32 Shot Dead in Virginia-Worst U.S. Gun Rampage*, N.Y. TIMES, Apr. 17, 2007, at A1 (explaining that on April 16, 2007, a Virginia Tech student killed thirty-two people and himself, and injured at least fifteen others, in two separate shooting attacks at Virginia Polytechnic Institute and State University, located in Blacksburg, Virginia).

14. In the wake of the April 16, 2007, tragedy, individuals, organizations, and corporations from around the world sent charitable contributions to Virginia Tech. Nikki Giovanni, *The Hokie Spirit Shines Brightly*, VA. TECH. MAG. (May 2007), <http://www.vtmagazine.vt.edu/memorial07/fund.html>. The contributors included a man who escaped the 104th floor of the World Trade Center II on 9/11, as well as a seven-year-old girl who sent a box full of pennies and nickels totaling \$5.36, all the money she had, to the “Virginia Tech kids.” *Id.* Many corporations offered to match their employees’ contributions in addition to making their own charitable gifts. *Id.* In May of 2007, the New York Yankees made a gift of one million dollars in response to the tragedy, and also wore a Virginia Tech logo on their caps during a game against the Boston Red Sox at Yankee Stadium. Assoc. Press, *Yankees Make Contribution to Va. Tech Fund*, ESPN (May

created the Hokie Spirit Memorial Fund to administer compensation to the victims of the shootings.¹⁵

Now, what is Bucket Two all about? It has nothing to do—nothing!—with alternatives to the tort system or class actions. The Virginia Tech Fund was a privately designed and privately administered program that wasn't joined at the hip to the tort system. The Fund was a gift. Victims could take their contribution, turn around, hire a lawyer, and sue.¹⁶ Two did, and they won.¹⁷

There is a drastic distinction between programs like the 9/11 and BP Funds that are somehow integrated into the tort system, and a Virginia Tech program that is a one-off with few, if any, similarities or ties to the legal or political system. The Virginia Tech Fund was a private program that allowed victims to receive compensation without having to sign away their right to individual or aggregate litigation. The Virginia Tech Fund falls into a separate Bucket from BP or 9/11, where there are ultimately consequences for signing on the dotted line before taking your money.

However, there's a Third Bucket, the Bucket with which Judges Walker and Martinotti are most familiar. There are occasionally—and this is really the jumping-off point for today and a reason for my somewhat pessimistic views on the future of class actions—mass tort cases which result in a class action settlement.

The quintessential example, the ultimate high water mark, of the class action as a device to resolve tort and other mass claims in one place

24, 2007, 9:45 AM), <http://sports.espn.go.com/mlb/news/story?id=2880851>.

15. *We Remember*, VA. TECH UNIV., <http://www.vt.edu/fund/index.html> (last visited July 29, 2012). Mr. Feinberg, the HSMF administrator, helped distribute approximately eight million dollars to those most profoundly affected by the shootings. *Id.* Although the HSMF was initially closed on December 31, 2007, it reopened in June 2008. *Id.* Contributions to the HSMF since its reopening are being distributed to the Hokie Spirit Scholarship Fund, which serves as a memorial to the victims of the tragedy and awards scholarships to undergraduate students with a demonstrated financial need (with a preference given to first-generation college students). *Id.*

16. The Federal September 11th Victim Compensation Fund mandated that all eligible claimants waive their right to litigate against any and all potential domestic tortfeasors as a precondition to Fund participation. Kenneth R. Feinberg, *Compensating the Victims of Catastrophe: The Virginia Tech Victims Assistance Program*, 93 VA. L. REV. IN BRIEF 181, 183 (Aug. 2007), <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/08/27/feinberg>. The Hokie Spirit Memorial Fund was unlike the September 11th Fund because it was purely comprised of private contributions, and eligible families and victims could participate without waiving their rights to sue potential defendants, including Virginia Tech University. *Id.*

17. See CNN Wire Staff, *Jury Finds for Two Virginia Tech Victims' Families in Lawsuit*, CNN (Mar. 14, 2012), http://articles.cnn.com/2012-03-14/justice/justice_virginia-virginia-tech_1_colin-goddard-virginia-tech-mark-owczarski?_s=PM:JUSTICE (stating that a jury awarded \$4 million to each of the two victims' families that brought negligence suits against Virginia Tech University).

through aggregative justice, is *Agent Orange*.¹⁸ In 1984, *Agent Orange*-type aggregative litigation represents a Third Bucket, one that is neither an alternative to the legal system nor a government-created fund or stand-alone private facility. The *Agent Orange* litigation is a clear example of using Federal Rule 23 to govern the procedure and conduct of class action suits in federal courts. Rule 23 mandates a two-step class certification protocol—Rule 23(a) prerequisites and Rule 23(b) requirements—in order to compartmentalize class issues, segregate common from individual claims, and ensure efficiency and fairness for both parties.¹⁹

The future of class actions? Well, *Agent Orange* is as good of an example as I know of using the class action device to resolve mass tort litigation. In *Agent Orange*, 250,000 Vietnam veterans claimed that their exposure during the Vietnam War to dioxin caused various maladies and injuries.²⁰ The famed federal district judge, Judge Jack Weinstein, certified the class.²¹ The Second Circuit, in affirming the

18. In 1979, a class action suit was commenced charging the United States government and several industrial chemical production companies with tens of thousands of deaths and dreadful injuries of named and unnamed Vietnam War veterans (and members of their families) who claimed to have come in contact with various phenoxy herbicides—including Agent Orange—used during the Vietnam War. *In re* “Agent Orange” Prod. Liab. Litig., 597 F. Supp. 740, 750 (E.D.N.Y. 1984). On May 7, 1984, the date on which jury selection was set to begin, the class representative agreed to settle their claims against the defendant chemical companies. *Id.* at 748. Upon motion for approval of the settlement agreement, the District Court held, in an opinion written by Chief Justice Jack B. Weinstein, that in light of the procedural posture of the litigation; the difficulty any plaintiff would have in establishing a case against any one or more of the defendant chemical companies; the uncertainties associated with a trial; and the unacceptable burdens on plaintiffs’ and defendants’ legal staffs and the courts, the proposed settlement of \$180 million to the class of Vietnam veterans and members of their families was reasonable and in the public’s, as well as the parties’, interest, and therefore would be tentatively approved. *Id.* at 748–50. Pursuant to the settlement agreement, the defendants did not admit any liability with respect to the plaintiffs’ claims, and both the plaintiffs and defendants reserved the right to pursue any applicable rights and claims against the United States, who was not a party to this suit. *Id.* at 748.

19. FED. R. CIV. P. 23. In order for one or more members of a class to sue or be sued as representative parties on behalf of all members of the party, the class must be so numerous that joinder of all members is impractical; questions of law or fact common to the class must exist; the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and the representative parties must fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)(1)–(4).

20. See *supra* note 18 and accompanying text (discussing the facts of *Agent Orange*).

21. Rule 23(c)(1) of the Federal Rules of Civil Procedure describes the requirements of a certification order. First, “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” FED. R. CIV. P. 23(c)(1)(A). Furthermore, “[a]n order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).” FED. R. CIV. P. 23(c)(1)(B). See also *In re* “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718, 720 (E.D.N.Y. 1983) (“The questions to be decided are whether the class should be certified, which of the types of classes described by Rule 23 should be utilized, how the class should be

class by a two-to-one vote, essentially said: “We hereby affirm this class. But don’t ever do this again. We’ll do it this time for a lot of reasons related to Vietnam and the Vietnam veterans and a common defense, etc. But don’t ever do it again because we are not pleased using Rule 23 to resolve mass tort cases where the claimants are very diverse and sprawling.”²² But that’s a Third Bucket. If you want an example of class action to resolve mass tort litigation, you can do no better than *Agent Orange*. Judge Weinstein must have written 300 pages in various opinions talking about it and why Rule 23 was the correct approach.²³

So, you have three Buckets. All three Buckets contain alternatives to the future of class actions. One bucket contains *Agent Orange* and Rule 23 classes. What are the alternatives to Rule 23 and *Agent Orange*? In the tort setting, at least, the alternatives are the 9/11 Fund, a statutory alternative, and the BP Fund, a handshake alternative (an escrow agreement). And then there is an alternative mirrored after the Virginia Tech Fund, a private facility resembling a gift more than a legal device.

You will also hear today from Judge Martinotti who labors every day with state aggregative alternatives to federal class actions, such as state classes,²⁴ state consolidated proceedings,²⁵ and state coordination.²⁶

described, and for what issues. For the reasons indicated below, the class is certified for all issues under 23(b)(3), and on the issue of punitive damages under 23(b)(1)(B).”), *certification for interlocutory appeal denied*, 100 F.R.D. 735 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir. 1984), *cert. denied*, 465 U.S. 1067 (1984). Judge Weinstein specifically defined the plaintiff class as

those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729.

22. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) (“Were this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error. However, we return to the cardinal fact we noted in denying the petition for writ of mandamus, namely that ‘the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war.’” (quoting *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 860 (2d Cir. 1984))). Agreeing with Judge Weinstein, the Second Circuit opinion cited the certifying court’s recognition that “[u]nlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiffs’ class as a whole.” *Id.* (citing *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. at 723).

23. See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002), *vacated by* 407 F.3d 125 (2d Cir. 2005); *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989).

24. Many states, pursuant to their own court rules and constitutions, allow class action suits, the procedures of which may differ from the Federal Rules of Civil Procedure. See, e.g., N.J. CT.

You'll hear from Judge Walker and others about very interesting federal alternatives to boilerplate Rule 23 class actions. For instance, there is regional consolidation among various federal district courts in which common cases are pulled together in a district or circuit.²⁷ Regional consolidation is neither a class action nor multidistrict litigation. Another federal alternative to the Rule 23 class action is multidistrict litigation (MDL).²⁸ Professor Lahav will surely discuss procedural justice and the due process implications of federal alternatives to the Rule 23 class action.²⁹ Nevertheless, MDL and regional consolidations are two aggregative forms of justice, despite stopping short of classwide certification.

R. 4:32 (describing the New Jersey State Court requirements for maintaining a class action suit); TIMOTHY COHELAN, ON CALIFORNIA CLASS ACTIONS (2012–2013 ed.) (analyzing the California State court requirements for maintaining a class action suit and comparing the state rule with Rule 23 of the Federal Rules of Civil Procedure).

25. See BLACK'S LAW DICTIONARY 328 (8th ed. 2004) ("The court-ordered unification of two or more actions, involving the same parties and issues, into a single action resulting in a single judgment or, sometimes, in separate judgments.").

26. See Martinotti, *supra* note 5, at 575 & nn.70–71.

27. Federal Rules of Civil Procedure Rule 42, entitled "Consolidation; Separate Trials," governs consolidation:

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

FED. R. CIV. P. 42. See also, e.g., Kenneth R. Feinberg, *Democratization of Mass Litigation: Empowering the Beneficiaries*, 45 COLUM. J.L. & SOC. PROBS. 481, 490 (2012) (highlighting the DES litigation—a regional consolidation of hundreds of related claims brought by women alleging injury to themselves and their children due to the ingestion of the DES pregnancy drug); ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 1109–19 (2000) (discussing Rule 42, its applicability in particular cases, and providing several notes and questions for further discussion).

28. See BLACK'S LAW DICTIONARY 1041 ("Federal-court litigation in which civil actions pending in different districts and involving common fact questions are transferred to a single district for coordinated pretrial proceedings, after which the actions are returned to their original districts for trial. Multidistrict litigation is governed by the Judicial Panel on Multidistrict Litigation, which is composed of seven circuit and district judges appointed by the Chief Justice of the United States."). Multidistrict litigation is statutorily permitted by 28 U.S.C. § 1407 (2006). See Charles Silver & Geoffery P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 108 n.2 (2010) (listing several prominent examples of recent multidistrict litigation cases, including *In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002) and *In re Vioxx Products Liability Litigation*, MDL No. 1657, 2009 WL 2408884 (E.D. La. Aug. 3, 2009)).

29. See generally Lahav, *supra* note 2.

Then you have Samuel Issacharoff who penned the American Law Institute's *The Law of Aggregate Litigation*.³⁰ Read that book, and read Judge Weinstein's opinion in *In re Zyprexa*,³¹ and, together, you can map out another alternative: the "quasi-class" action.³² That's a poetic device ascribed to Judge Weinstein, of *Agent Orange* fame, designed to deal with Professor Lahav's procedural due process concerns in aggregate litigation. Judge Weinstein stated, in essence, "Well, we may not have a class, but there are certain procedural protections that judges, like Judge Walker and Judge Martinotti, should implement to protect aggregative plaintiffs and members of an aggregative group. We'll call it a quasi-class."

Now, why all of this? Why all of this conceptualizing and hair-splitting and Buckets and devices? Because here is where I see the glass, the *class*, as half-empty. And there will be people following me

30. The American Law Institute (ALI) often undertakes a project to address uncertainty in the law through a restatement of basic legal subjects that strives to explain the law to judges and lawyers. *ALI Overview—Institute Projects*, AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects> (last visited Aug. 21, 2012). "A project is undertaken by the [ALI] only upon the careful consideration and prior approval of its officers and the Council, ALI's governing body. When a project has been authorized, an expert in the field of law to be considered, usually a legal scholar, is designated as Reporter." *ALI Overview—How the Institute Works*, AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=about.instituteworks> (last visited Aug. 21, 2012). The Reporter completes the basic research and prepares an initial draft of the material. *Id.* Professor Samuel Issacharoff is the Reporter for the ALI's *Principles of the Law of Aggregate Litigation*. See generally PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 1. Dean Klonoff is an Associate Reporter for this ALI publication. *Id.*

31. While the original citation is "*In re Zyprexa Products Liability Litigation*, 233 F.R.D. 122 (E.D.N.Y. 2006)," there are at least thirty additional separate decisions and orders due to ongoing *Zyprexa* litigation, all under the same case caption, "*In re Zyprexa Prods. Liab. Litig.*" *Zyprexa* was an antipsychotic pharmaceutical that the U.S. Food and Drug Administration had approved for treatment of schizophrenia and bipolar disorder. See, e.g., Press Release, U.S. Dep't of Justice, Eli Lilly and Company Agrees to Pay \$1.415 Billion to Resolve Allegations of Off-label Promotion of *Zyprexa* (Jan. 15, 2009), available at <http://www.justice.gov/opa/pr/2009/January/09-civ-038.html>. Alleging that, as a result of inadequate warnings by Eli Lilly the plaintiffs became obese and suffered from diabetes, thousands of plaintiffs brought suit, all of which were ultimately consolidated by the Judicial Panel of Multidistrict Litigation. See *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 391 (E.D.N.Y. 2007) (describing the plaintiffs' allegations); *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1382–83 (J.P.M.L. 2004) (ordering that the all actions listed in an attached schedule be transferred to the Eastern District of New York and assigned to Judge Weinstein for coordinated or consolidated pretrial proceedings).

32. See *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. at 122 ("While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and defendants, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action . . ."). See also Linda Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 395 (2011) ("It is perhaps not too far-fetched to suggest that Judge Jack Weinstein single-handedly invented the term quasi-class action . . ."); *id.* at 392 ("In addition to the thirty-two repetitive *Zyprexa* decisions, Judge Jack Weinstein has used the term quasi-class action in five other decisions to describe aggregate litigation before him . . ."). For a detailed list of those cases, including short case descriptions, see *id.* at 392 n.11.

after I escape today who will say that the glass is really not half-empty, but indeed half-full. But, why is it important to analytically talk about aggregation in a number of different Buckets? Because, at least as to tort law, I see the future of class actions as dark, dark indeed. Perhaps nonexistent.

Agent Orange came before Judge Weinstein almost thirty years ago. People at the time thought that it was the beginning of a very efficient, creative way to deal with mass tort claims through Rule 23. It hasn't turned out that way. *Amchem* put a road block in it.³³ *Ortiz* put a road block in it.³⁴ *Wal-Mart* recently put a concrete wall between class action plaintiffs and Rule 23.³⁵ Will the Supreme Court's view of

33. In *Amchem Products, Inc. v. Windsor*, the U.S. Supreme Court held that a putative class created solely for settlement purposes must be analyzed in the same manner as a class sought for litigation purposes. 521 U.S. 591, 622 (1997). The Court agreed with the Third Circuit, ruling that "with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23's requirements." *Id.* Specifically, the Court ruled that the class failed to satisfy Rule 23(b)(3) because the putative class members' shared experience of asbestos exposure, and their common interest in seeking fair compensation, was lacking given that the class members had many uncommon questions, such as that they were exposed to different asbestos containing products, for different amounts and period of time, and in different ways. *Id.* at 623–25; see *id.* at 624 ("No settlement class called to our attention is as sprawling as this one."). Further, the adequacy of representation standard—Rule 23(a)(4)—was not met because "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses." *Id.* at 626. In *Amchem*, there was a representative disparity between those currently injured and those "exposure-only" plaintiffs. *Id.*

34. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Ortiz*, the Supreme Court rejected a limited fund settlement arising out of decades of asbestos litigation. *Id.* at 841. Fibreboard Corp., although primarily a timber company, manufactured a variety of products containing asbestos from the 1920s through 1971. *Id.* at 822.

As the tide of asbestos litigation rose, Fibreboard found itself litigating on two fronts. On one, plaintiffs were filing a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of new claims for compensatory damages each year. On the second front, Fibreboard was battling [its insurance companies] for funds to pay its tort claimants.

Id. at 822. Feeling pressured on both fronts, Fibreboard attempted to negotiate a class action settlement with those injured as well as its insurers, attempting to bring finality to the many years of litigation. See Matthew Stiegler, *The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation after Ortiz v. Fibreboard Corp.*, 78 N.C. L. REV. 856, 865 (2000) (discussing the facts of *Ortiz*). The Supreme Court rejected the District Court's class certification because a certification of a mandatory settlement class on a limited fund theory requires a showing that the fund is limited independently of an agreement by the parties to the fund, and the parties in *Ortiz* made an insufficient showing of any limitation aside from the global settlement agreement. See *Ortiz*, 527 U.S. at 838–41 ("The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims.").

35. In *Wal-Mart Stores, Inc. v. Dukes*, the United States District Court for the Northern District of California approved the certification of a plaintiff class comprising approximately 1.5 million female Wal-Mart employees who alleged that the company discriminated against them on the basis of their sex by denying them equal pay or promotions in violation of Title VII of the

aggregative litigation be similar in the years to follow? I must say, at least as to tort, we better spend some time today talking about alternatives to the future of class actions because I do not see tort law being particularly susceptible to Rule 23.

So let's talk about alternatives like BP and 9/11. And, even more importantly, let's talk about alternatives like consolidation, state classes, multidistrict litigation, and quasi-classes. As an observer of aggregative litigation, I am not sure that the future of class actions these days is that bright in a non-tort setting. It certainly doesn't appear to be after reading *Wal-Mart* and *Concepcion*³⁶ and other cases coming out of the Supreme Court where there is a real skepticism about lower courts' lax reading of Rule 23 jurisprudence.³⁷ Justice Breyer carries the same

Civil Rights Act of 1964. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 187 (N.D. Cal. 2004). See also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011) (providing a brief summary of the facts); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1-17 (2006). The Ninth Circuit affirmed the class. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010). The Supreme Court unanimously held that, because of the variability of all the plaintiffs' circumstances, the class action could not proceed as comprised. See *Wal-Mart*, 131 S. Ct. at 2557 ("[T]he members of the class 'held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of different supervisors (male and female), subject to a variety of regional policies that all differed . . .'" (quoting *Wal-Mart*, 603 F.3d at 652 (Kozinski, J., dissenting))).

36. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the named plaintiffs purchased cellular telephone service from AT&T pursuant to an advertisement offering free phones with service; while the *Concepcions* were not charged for the phones, they were charged \$30.22 in sales tax based on the phones' retail value. *Id.* at 1744. The *Concepcions* filed a complaint against AT&T in the United States District Court for the Southern District of California which was "later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free." *Id.* The service contract contained a provision "providing for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representation proceeding.'" *Id.* Denying AT&T's motion to compel contractual arbitration, the District Court, relying on *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), found that the arbitration provision was unconstitutional because AT&T had not shown that bilateral arbitration substituted for the deterrent effects of class actions. *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008). The Ninth Circuit affirmed on the same grounds. *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 855 (2009).

The Supreme Court reversed, holding that the Federal Arbitration Act (FAA) preempted California's *Discover Bank* rule regarding the unconscionability of class arbitration waivers in consumer contracts. *Concepcion*, 131 S. Ct. at 1754. The Court reasoned that the FAA's overarching purpose was to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings, but stated that there are some instances in which parties may agree to limit the issues subject to arbitration. *Id.* at 1748-50. The *Discover Bank* rule, which had been used to eliminate the arbitration clause of consensual contracts, interfered with the fundamental attributes of arbitration. *Id.* at 1751-53.

37. See, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WA. L. REV. (forthcoming 2013) (explaining the new rigorous Rule 23 standards sanctioned by the Supreme Court and lower federal courts).

pessimistic views, I'm sure.

Justice Breyer gets it, you see. If you are not going to certify a class, well, what is the alternative? Are you really nonsuiting people in the consumer and tort settings, or is there a way to efficiently and fairly aggregate their claims? Justice Breyer dissented in *Amchem*,³⁸ he dissented in *Ortiz*,³⁹ he dissented in *Wal-Mart*,⁴⁰ and he dissented in *Concepcion*.⁴¹ Justice Breyer would rather let Judge Walker and Judge Martinotti, who are on the front line,⁴² use whatever creative devices

38. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629–41 (1997) (Breyer, J., concurring in part and dissenting in part).

39. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865–84 (1999) (Breyer, J., dissenting).

40. In *Wal-Mart*, Justice Breyer joined in Justice Ginsburg's opinion, which concurred with the majority's analysis of bringing backpay claims under Rule 23(b)(2), but dissented as to majority's Rule 23(a)(2) commonality analysis. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561–62 (2011) (stating that the cosigners agreed with the majority that the class of Wal-Mart employees should not have been certified under Federal Rule of Civil Procedure 23(b)(2), but that it may have been certifiable under Rule 23(b)(3); and that the class met the Rule 23(a)(2) commonality prerequisite).

41. In *Concepcion*, Justice Breyer, dissenting, wrote in favor of placing arbitration clauses "upon the same footing" with all other contractual provisions, *Concepcion*, 131 S. Ct. at 1757 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)), in adherence with the Federal Arbitration Act, which states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006). See also *Concepcion*, 131 S. Ct. at 1756 ("California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration.").

42. In *Amchem Products, Inc. v. Windsor*, Justice Breyer opined, among other points, that he "believe[d] that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, [wa]s greater than the Court's opinion suggest[ed]" and that he was "uncertain about the Court's determination of adequacy of representation, and d[id] not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it," especially in light of the district court's "more than 300 findings of fact reached after five weeks of comprehensive hearings." 521 U.S. 591, 629–30 (1997) (Breyer, J., concurring in part and dissenting in part).

In *Ortiz*, Justice Breyer, in his dissenting opinion, highlighted the timing and finance factors of the limited fund settlement and stated that he would have "accepted the valuation findings made by the District Court" in order to find the certification legally sufficient. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 877–78 (1999) (Breyer, J., dissenting) ("The ship was about to sink, the trust fund to evaporate; time was important. Under these circumstances, I would accept the valuation findings made by the District Court and affirmed by the Court of Appeals as legally sufficient.").

In *Wal-Mart*, the district court certified the class of "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998." *Wal-Mart*, 131 S. Ct. at 2562 (lower court citation omitted).

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality.

Wal-Mart, 131 S. Ct. at 2562 (Breyer, J., concurring in part and dissenting in part) (internal citations omitted). See also *id.* at 2562–65 (discussing the evidence that the District Court reviewed in finding that a common question existed and concluding that such a finding was

they need to advance the common good for class plaintiffs. Justice Breyer does not believe that appellate judges should readily second-guess district court judges who are holding detailed hearings, providing both parties with an opportunity to be heard in line with procedural due process the way Professor Lahav wants it,⁴³ evaluating expert opinions with close scrutiny, and writing lengthy opinions to explain how the class passes muster under Rule 23. Justice Breyer wants and trusts that lower judges are making appropriate findings that classes are not collusive, that questions of law or fact common to classes predominant over individual issues, and that classes are so numerous that they ought to be certified.⁴⁴ However, since certain appellate courts don't see eye-to-eye with Justice Breyer, there is a growing demand for alternatives to the Rule 23 class action.

Now, here is what I hope you hear from the luminaries that are here today. First, that the future of class actions, state and federal, is not that dark. Certainly, Professor Issacharoff and his colleagues can come up with some very creative ways to say that the glass is half-full, not half-empty; that the class action landscape may have shifted in the aftermath of *Dukes* and *Concepcion*, but that these recent decisions didn't sound the death knell for large-scale class actions. Good. Great. We ought to hear that.

Now, if today's panels also discuss aggregate class alternatives, such as consolidations, MDL, and quasi-classes, that will surely be helpful. I suggest that what is *not* particularly worthy of close examination is my recent work with the 9/11 and BP Funds. Those are not precedents for anything. Anybody who thinks that the 9/11 Fund, passed by Congress, or the BP Fund, created by a handshake between the President and BP, are worth exploring in detail as viable alternatives to class actions is wasting valuable time. Those are alternatives for nothing. There isn't going to be another 9/11 Fund. The 9/11 Fund was a unique response by Congress to an unprecedented national calamity. For 9/11 victim compensation, Congress told us, "The taxpayer will foot the bill for anybody who lost a loved one or was physically injured as a result of

"hardly infirm"). See *Concepcion*, 131 S. Ct. at 1758 ("By using the words 'save upon such grounds as exist at law or in equity for the revocation of any contract,' Congress retained for the States an important role incident to arbitrate. Through those words Congress reiterated a basic federal ideal . . . [Federalism] often takes the form of a concrete decision by this Court that respects the legitimacy of a State's Action in an individual case.") (citations omitted).

43. See Lahav, *supra* note 2, at 548. See generally Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (2012).

44. See FED. R. CIV. P 23(a)-(b).

the terrorist attacks.⁴⁵ The taxpayer, not one dime from American Airlines or United Airlines or the other private defendants, will compensate the loved ones of 9/11 victims. It's all your money. Oh, and by the way, when we pass the law, we're not going to appropriate any specific amount. We don't know what this cost should be because we've *never* done it before. Ken Feinberg, whatever you authorize to pay these people is fine; just take it out of petty cash from the U.S. Treasury because there won't be an appropriation."

But, perhaps the BP Fund *is* a precedent worthy of discussion, because BP took money from its own coffers and put it into the class action alternative Bucket. Unlike the 9/11 Fund, not one dime of U.S. taxpayer money financed the BP Fund. You don't have to be too cynical to ask yourself when the last time a multinational company ever fronted twenty billion dollars merely two weeks after a disaster along with the proviso, "We'll worry about contribution later from other co-defendants. Right now, Ken Feinberg will run an independent program and just pay out the claims with our money. We'll worry later about contributions from Anadarko, Halliburton, and Transocean. Just pay it."⁴⁶

I know of no case in American history—history!—where any company has, at the urging of the federal government, put up twenty billion dollars only two weeks after a disaster. So, maybe it is a precedent. Remember, the Exxon Valdez oil tanker disaster is still being litigated twenty some-odd years later.⁴⁷ But I'm not too critical of the seemingly endless Exxon Valdez litigation; that's the way it works in America—*that* is the precedent rather than the BP Fund. How many companies can just write a check for twenty billion dollars? BP knew what it was doing. BP had a view about the American litigation

45. See Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 406(b), 115 Stat. 230, 240 (codified as amended at 49 U.S.C. § 40101 (Supp. II 2002)) ("[Title IV, Victim Compensation] 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.").

46. See Scott Wilson & Joel Achenbach, *BP Agrees to \$20 Billion Fund for Gulf Oil Spill Claims*, WASH. POST, June 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061602614.html> (explaining the logistics of the BP Fund).

47. See, e.g., *Carey v. Alyeska Pipeline Serv. Co.*, No. S-14303, 2012 WL 4039810, at *1-3 (Ak. Sept. 12, 2012) (upholding the dismissal of a lawsuit in which a woman alleged she and her unborn child suffered lifelong health complications from exposure to oil during the 1989 Exxon Valdez cleanup); William Yardley, *22 Years Later, the Exxon Valdez Case is Back in Court*, N.Y. TIMES, Mar. 3, 2011, <http://www.nytimes.com/2011/03/04/us/04exxon.html> (describing litigation over the meaning of a special section in a 1991 agreement). See generally *Exxon Valdez Oil Spill*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/e/exxon_valdez_oil_spill_1989/index.html (last updated Aug. 3, 2010) (briefly summarizing the oil spill).

system—and, I might add, its own net worth—and it made a business decision. At least one Congressman said that the President forced BP to put up the money, that it was a shakedown.⁴⁸ There was no shakedown. BP got a lot out of the BP Fund: around two-hundred and twenty releases and nearly seven billion dollars out of the twenty billion, out the door. But the point is this: you study the BP and 9/11 Funds in a history class, not in a law school. Maybe in a divinity class, too, but certainly not in law school. I don't think there are many lessons to be learned here at Loyola University Chicago on class action alternatives like BP and 9/11. Those mechanisms represent very unique responses to very unique situations. And the Virginia Tech Fund, forget that all together. That was a purely private gift that had nothing to do with the legal system, separate and apart from alternatives to the class action device. Victims of the Virginia Tech attack could accept the gift, then turn around, hire a lawyer, and sue.

In other words, I am suggesting to our panelists and audience that the alternatives which should occupy most of the attention today are alternatives as to how class actions can work, despite my pessimism, and other ways to aggregate claims besides Rule 23 class actions. But I'm constantly asked about my work and whether it should be mimicked after future crises. Questions typically sound like, "Don't you think, Ken, since you spearheaded the 9/11 and BP Funds, that it would be good and sound public policy if they were precedents to be emulated in other aggregative situations?"

No, I do not. I don't think they are sound public policy to be emulated by future crises, and I don't think they're a good idea. Now, they work, don't get me wrong. I think the 9/11 Fund was the right thing to do. I think the BP Fund was an extraordinarily successful, effective mechanism for a unique situation. But these Funds should not be replicated after future disasters, and here's why.

Bad things happen every day to good people in this country. But everybody can't go down to see Ken Feinberg, file a claim, and if it is a 9/11-type fund, get two million dollars tax free, or if it's a BP-type

48. Rep. Joe Barton of Texas, senior House Republican, apologized to Tony Hayward, CEO of BP, stating, "I do not want to live in a country where any time a citizen or a corporation does something that is legitimately wrong is subject to some sort of political pressure that is—again, in my words—amounts to a shakedown." See Stephen Power & Laure Meckler, 'Shakedown': *Lawmaker Apologizes to BP*, WALL ST. J. BLOG (June 27, 2010, 12:31 PM), <http://blogs.wsj.com/washwire/2010/06/17/lawmaker-apologizes-to-bp-for-white-house-shakedown/>. Rep. Barton later retracted his original oral statement in a subsequent written statement: "I apologize for using the term 'shakedown' . . . and I retract my apology to BP." See Aaron Zitner, *Barton: BP 'Shakedown' Apology Retracted*, WALL ST. J. BLOG (June 27, 2010, 4:45 PM), <http://blogs.wsj.com/washwire/2010/06/17/barton-bp-shakedown-apology-retracted/>.

fund, get thousands and thousands of dollars because the president authorized it. In other words, how do you justify carving out, for very special treatment, the victims of 9/11 or the victims of the BP oil spill, but prohibit anyone outside these Buckets from taking advantage of similar programs? My concern about what I do and what has proven to be, I think, quite successful, is the need to be careful about what success breeds, conceptually and practically.

You should have read some of the emails I received while administering the 9/11 Fund: “Dear Mr. Feinberg, my son died in the Oklahoma City bombing. Where’s my check?”; “Dear Mr. Feinberg, my son died on the USS *Cole* in Yemen fighting the terrorists. How come I’m not eligible?”; “Dear Mr. Feinberg, would you explain something to me? My daughter died in the basement of the World Trade Center in the original 1993 attacks. How come I’m not eligible?”⁴⁹ And it’s not just terrorist attacks: “Mr. Feinberg, last year my wife saved three little girls from drowning in the Mississippi River and then she drowned a heroine. Where’s my check?”⁵⁰

How do you justify, as a matter of sound public policy, carving out of our regular system certain people or groups? This is why many lawyers are affronted by the BP and 9/11 Funds. It is alien to the way we go about resolving disputes in this country. How do you justify for You, victims of 9/11, or You, victims of an oil spill, special, fast-track money, while everybody else, innocent as they may be, the lid to the Bucket is shut tight? And when I respond, “Well, I’m administering this program, don’t blame me, go blame Congress,” people don’t particularly like that answer.

Equal protection under the law is a mainstay in this country. We frown on elitism. We frown on special rules. I must say the fact that the country gets behind a 9/11 Fund or a BP Fund is its own justification. And it’s a very valuable one. In other words, do not try and justify these alternative programs by the nature or definition of the victim. That will avail you of nothing. I certainly can’t justify it.

But from the perspective of the American people, I can justify it. “Ken, you say the 9/11 fund was a good idea and it worked, but you just

49. See FEINBERG, WHAT IS LIFE WORTH?, *supra* note 8, at 66–67 (recalling similar 9/11 Fund eligibility questions eligibility from families with relatives who died in the 1995 Oklahoma City bombing of the Murrah Federal Building, families of navy victims of the terrorist attack on the USS *Cole*, families of the lost loved ones in the 1998 terrorist bombing of the U.S. embassy in Kenya, and families of the anthrax victims in the Washington, D.C., area).

50. See *id.* at 67 (“I couldn’t compensate families of victims of previous terrorist attacks, just as I couldn’t compensate families who had lost loved ones in other circumstances—in a flood, fire, or other natural disaster. . . . I was constrained by a statute expressly limited to 9/11 victims.”).

said don't do it again." Well, the American people, acting through their elected representatives, thought it was a good idea from their own perspective. The 9/11 Fund had the ratification of the American people. They wanted to demonstrate to the world, "We take care of our own. We will rally around the victims. We want to show our generosity to the victims." When somebody says to me—for example, Sam's colleague at NYU, Peter Schuck—that the 9/11 Fund is bad public policy because you're singling out for special treatment just a small group of people,⁵¹ I say: "Your elected representatives wanted to do it. Why is that bad public policy?" Perhaps people like Mr. Schuck would say it's bad policy because the government didn't want to establish a Hurricane Katrina fund, where two-thousand people died;⁵² it didn't want to do it for the Joplin or Tuscaloosa tornadoes; and it didn't want to do it in the aftermath of the Oklahoma City bombing.⁵³

Now, you may disagree with Congress having established the 9/11 Fund. The widely held belief, however, is that the 9/11 Fund was the right approach to take. And with respect to BP, the President looked at the Katrina debacle and said, "The American people won't stand for another calamity like Katrina. BP, come on in here. Let's come up with a different system." If you want to disagree, then disagree. Vote against the President in November. But I think he gets rave reviews for setting up the system in BP. It worked.

But be very guarded about how often you turn to these class action alternatives. If what we mean by "alternatives" is out-of-the-box, out-of-the-legal-system, out-of-judicial-oversight, special one-off avenues to pursue just compensation for victims of unique circumstances—such alternatives are very risky public policy. However, I defend it. People

51. See Lisa Belkin, *Just Money*, N.Y. TIMES (Dec. 8, 2002), <http://www.nytimes.com/2002/12/08/magazine/just-money.html?pagewanted=all&src=pm> (quoting Professor Peter Schuck) ("It's impossible to justify this money in terms of a defined system of justice. We should not be saying that a death caused by one terrorist is worth more than a death caused by another, or that a death caused by a terrorist is worth more than a death caused by a drunk driver. And isn't that what this fund is saying?").

52. John L. Beven II et al., Tropical Prediction Ctr., NOAA/NWS/National Hurricane Center, *Annual Summary: Atlantic Hurricane Season of 2005*, 136 MONTHLY WEATHER REV. 1109, 1140 (Mar. 2008), available at <http://www.aoml.noaa.gov/general/lib/lib1/nhclib/mwreviews/2005.pdf> ("The total number of known fatalities, either directly or indirectly related to Katrina, is 1833, based on reports from state and local officials.").

53. See 'Who Gets What': Putting A Price On Human Tragedy, NPR (June 27, 2012), <http://www.npr.org/2012/06/27/155850506/who-gets-what-putting-a-price-on-human-tragedy> (questioning Mr. Feinberg on National Public Radio's "Talk of the Nation" radio program about victim compensation funds, host Neal Conan quotes from Mr. Feinberg's book *Who Gets What*: "Congress fell silent when it came to considering compensation for the victims of Hurricane Katrina in 2005 or the tornadoes that ravaged Tuscaloosa, Alabama and Joplin, Missouri in 2011. It raises the fundamental question of fairness.").

sometimes accuse me of being the policy maker who decided to implement the 9/11 Fund or the BP Fund. Those claims are inaccurate. I get involved in these disasters only after somebody else decides the payout device.

So I think that during the course of today, when we talk about “The Future of Class Actions and Its Alternatives,” I venture my own personal view: spend very little time on BP and 9/11 because even if you want to do something along those lines, you are tilting at windmills.⁵⁴ The litigation system is so ingrained in the fabric of our country, it’s so much a part of our history, that you are not going to change the rules. There may be one-off situations. But to me—and I have the luxury of going first before these three incredibly able panels that are scheduled today—the future of class actions is a mixed bag. Let me sum up this talk for lawyers and academics now analyzing the topic.

First: Do class actions under Rule 23 have a future? I’m reasonably pessimistic. Federal alternatives: do they have a future? Judge Walker is here. State alternatives: do they have a future? Judge Martinotti is here. What is the future of the class action device as an aggregative tool? How can we save it? Oh, that’s worth a lot. That’s worth your weight in gold being here today. That’s a symposium edition that will sell out. People, at least us legal professionals, will probably buy it on newsstands instead of the *Chicago Tribune*. If you can come up with a way to save the federal class action and ensure the same fate for the state class action, my ears are tuned in.

Second: If the future of the class action is problematic, what about other judicially imposed aggregative alternatives? That’s a subject worth discussing. Go to Dean Klonoff’s textbook and his recent scholarship.⁵⁵ Notice Sam Issacharoff’s volume with the American Law Institute,⁵⁶ titled *The Law of Aggregate Litigation*, not *The Law of Class Actions*. In our contemporary system with MDLs, regional and state consolidations, state class actions, and quasi-class actions, we ought to tweak the title of today’s Symposium ever so slightly. Not so much “The Future of *Class Actions*,” but rather “The Future of *Aggregate Litigation*.” The alternatives might be what I have just said,

54. See generally KENNETH R. FEINBERG ET AL., FINAL REPORT OF SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, VOLUME I, at 78–85 (2004) (describing observations and lessons learned about the 9/11 Fund and its implications for compensating victims of future terrorist attacks).

55. See KLONOFF & BILICH, *supra* note 27 and accompanying text.

56. See *supra* note 30 and accompanying text (discussing the American Law Institute’s *The Principles of the Law of Aggregate Litigation*, with Professor Issacharoff serving as Reporter).

2012]

Is the Class Half-Empty or Half-Full?

367

but the alternatives might also be like the BP and 9/11 Funds.

Third: I'm optimistic because Judge Martinotti is here. He is not subject to increasingly stringent mandates in Rule 23.⁵⁷ He's figuring out the State of New Jersey procedures to allow aggregative litigation.

Fourth: I'm inherently optimistic anyway—I mean, these things have a way of working themselves out.

And Fifth: tort is only one area. When you start talking about consumer classes and securities classes, maybe there is more hope and more optimism.

I have tried to parse the title for today, discuss the seemingly bleak future of the traditional class action device, and pave the way I hope for most of our panelists to say, "Too bad Ken couldn't stay because he got it wrong." That's good! I hope the panels will be more optimistic about class actions. There may even be some optimistic people who think BP and 9/11 *do* provide a precedent. I don't see it myself, but what makes me upbeat is that for one, I don't know a thimble what today's panels know. These luminaries may say I'm being much too pessimistic. And secondly, I'm optimistic because there are other ways to aggregate. I've learned at the foot of Judge Weinstein with his quasi-classes in *In re Zyprexa*.⁵⁸ Class actions are not, and will not be, the only way to aggregate claims in federal or state courts.

Thank you very much.

57. See FED. R. CIV. P. 23 (governing class action lawsuits in federal courts).

58. See *supra* note 32 and accompanying text (outlining the background and holding of *In re Zyprexa*).