PHASE II: MANAGING THE REMEDIAL PHASE IN AGGREGATE LITIGATION

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This Article proposes nine methods for dealing with the damages phase in a mass tort or mass accident situation after an issue class action on liability has been certified and plaintiff has prevailed on liability in Phase I or once a case has been filed in a bankruptcy court and needs to be valued. Courts, scholars and treatise writers generally hand-wave regarding the procedures for follow-on proceedings after liability has been established, but as defendants appear to be increasingly risk-seeking in their trial strategy, judges cannot rely on settlement to take care of the possible complexities of the remedial phase, sometimes referred to as Phase II. The Article explains the costs and benefits of each method with the aim of helping judges structure a trial plan to resolve mass torts fairly and efficiently. It proposes that in addition to doctrinal limitations, the choice of procedure in Phase II requires consideration of (1) the likelihood that the procedure will resolve substantial numbers of cases; (2) the capacity of the process to achieve consistency or equal treatment among similarly situated plaintiffs; and (3) how well the procedure results in rectitude, or the correct application of the law to the facts of the case.

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INTRODUCTION

Every year, thousands of prisoners suffer substantial damages because they are denied medical and mental health care. Women suffer discrimination at the hands of their employers. Tort victims suffer injuries due to defective earplugs or exposure to toxic chemicals. Fire victims lose their homes. How should all these different cases, all of which involve what are essentially tort damages against institutional defendants or corporations, be adjudicated?

Scholars have expressed renewed interest in how mass torts might be resolved using issue class actions[1] or bankruptcy.[2] This is not only an academic issue. In courts, issue classes appear to be moving forward more frequently, including in mass tort cases.[3] Even in 23(b)(3) classes, courts seek ways to resolve both liability and damages.

How to resolve damages in mass accident or mass tort cases is an old problem.[4] Often, courts and litigants have relied on settlement to resolve these cases.[5] But what if the

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1 *See generally* Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 GA. L. REV. 1305 (2019) [hereinafter Gilles & Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*]; Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. 133 (2021).

2 *See generally* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023).

3 *See In re* FCA US LLC Monostable Elec. Gearshift Litig., 340 F.R.D. 251, 255 (E.D. Mich. 2022) (proceeding with issue trial would not violate Seventh Amendment's reexamination clause in consumer case); Opinion and Order Granting Plaintiffs' Motion for Issue Class Certification, James v. Pacificorp, No. 20CV33885 (Or. Ct. App. May 23, 2022) (certifying issue class under Oregon law in mass tort case arising out of fires on Labor Day, 2020).

4 *See, e.g.,* Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 169 (1998) (advocating for issues classes to resolve mass torts); Jenkins v. Raymark Indus., (approving issue class action in asbestos case). For the proposition that mass torts is an old problem, see Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1579–1584 (2004) (describing the beginning of mass industrial harm in the United States). For the proposition that issue class actions have been proposed in mass torts since the 1980s, see Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1851 (2008).

5 *See generally* Francis E. McGovern, *The What and Why of Claims*

litigation does not settle? Scholars and judges rarely address this possibility in detail, so sure are they that most cases settle after a liability finding.[6] Most cases do settle, and most class actions settle after certification, so the lack of attention to the damages phase of aggregate litigation has been justified. But defendants are more risk-seeking than they are given credit for being, or at least have been more risk seeking recently.[7] Knowing that there is no firmly established procedure for resolving mass torts after liability has been determined, defendants may insist on trying cases individually, hoping that the overwhelming nature of a litigation involving thousands, or tens of thousands, of trials will ultimately limit their exposure to risk of loss by depressing settlement value or delaying litigation until plaintiffs simply give up or die. This is a problem for many different kinds of cases, in private law and public law, from mass torts to prison litigation.

The phenomenon of risk-seeking defendants who will not settle even after a liability finding requires that there be a plan for Phase II, that is, a plan for determining either liability to individuals and/or claim value for individuals after the issue class trial on liability. This Article is an attempt to advance the thinking on Phase II. The Article surveys nine possibilities for Phase II proceedings and evaluates the benefits and costs of each.

There are many good options for resolving Phase II, but none have deep doctrinal provenance because rarely has Phase II actually gone forward. That is about to change. Indeed, it is already changing. Judges have the opportunity to craft procedures for Phase II that will be fair to both defendants and plaintiffs and that will not overwhelm the court system. The Article proposes three criteria that judges should consider in

Resolution Facilities, 57 STAN. L. REV. 1361, 1362 (2005).

6 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:54 (6th ed. 2025) (stating that "the black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate, and courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations").

7 Evidence for this proposition can be found in the many talc cases taken to trial by Johnson & Johnson, as well as that company's adventurous attempt to resolve the case through bankruptcy. *See In re* LTL Mgmt., LLC, 64 F.4th 84, 109 (3d Cir. 2023) (holding that company's attempt to resolve talc liability through bankruptcy was not a valid bankruptcy purpose). It is also evident in the many trials pursued by Monsanto arising out of the claims that Roundup causes cancer. *See* Aleeza Furman, *New Wave of Roundup Trials Shifts Focus Out of Philadelphia*, LAW.COM (March 31, 2025).

evaluating Phase II procedures. First, what is the likelihood that the proposed procedure will resolve substantial numbers of cases? Second, what is the capacity of the proposed procedure to achieve consistency among plaintiffs, or horizontal equality?[8] Finally, how well does the procedure produce rectitude, or the correct application of the law to the facts of the case? This third criterion need not be perfect rectitude, as the Supreme Court's due process jurisprudence teaches.[9] Rather, the court must balance the interests of both parties, the ancillary interests of the courts, the risk of error, and the cost of additional procedural safeguards.[10]

There are numerous options for judges to achieve these three goals. This Article describes nine promising variations, drawn from procedures used in previous cases as well as some more imaginative procedures that are consistent with or loosely inspired by past practices. It considers the benefits and costs of different approaches, as well as their constitutionality under the Seventh Amendment right to a jury trial, particularly the reexamination clause of that Amendment.[11] It concludes with some reflections on the compared-to-what problem. If judges do not adjudicate Phase II, they leave many plaintiffs with no recourse because trying thousands of cases is not realistic. This reality should be factored into the "risk of error" consideration under the traditional due process analysis as judges evaluate resolution methods.[12]

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8 For an argument that consistency, or horizontal equality, among similarly situated claimants is an important value of the court system that can be promoted better on aggregate than through individual trials, see Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (2012) [hereinafter *Trial by Formula*].

9 *See* Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (applying the *Mathews* test to court processes between private litigants). The court will weigh the interest of the plaintiff against the interest of the defendant in light of the risk of error from the proposed procedure and the probable value of additional safeguards. *Id.; see also* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975) (discussing the minimal requirements for a pre-deprivation hearing). For a critique, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). These are the factors for administrative adjudication, but judges have a great deal of discretion under the procedural rules in structuring trials. The greatest limitation on judicial innovation is the jury right, but it is not insurmountable. *See* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998)

10 *Doehr*, 501 U.S. at 11.

11 *See* Woolley, *supra* note 9; Gilles & Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, *supra* note 1, at 1324–25.

12 *See Doehr*, 501 U.S. at 11 (describing the due process test as applied to

I
EXTRAPOLATION BY SPECIAL MASTER, APPROVED BY JURY

In planning Phase I and considering what is likely to happen in Phase II, courts often invoke appointment of special masters to determine compensation after liability has been found on a class-wide basis.[13] It is not as easy as one might think to find examples of actual use of special masters to resolve Phase II, as cases often settle after a global liability finding. There are, however, a few examples of courts using special masters to determine damages on an aggregated basis after a liability finding and ratified by a jury, dating from the 1990s, which are discussed below.

A frequent objection to the use of special masters is the Seventh Amendment's reexamination clause, which states that " There are arguments that the Seventh Amendment permits a special master to make damages determinations evaluated only by a judge at a bench trial.[14] But the more conservative course of action is to involve a jury. This can be done in two ways. Either the special master's findings would have to be approved by a jury on an omnibus basis, or either party would be allowed to opt out of the findings and try their case to a jury.

Under the special master extrapolation method, after a jury has determined liability, the judge would appoint a special master to collect and analyze information on damages suffered by individual class members. For example, the special master might evaluate a random sample of similarly situated injured individuals and extrapolate their injuries to the remaining class members. That report would then be presented to the jury, with arguments from counsel on both sides, and the jury would determine a global amount of damages for the class as a whole based on the report. The special master's methodology would then be used to award damages to individuals. To the extent that the jury's damages award does not match that proposed by the special master, the recovery could be reduced or increased pro-rata or the jury verdict form could provide the opportunity to state the amounts awarded for each category of plaintiff or injury identified by the special master so that there is no question as to allocation amounts.

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private litigants in court proceedings).

13 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 11:9 & n.9 (6th ed. 2025) (citing cases).

14 *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 618 (2008) [hereinafter *Bellwether Trials*] (arguing in favor of the preclusive effect of bellwether trials based on procedures in effect in 1791).

An example is *Hilao v. Estate of Marcos*.[15] *Hilao* was a class action brought by persons in the Philippines who had been victims of human rights abuses there.[16] They brought suit against the estate of the former dictator Ferdinand Marcos under the Alien Tort Claims Act and Torture Victim Protection Act.[17] The district court certified an opt-in class, a procedure now rejected by courts as impermissible under the federal class action rule.[18] The class consisted of 9,541 claims (after the court vetted all filed claims).[19] The court randomly selected 137 sample cases and appointed a special master to travel to the Philippines to investigate them. The special master made preliminary validity and damages findings for this sample group and developed a method for extrapolating from the sample to the larger claimant population.[20]These findings were presented to the jury (which reached conclusions slightly different from those proposed by the special master).[21] This process was approved by the Ninth Circuit at the time.[22]

This approach resurfaced in *Wal-Mart v. Dukes*.[23] In that case, the district court had certified a class of a very large number of Wal-Mart workers. In the earlier procedural history of the case, the Ninth Circuit considered how damages might be determined in a class proceeding where plaintiffs' damages were heterogeneous and the defendant had individualized defenses.[24] It reproduced the description of the *Hilao* process from that opinion, including the statement in that case that "[w]hile the district court's methodology in determining valid claims is unorthodox, it can be justified by the extraordinarily unusual nature of this case."[25]

What was the practical manner in which the Ninth Circuit thought *Wal-Mart* might be resolved? In a footnote, the circuit court explained:

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15 103 F.3d 767 (9th Cir. 1996).

16 *Id.* at 771.

17 *Id.* at 771, 778.

18 *See, e.g.*, Cox v. Spirit Airlines, Inc., No. 17-CV-5172(EK)(VMS), 2023 WL 2788457, at *2 (E.D.N.Y. Apr. 5, 2023).

19 *Hilao*, 103 F. 3d at 782.

20 *Id.* at 782–84.

21 *Id.* at 784.

22 *In re* Estate of Marcos Hum. Rts. Litig., 910 F. Supp. 1460 (D. Haw. 1995), *aff'd sub nom.* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

23 Wal-Mart v. Dukes, 564 U.S. 338 (2011).

24 Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 625 (9th Cir. 2010), *rev'd*, 564 U.S. 338 (2011).

25 Dukes, 603 F.3d at 627 (quoting *Hilao*, 103 F.3d at 786).

> We note that this procedure would allow Wal–Mart to present individual defenses in the randomly selected "sample cases," thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something *other* than gender discrimination. The "invalid claim rate" revealed by this process would, as it did in , come very close to the invalid claim rate one would expect to find among the entire class.[26]

The *Hilao* decision came during a period when courts were more open to the idea that the amount of damages could be calculated from the defendant's point of view. That is, that the proper question in damages calculation was how much the defendant ought to pay the class, rather than the accurate distribution of damages only to those injured. The following statement, from the D.C. Circuit in *Segar v. Smith*,[27] a 1984 Title VII case involving pervasive discrimination against Black Drug Enforcement Agency (DEA) agents, is illustrative.

> To require individualized hearings in these circumstances would be to deny relief to the bulk of DEA's black agents despite a finding of pervasive discrimination against them. In effect, DEA would have us preclude relief unless the remedial order is perfectly tailored to award relief only to those injured and only in the exact amount of their injury. Though Section 706(g) generally does not allow for backpay to those whom discrimination has not injured, this section should not be read as requiring effective denial of backpay to the large numbers of agents whom DEA's discrimination has injured in order to account for the risk that a small number of undeserving individuals might receive backpay.[28]

A somewhat similar approach was upheld by the D.C. Circuit in *Berger v. Iron Workers Reinforced Rodmen Local 201*.[29] In *Berger*, which had gone on for twenty-three years, the lower court had approved of a process by which a special master evaluated claims and made determinations based on averages.[30]On appeal, the methodology was questioned by the defendants and the D.C. Circuit agreed with some of their arguments but did not dispute the basic idea that the Special Master, using valid methodologies, could make such average

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26 *Id.* at 627 n. 56.

27 Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).

28 *Id.* at 1291.

29 170 F.3d 1111 (D.C. Cir. 1999).

30 *Id.* at 1116–19.

determinations.[31] The circuit court also approved the Special Master's award of compensatory damages and emotional distress damages extrapolated from the type of harm plaintiffs had suffered.[32] Accordingly, there is some precedent for binding and reviewable Special Master determinations.

The difference between these older cases and a modern Title VII case such as *Wal-Mart* is the Supreme Court's reliance on defendant's individualized defenses on liability to reject class treatment. *Wal-Mart* implies that collective damages processes of any kind are barred by the presence of individualized defenses. The special master approach was seldom used even before *Wal-Mart* (although this might be attributable to the defendants' propensity to settle) and there is some negative treatment of it in the federal courts, although it has not been explicitly overruled. The best example is Justice Scalia denigrating this methodology as "Trial by Formula" in his majority opinion in *Wal-Mart v. Dukes*.[33]

More recently, however, the Supreme Court's opinion in *Tyson Foods, Inc. v. Bouaphakeo*[34] raises some doubts as to whether *Wal-Mart's* disparagement of "trial-by-formula" binds courts. *Tyson* was a case about whether meat processing plant workers should have been paid for the time it took them to don and doff protective equipment.[35] In *Tyson*, an expert testified as to the time it took employees to don and doff based on a representative sample.[36] The jury awarded a global amount to all class members based on this testimony.[37] The Supreme Court upheld the process as consistent with the substantive law.[38] The Court explained that:

> A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.[39]

The Court interpreted the underlying substantive law, the

31 *Id.* at 1122–24.
32 *Id.* at 1138–39.
33 564 U.S. 338, 367 (2011).
34 577 U.S. 442 (2016).
35 *Id.* at 446.
36 *Id.* at 450.
37 *Id.* at 451–52.
38 *Id.* at 454–55.
39 *Id.*

Fair Labor Standards Act, to permit representative evidence even in individual cases, and held that the same type of evidence would be permitted in collective litigation as well.[40] The Court relied on precedent stating that if a defendant had failed in their legal obligation to keep records in an FLSA case, the plaintiff could make up the missing information using representative evidence.[41] How narrowly this part of the opinion should be read is debated, but there are a number of courts who have taken a broad view of the opinion at the class certification stage.[42] Part of the difficulty is that the Supreme Court failed to distinguish between statistical proof and statistical adjudication. That is, the Court confused inferences drawn from statistical proof with the substitution of averages for individual plaintiff-specific findings.[43] As Robert Bone has explained:

> *Tyson Foods*, broadly interpreted, stands for the proposition that sampling can be used to overcome any serious proof obstacle that systematically deprives a large number of injured parties of compensation, impedes enforcement of the substantive law, and leaves the defendant free to retain the benefits of its unlawful conduct—provided, of course, that sampling is otherwise consistent with the applicable substantive law.[44]

Notably, the jury in *Tyson* did not award the amount that plaintiff's expert had testified to as a result of his extrapolation methodology.[45] It is unclear from the record why the jury

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40 "If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action." *Id.* at 455.

41 *Id.* at 456.

42 *See, e.g.,* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 677 (9th Cir. 2022) (antitrust class action stating that " *Foods* rejected any categorical exclusion of representative or statistical evidence" and that "regression models have been widely accepted as a generally reliable econometric technique to control for the effects of the differences among class members and isolate the impact of the alleged antitrust violations on the prices paid by class members"); Green-Cooper v. Brinker Int'l, Inc., 73 F.4th 883, 887, 894 (11th Cir. 2023) (approving a methodology based on averages in a hacking and cyber-attack class action). For a narrower interpretation, see *In re* Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018). See also Hillel J. Bavli & John Kenneth Felter, *The Admissibility of Sampling Evidence to Prove Individual Damages in Class Actions*, 59 B.C. L. REV. 655, 702 (2018) (discussing use of sampling evidence in class action context with reference to *Tyson*).

43 Robert G. Bone, Tyson Foods *and the Future of Statistical Adjudication,* 95 N.C. L. REV. 607, 610 (2017).

44 *Id.* at 636.

45 *Tyson Foods, Inc.*, 577 U.S. at 451–52.

reduced the damages and whether this was a reflection of a weakness in plaintiff's case or a jury compromise.[46] But importantly, that reduction was done on a class-wide basis rather than an individual one. That is the nature of statistical adjudication: The determination is made regarding a sample and attributed to all the relevant, similarly situated plaintiffs.

Where it has been used, a special master evaluation followed by a jury trial on global damages has relied on some kind of class certification in order to proceed.[47] Whether class certification is necessary depends on the number of persons sought to be bound. For example, imagine a natural disaster such as a flood or fire in which a few thousand families were injured. In that case it would be possible to split them into groups of several hundred similarly situated plaintiffs, named in a single lawsuit, whose injuries would be determined by the special master and then adjudicated at a hearing before a jury. These groups might be selected based on geographic location or type of injury or other salient characteristics. But in a case that had a broader reach, such as a toxin or product affecting tens of thousands or more, naming plaintiffs in individual lawsuits would not be possible, and a class action would have to be certified. It is possible to certify such a class, or set of subclasses, but this raises the question of why a class would not have been certified for the action as a whole in the first place.[48] The answer of course is that outside the settlement context, mass tort class actions are difficult to certify under 23(b)(3) because courts generally tend to find that class treatment would be unmanageable. If special master determinations reviewed by a jury became more common, such classes might be able to be certified so long as the class did not involve future claimants.

Overall, extrapolation by special master followed by jury approval is a means for resolving Phase II that can meet two of

46 *See id.* at 465 (Roberts, C.J., concurring). This fact demonstrates that, as Bone points out, *Tyson* was a case of statistical adjudication rather than statistical proof. Bone, *supra* note 43, at 625.

47 *See, e.g., Tyson Foods, Inc.*, 577 U.S. at 446.

48 On the difficulty of certifying mass tort class actions for damages, see Gilles & Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, *supra* note 1, at 1317; Alexandra D. Lahav, *Mass Tort Class Actions—Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1006 (2017) [hereinafter *Mass Tort Class Actions*] (describing attempts to certify mass tort classes and relative lack of success); David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1567 (2017) (describing history of mass tort class action, concluding that the idea failed, and demonstrating that the failure of mass tort classes spurred increased appellate oversight over class actions more generally).

the three criteria that judges ought to consider. First, it would provide a mechanism for determining outcomes in large numbers of claims because the special master can sample claims and extrapolate to the remaining class members. Second, if done correctly, as compared with individual trials, it is more likely to result in equality of treatment across plaintiffs, because the jury determines damages based on a global allocation mechanism and evaluation rather than individually, when the risk of variance is greatest. As to the third requirement of rectitude, an extrapolation approach risks that some individuals to whom the findings are extrapolated recover more than they should have, or perhaps individuals might recover even though they have suffered no legal wrong.[49] Vetting by the courts can alleviate some of these problems as part of the case processing system. But it is in the nature of statistical adjudication that there will be some mismatch between the plaintiff's statistical recovery and what would have occurred at trial. As long as the risk of false positives is less than the risk of no-adjudication in an alternative system, this procedure still comports with due process.

II
AN OPT-IN AGGREGATION

A related but more adventurous approach would combine a special master determination with an opt-in class. In the federal system, opt-in classes are not recognized under Rule 23.[50] There are statutory provisions for opt-in actions under the Fair Labor Standards Act (FLSA).[51] *Tyson*, referenced above, was a federal case invoking the FLSA and analogous state law claims that were certified as a class action. But absent statutory authority, the federal courts have rejected opt-in class actions where they have been attempted. The reason that opt-in classes are not recognized is the preclusive effect with respect to individuals who do nothing. The predicate for an opt-in class has been that the action would be

49 Bone, *supra* note 43, at 641.

50 *See* 3 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 9:48 (6th ed. 2025) (stating that "no court has ever certified an opt-in class under 23(b)(3), and courts have denied certification of classes for which plaintiffs request an opt-in provision") (footnotes omitted); *see also* Cox v. Spirit Airlines, Inc., No. 17-CV-5172(EK)(VMS), 2023 WL 2788457, at *2 (E.D.N.Y. Apr. 5, 2023) (rejecting defendant's attempt to impose a questionnaire on plaintiffs—which would deny them recovery if they did not answer—because it created a kind of "opt in" requirement).

51 29 U.S.C. § 216(b).

preclusive against non-participating class members.

The rationale against opt-in classes assumes that individuals who did not opt in would not obtain compensation.[52] Courts have also reasoned that by creating a federal rule with an opt-out requirement, the rules by implication prohibited opt-in classes.[53] For example, in *Kern v. Siemens Corp*, the Second Circuit held that a Phase I (liability) class action that would have bound absent class members who did not opt in violated the class action rule.[54] That case involved a ski train crash that killed 155 people, some of whom were foreign residents.[55] It is unclear if the district court in that case intended for non-participants to be bound or only intended to bind participants in a kind of court-created invitation to joinder or interpleader device. An opt-in procedure would not need to be preclusive as against those who chose not to participate.

There is a strong informational benefit to the non-binding opt-in mechanism. The opt-in rates would communicate to the court the extent to which plaintiffs believed the methodology to be used was fair.[56] A district court judge could create an opt-in process where litigants who want an expedited review of their claim by a neutral magistrate could participate and an award could be based on some kind of matrix or point system as is often used in settlements. That award could then be appealed to the judge for a determination of validity by either party on an individualized basis. Parties not opting in would pursue individual trials at whatever pace such trials could become available. This process could be approved by a voting procedure as suggested by the American Law Institute's Principles of the Law of Aggregate Litigation,[57] or it could be

52 Ackal v. Centennial Beauregard Cellular L.L.C., 700 F.3d 212, 216–17 (5th Cir. 2012). *But see* Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 789–95 (2019) (proposing opt-in classes through the MDL process); Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601, 638 (2015) (describing European preference for opt-in classes); John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. ILL. L. REV. 903, 906 (2005) (proposing an opt-in approach to preclusive settlements in class actions).

53 Kern v. Siemens Corp., 393 F.3d 120, 124 (2d Cir. 2004).

54 *Id.* at 126–25.

55 *Id.* at 122.

56 I make a similar argument about binding bellwether trial procedures in *Bellwether Trials*, *supra* note 14, at 613.

57 A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (2010) (proposing a "substantial-majority" voting mechanism for settlements of

purely opt-in on an individualized basis.

One would anticipate that the lowest value claims or those for which there are objective criteria to determine value would opt in, while higher value, more uncertain and extreme emotional distress cases would opt out in favor of individualized hearings or trials. This is analogous to the way mass torts are currently resolved. Often, very high value claims are segregated out of the general population for individualized settlements, while the remainder of cases tend to settle on what is sometimes referred to as an "inventory" basis or according to a matrix for damages.[58]

A question remains as to whether a defendant would ever consent to such a procedure, and if not, what doctrinal basis authorizes the court to create an opt-in mechanism for plaintiff joinder over defendant's objection. Even if an opt-in mechanism may solve the problem of fairness to plaintiffs because they consent, the same is not true of defendants. A mandatory procedure that determines plaintiffs' injuries through an administrative-type process needs a rationale other than consent to bind defendants because defendant does not opt in. Under the federal rules, courts have the power to consolidate cases for trial,[59] and plaintiffs have the power to join in a lawsuit, so long as they meet the requirements of Rule 20.[60] An opt-in procedure could be crafted from some combination of these rules so long as it does not preclude plaintiffs who choose not to opt in from pursuing their own litigation.

An opt-in procedure, while encompassing fewer claims than the extrapolation mechanism described in the previous sub-section, would have the benefit of moving forward the resolution of large numbers of claims. It would produce some consistency across plaintiffs, but only for those who chose to participate in the procedure. And it would achieve rectitude to a somewhat greater extent because it would permit appeals to the district judge of individual determinations.

III

aggregate litigation).

58 *See* Lynn A. Baker & Andrew D. Bradt, *MDL Myths*, 101 TEX. L. REV. 1521, 1542 (2023) (discussing settlement by matrix).

59 FED. R. CIV. P. 42.

60 FED. R. CIV. P. 20.

SPECIAL MASTER OFFERS WITH OPT-OUTS

A third, closely related approach would allow a special master to determine damages for each class member and for that determination to be binding absent objection. In the case of objection, the objecting party could choose a hearing, either a jury trial or a bench trial. These could be short proceedings, perhaps limiting the adjudicated issues to those contested by the objecting party.[61]

This approach was utilized in *Bell v. Brockett*.[62] *Bell* was a defendant class action arising out of a Ponzi scheme.[63]The victims of the Ponzi scheme, who invested money and were net losers in the business, were represented by a receiver who was appointed by the district court in a related SEC enforcement action shutting down the Ponzi scheme. Approximately eight percent of the investors were what the court called "Net Winners" who illegally collected about $282 million collectively from the scheme. The receiver sued the individual Net Winners who had made more than $1,000 in the scheme as a defendant class. After a liability finding, the court allowed the receiver to send notices to the Net Winners including the amount they owed.[64] The Net Winners then could either pay the amount, negotiate a lower amount directly with the receiver, or have their damages calculations referred to a Special Master. The Court explained: "If the parties did not agree that the Special Master's decision would be binding, then the matter could be appealed to the district court, at which point there could include, if appropriate, the opportunity for either party to request an individual jury trial on damages."[65]

Bell was a rare defendant class action, but that fact ought not make a difference with respect to the propriety of the procedure used. The defendants in *Bell* had a right to their defenses and individualized findings to the same extent as a plaintiff might in a money damages case. The key difference that would matter is that the nature of the damages sought from defendants in *Bell* was of a different kind than what would be sought in some mass tort class actions because it involved property not personal injury. There are mass actions that

61 *But see* Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2132–33 (2018) (documenting and criticizing move towards shorter, more judicially controlled trials).

62 922 F.3d 502 (4th Cir. 2019).

63 *Id.* at 504–05.

64 *Id.* at 508.

65 *Id.*

involve property damages, such as those due to pollution, floods, or fire.[66] But personal injury is somewhat different because personal injury is more directly related to personhood and identity than property interests. In the past, scholars posited that courts tended to treat personal injuries differently than financial losses and were more likely to approve classes and settlements in cases involving financial loss than personal injury.[67] Today, at least for settlement purposes, courts will certify some mass tort personal injury class actions.[68] There is greater recognition now than in the past that personal injury damages in settlement are often priced by a kind of market, even if an imperfect one.

The risk of a process offering plaintiffs a settlement as well as the opportunity to opt out is that an obstreperous defendant could opt out and seek a jury trial in every case, derailing the process. Or a group of plaintiffs could similarly resist the process. How this would play out depends on the dynamic between parties, judge, and special master, as well as the nature of the defenses available to the defendant. Depending on the judge's attitude and the special master's skill, it is possible that for many cases, there would be little dispute, allowing the speedy resolution of those cases. If the defendant calculated that individual defenses were not worth bringing in most cases, it might not opt out for most cases. And the follow-on individual proceedings could be streamlined as well. In sum, this procedure would create a greater risk that large numbers of plaintiffs' cases cannot be resolved, but it would provide consistency among those claimants subject to the procedure and would result in close attention to the facts of the individual case for each settlement offer and resolution.

IV
HYBRID COLLECTIVE AND INDIVIDUALIZED PROCEEDINGS

Courts might also split proceedings following Phase I into two parts: Phase II for collective resolution of damages

66 *See Mass Tort Class Actions, supra* note 48, at 1007 (describing property injury asbestos and other mass tort cases).

67 *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 374 (2001) (describing different treatment of securities and mass tort class actions). Notably, it has become much harder to certify any class action since Rubenstein wrote this article. *See* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (2017) (describing a trend that courts had cut back on plaintiff's ability to bring class actions prior to 2013 and showing how the doctrine had stabilized as of 2017).

68 *See, e.g.,*

questions and Phase III for further individualized proceedings. A court could use a collective or aggregated proceeding for some claims in Phase II, leaving others to individualized trials in Phase III.[69] Some types of damages claims are easier to assess than others. For example, suppose that a toxic tort involved both property damage (such as reduction in property values) and personal injuries. The property claims could be adjudicated collectively while the more sensitive personal injury claims could be adjudicated individually. Or a court might bifurcate general damages and special damages, as has been done in civil rights cases alleging both general damages and emotional distress.

A model for such a procedure is *Barnes v. D.C.*[70] *Barnes* was a class action brought against the District of Columbia by persons held in the District's jail facilities.[71] The plaintiffs claimed unconstitutional over-detention and strip searches. The District Court held that it would permit a trial, using representative evidence, on the issue of general damages, but would require individualized proceedings for compensation for psychological damages.[72] The Court limited the testimony in the collective proceeding to the fact of the violation but would not permit testimony as to the individual's circumstances, such as the reasons they were in jail or the effect of the over-detention or strip search on their lives.[73] The reason for this was the Court's concern that the jury might extrapolate from the representatives that the remainder of the class shared those same experiences when the representatives were not selected to be typical of a heterogeneous group.[74] The Court decided that the jury, with the help of expert testimony, would "determine a dollar value for each strip search" and would use a matrix to assign values for over-detention ("*i.e.*, 0-12 hours, 0-24 hours, 0-36 hours, and so forth").[75] These experts would explain "the range of general damages that have been awarded

69 *See* Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1267 (Fla. 2006). In that case, only the Phase I findings were preclusive. For a discussion of the significance of *Engle*, see Gilles & Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, *supra* note 1 at 1316–20. Gilles and Friedman argue that the judge in that case should have certified an issue class action. *Id.*

70 278 F.R.D. 14 (D.D.C. 2011).

71 *Id.* at 16.

72 *Id.* at 20–22.

73 *Id.* at 21.

74 *Id.* at 21–22.

75 *Id.* at 21.

by judges or juries in similar cases."[76] The main issue of contention in *Barnes* was the nature of the sample—would it be nonrandom, as the Court ultimately decided, or would it be random? The defendant did not contest the idea of determining general damages collectively but did contest collective proceedings for emotional distress damages.[77] In other proceedings, judges may need to impose such an approach over defendant's objection. As discussed above, this may be possible under *Tyson*.[78]

A similar method was used in *Augustin v. Jablonsky*.[79] That case was also a strip search class action. In that case, the defendant lost a summary judgment motion on liability.[80] This was the functional equivalent of Phase I. The court held a collective proceeding for general damages, ultimately awarding $500 per strip search as a dignitary harm.[81] After issuing findings on liability and general damages, the court held that the class had never been certified with respect to special damages and declined to extend certification.[82] The court explained that individualized damages trials could occur in small groups.[83]

Ordinarily, one would think the rule against claim splitting would prevent a plaintiff from litigating the property damages claims separately from the personal injury claims.[84] It would be one thing if some plaintiffs only had one type of claim. In that case plaintiffs with, say, only general damages or only property damages could have their claims decided separately by collective proceeding. But otherwise, it would not be

76 *Id.*

77 *Id.* at 20.

78 Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442 (2016).

79 819 F. Supp. 2d 153, 158 (E.D.N.Y. 2011). *But see* Betances v. Fischer, No. 11-CV-3200 (RWL), 2024 WL 182044, at *20 (S.D.N.Y. Jan. 17, 2024) (de-certifying class on grounds that individualized damages issues couldn't be determined on a class-wide basis).

80 *Augustin*, 819 F. Supp. 2d at 156.

81 *Id.* at 157–58.

82 *Id.* at 163.

83 *Id.* at 174–75 (discussing a prior case in which the court ordered trials on some individualized damages issues in groups of five (citing *Watson v. Shell Oil Company,* 979 F.2d 1014, 1018 (5th Cir. 1992)).

84 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (A.L.I. 1982) (stating that "(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose").

possible to obtain a collective judgment as to one kind of claim without either determining the second or engaging in claim splitting. Like the initial issue class, perhaps this could be decided in remedies stages, with property claims decided in Phase II and personal injury in Phase III. Or general damages could be decided in Phase II and emotional distress decided in Phase III. All the phases would be part of the same litigation (rather than serial case filings for example).

Evidently, the courts in *Barnes* and *Augustine* were not concerned that claim splitting was a barrier to recovery in follow-on proceedings for special damages.[85] It is likely that certifying courts understand class certification for a particular purpose not to be either preclusive or claim splitting for absent class members, and I have found no cases where a court barred types of damages that were specifically excluded from the certification order in follow-on proceedings under a claim splitting rationale. Thus, it appears that the bar on claim splitting is not a barrier to a hybrid collective approach in Phase II.[86] Why is this the case? Likely because there is some confusion as to the status of absent class members. They are parties for some purposes and non-parties for other purposes, and thus there is some gray area around the preclusive effect of undecided issues in limited certification situations.[87] In other words, maybe it is not claim splitting if the court does it.

The extent to which large numbers of cases can be resolved using this procedure depends on the underlying claims in the individual suits. If most of the claims are relatively straightforward damages evaluations that can be made collectively, and only a small number involve (or choose to pursue) more complex and individualized types of damages such as emotional distress damages, a system like this could lead to the resolution of large numbers of cases. This procedure is likely to produce consistency across those plaintiffs who are aggregated, as is the case with the

85 *See Augustin*, 819 F. Supp. 2d at 175–76 (stating that "the Court is doubtful that the process of holding potentially hundreds if not thousands of mini-trials, or appointing one or more Special Masters to do so, would be any more efficient than requiring former class members to commence their own individual actions should they elect to pursue claims for special damages").

86 A counterargument is that class representatives would ordinarily be treated differently for preclusion purposes, and their full claims ought to be decided in the damages phase because they are before the court.

87 *See* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1943–45 (2011) (describing the different approaches to the question of whether absent class members are parties).

extrapolation procedures discussed earlier. Those remedies tried individually, however, may end up with inconsistent outcomes. Finally, while the procedure may result in some false negatives, it is less likely to do so than global extrapolation because the claims being adjudicated collectively are selected for collective treatment because they are easier to evaluate based on objective evidence.

V
CONSOLIDATED TRIALS OF MULTIPLE CLAIMANTS

A fifth approach is for the court to hold consolidated trials of multiple claimants. Under this scenario, large numbers of individual claimants would be joined together for trial. These individual claimants could have varying injuries or could have injuries of all the same type. The jury would reach individual damages determinations for each plaintiff as part of the verdict. Consolidated trials are a common approach in mass torts, although the highest number of plaintiffs in a single case that I have found is twenty-two.[88] If all the plaintiffs have very similar injuries and the injuries do not involve a substantial inquiry into each individual's situation (yet, somehow, still cannot be treated collectively) it is possible to imagine a trial with as many as a hundred plaintiffs. It is difficult to imagine a situation in which one hundred cases can be tried together yet not be suitable for collective treatment in a class action, however. That said, given today's parsimonious interpretation of predominance by courts, such a scenario is possible.

Some defendants complain that consolidated trials prejudice juries against the defendant, essentially by implying liability due to the number of people with similar injuries who blame the defendant. But the proposal at Phase II is not to consider liability, as that will have already been determined at

88 *See* Ingham v. Johnson & Johnson, 608 S.W.3d 663, 682 (Mo. Ct. App. 2020) (upholding joinder of twenty-two plaintiffs in one proceeding and dismissing some claims for out-of-state plaintiffs on personal jurisdiction grounds not at issue here); *see also* Gray v. Derderian, 365 F. Supp. 2d 218, 222 (D.R.I. 2005) (two hundred plaintiffs' cases against 50 defendants consolidated). No trials were held in *Derderian* because the cases were settled. *See* Elizabeth Cabraser & Robert Klonoff, In Memoriam, *Francis McGovern: The Consummate Facilitator, Teacher, and Scholar*, 84 LAW & CONTEMP. PROBS., 2021, at 1, 2 ("McGovern achieved a comprehensive settlement of lawsuits stemming from the February 2003 fire at a West Warwick, Rhode Island nightclub, in which 100 people died and 200 others were injured. McGovern met with every victim and devised a point system for compensating all of them. In total, his approach resulted in the distribution of $176 million. In the nightclub fire resolution, he did this work pro bono.") (footnotes omitted).

Phase I, and the Seventh Amendment does not permit reexamination of an issue determined by a jury.[89] As the Supreme Court explained, the Seventh Amendment "does not . . . require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury."[90]

Multi-plaintiff consolidated trials are unlikely to result in a speedy determination of a mass tort involving more than a few hundred plaintiffs, nor are they likely to resolve large numbers of cases at once. As many mass torts involve between six hundred and a few hundred thousand plaintiffs, group trials are not a good solution for resolving Phase II by trial alone. But consolidating plaintiffs in single trials may lead to a quicker settlement if claim value is a major stumbling block in negotiations, as consolidated trials allow the determination of claim value for a larger number of plaintiffs. These trials could lead to consistency among the plaintiffs included in the individual trials, but they are unlikely to promote consistency across trials, as each jury would make its own determination. Finally, this is an individualized approach requiring no extrapolation and therefore would achieve rectitude in individual cases, but at the cost that many individuals may have long waits to be heard or may never be heard at all.

VI
TEAMSTERS HEARINGS AND INDIVIDUAL SUMMARY JURY TRIALS

Teamsters hearings are often invoked in class certification battles in employment litigation under Title VII. The concept is named after a 1977 U.S. Supreme Court case, *International Brotherhood of Teamsters v. United States*.[91] Under this case,

89 U.S. CONST. amend VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States" except as permitted by common law); Sowers v. R.J. Reynolds Tobacco Co., 975 F.3d 1112, 1127–1132 (11th Cir. 2020) (holding that if the issue is separable, it may be retried). For a thorough argument that such trials would not violate the Seventh Amendment, see Woolley, *supra* note 9. Cases to the contrary, such as *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (per Judge Posner), are in error. Making this argument yet again is unnecessary in light of Woolley's convincing arguments and modern caselaw.

90 Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

91 431 U.S. 324, 361 (1977) (stating that "[w]hen the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief").

once liability is established on a class-wide basis because of a pattern or practice of discrimination, class members are presumptively entitled to relief, and the burden shifts to the employer to present affirmative defenses that would prove an individual is not so entitled.[92] The opportunity to present such defenses is provided in short form hearings. Such short form hearings have been routinely invoked in these cases since the 1970s,[93] although my conversations with employment discrimination class action lawyers indicate that there are few cases in which the process has actually been used because cases settle so often.

In 1977, when the *Teamsters* case was decided, plaintiffs in Title VII cases had no right to a jury trial.[94] Thus, the original vision of *Teamsters* hearings involved a short bench hearing in which the defendant could present its individualized defenses with respect to those plaintiffs for which that challenge would have been appropriate.[95] Unless the parties agree to waive their right to a jury in a mass tort case, the *Teamsters* approach as it was originally conceived is unlikely to be operational in the Phase II context. The cost and risk of jury trials may also explain why *Teamsters* hearings are rarely used in modern employment discrimination class actions.

Still, there are examples of *Teamsters* hearings utilizing juries. In *Neal v. D.C. Department of Corrections*, Judge Roy Lambeth certified a class for liability purposes on a discrimination claim and then ordered hearings for absent class members on compensatory damages before juries.[96] Class counsel was to inform class members of the hearings, and individual class members wishing to participate were to submit summaries of their claims to the court and serve them on the defendants.[97] Then the parties would determine how

92 *Id.* at 362.

93 *See, e.g.,* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Hartman v. Duffey, 88 F.3d 1232, 1235 (D.C. Cir. 1996).

94 *Cf.* 1977A, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at

95 *See, e.g.*, *Hartman*, 88 F.3d at 1235 & n.2 (describing Teamsters hearings).

96 *See* No. 93-2420 (RCL), 1995 WL 517246, at *1 (D.D.C. Aug. 9, 1995).

97 *Id.* at *7. The court described the claim summaries as follows: "The claim summary shall identify, to the extent possible, the following: (i) the names of persons who the claimant alleges committed the sexual harassment or retaliation; (ii) the conduct alleged to constitute sexual harassment or retaliation; (iii) the dates and locations of such conduct; (iv) witnesses, if any; (v) complaints relating to the sexual harassment or retaliation made by or on behalf of the claimant, formally or informally, prior to the completion of the notification form in this action; (vi) the general nature of any harm sustained by the claimant; and (vii) a general description of the relief sought by the claimant. The claim summary

much discovery was needed on individual claims, discovery was to proceed on those individual claims in accordance with the Federal Rules, and the court would schedule trials.[98] Juries would be empaneled to sit for two weeks and would decide as many claims as possible during that period.[99] The trials were to follow the burden-shifting regime articulated in *Teamsters*. Plaintiffs would demonstrate a prima facie case. Then the burden would shift to the defendant, who would show that either the plaintiff was not a member of the class or that the defendant had a legitimate non-discriminatory reason for the adverse action.[100] After that, the burden would shift back to the plaintiff to rebut the defendant's evidence.[101]

The same concept behind *Teamsters* hearings, which is a focused trial on damages and defenses, can be applied in the jury trial context by utilizing summary jury trials. Summary jury trials have been proposed by the judiciary since the 1980s.[102] A particularly well-known proposal comes from an article by Judge Thomas Lambros of the Northern District of Ohio.[103] He suggested a jury trial before six jurors[104] that could be either binding or non-binding,[105] with presentation of evidence limited to descriptions and arguments rather than

shall be served on defendants and filed with the court within 90 days of receipt of the claimant's notification form, unless this time is extended for good cause." *Id.* This process was not unlike how some MDLs are organized, using plaintiff fact sheets or a census to determine the allegations.

98 *Id.* at *7–8.

99 *Id.* at 8 ("Each jury shall be impaneled for approximately two weeks and shall hear as many claims as possible within that time frame. Each jury shall be given instructions consistent with those given to the jury which tried the individual claims of class representatives in the first phase of this litigation. Each jury shall deliberate and render a verdict on all claims presented to it.")

100 *Id.* at *5.

101 *Id.* at *8.

102 *See* Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 487–88 (1984).

103 *Id.*

104 *Id.* at 487 (Lambros's model pretrial order stated: "This action shall be heard before a six-member jury. Counsel will be permitted two challenges apiece to the venire, and will be assisted in the exercise of such challenges by a brief voir dire examination to be conducted by the presiding judicial officer and by juror profile forms. There will be no alternate jurors.")

105 *Id.* at 488 (pretrial order stating that "[t]he jury may return either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings on liability and/or damages (each known as the jury's advisory opinion). The jury will be encouraged to return a consensus verdict[.]" The order also stated that "[c]ounsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the Court, or may stipulate to any other use of the verdict that will aid in the resolution of the case.")

live witnesses, and permitting limited objections.[106] The benefit of such an approach is that these hearings would be short, and multiple individuals with similar damages could even be presented to the jury simultaneously if the defenses were similar. Different jurors could be empaneled for short periods of time, such as for example one day per jury, to minimize the impact on the community.

There is a voluminous literature on summary jury trials, as experiments have been ongoing in both federal and state courts.[107] A 2018 article by Nora Freeman Engstrom argues that this approach has permeated deeply into the federal judiciary and that as of 2016, fifty-four percent of trials were one day long.[108] Freeman Engstrom notes two phenomena that have become common since the 1980s and may be the cause of shorter trials. These are restrictions on timing of opening and closing statements and trial time limits.[109] Still, even short trials ordinarily involve presentation of live witnesses, and trials in mass torts are ordinarily not short. This is largely because trials in mass tort cases are either perceived as or set up to be bellwether trials, where lawyers are investing significant resources to prove their claims in order to obtain a result that they can use to settle many thousands of other cases on a global basis.[110]

The drawbacks to the summary jury trial approach are evident. First, live witnesses are the keystone of modern trial practice. Both parties might have reasons to object to presenting a cold record to a jury.[111] Second, studies show that

106 *Id.* at 487 (pretrial order explaining that "[a]ll evidence shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence and sworn statements of potential witnesses. However, no witness' testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavit of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness' proposed testimony by the witness.")

107 *See, e.g.,* PAULA L. HANNAFORD-AGOR, SHORT, SUMMARY AND EXPEDITED: THE EVOLUTION OF SUMMARY JURY TRIALS(2012), https://ncsc.contentdm.oclc.org/digital/api/collection/juries/id/253/download [https://perma.cc/H6VV-LL66].

108 Freeman Engstrom, *supra* note **Error! Bookmark not defined.**, at 2134.

109 *Id.* at 2142.

110 *See* discussion *infra* Part VII, Binding Bellwether Trials.

111 For a critique of summary trials, see Freeman Engstrom, *supra* note **Error! Bookmark not defined.**, at 2133 ("[T]rials seem to be undergoing a subtle metamorphosis: becoming shorter, more regimented, subject to less party

twelve-person juries make better decisions than six-person juries.[112] To protect against concerns that this procedure departs too much from ordinary trial practice, the summary trials may need to be consensual or at least non-binding, limiting their utility as a resolution mechanism where settlement is not a possibility.[113] Third, and perhaps most concerning, even in a relatively small mass tort summary, trials would long delay recovery for many plaintiffs. Consider a case involving 2,000 plaintiffs, which would not qualify as a large mass tort. If a judge ordered a one-day summary proceeding for each plaintiff, even if the judge devoted herself entirely to these proceedings every workday of the year (that is, approximately 250 days), it would take *eight years* to resolve all claims by trial. Importantly, that judge would be doing nothing but these cases—no criminal cases, no other civil litigation—for the entirety of that period.

VII
BINDING BELLWETHER TRIALS

A more adventuresome option for resolving Phase II is binding bellwether trials. This approach was attempted in the 1990s in the context of a class action proceeding, struck down by the Fifth Circuit, and then never tried again.[114] But perhaps now is the time to reconsider, as thinking about the usefulness of bellwether trials has evolved.

In a binding bellwether trial procedure, the court would select a sample of cases for adjudication, and that sample would then be extrapolated to the class as a whole, not through settlement or as determined by a jury, but by the court.[115] Ordinarily, this requires class certification, and courts have been reluctant to certify mass tort classes for litigation because they worry damages are too different such that the class does not meet the predominance requirement of Rule 23.[116] Indeed, the reason for this Article is that courts think that a class

control, and more affected by particular judicial whims.")

112 *See* Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 887, 945–46 (summarizing empirical studies of jurors and arguing in favor of a return to twelve person juries).

113 See FED R. CIV. P. 39(c) (permitting advisory juries).

114 *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998); *see also Bellwether Trials*, *supra* note 14, at 581–85 (discussing history of *Cimino*).

115 *Bellwether Trials*, *supra* note 14, at 581.

116 Troy A. McKenzie, *Toward A Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 966–73 (2012); FED R. CIV. P. 23(b)(3).

cannot be certified for Phase II.[117] Elsewhere, I have argued that bellwether trials should be used to extrapolate damages in the mass tort context because this approach would promote efficiency through collective proceedings, would promote horizontal equality of treatment (or consistency in outcomes) among litigants, and would promote the public benefit of deliberation and transparency through the trial process.[118] The difficulty is that bellwether trials tend to produce highly varied verdicts, and it is hard to figure out how to extrapolate these to other class members if the claims of the remaining class members do not have a symmetric distribution.[119]

Outside of class certification for damages, the way to use binding bellwether trials would be through non-mutual issue preclusion.[120] The problem is that it would be difficult to meet the requirements of that doctrine with respect to damages determinations. Issue preclusion requires the same issue to have been actually litigated and essential to the judgment.[121] In the context of damages determinations, the issue may never be exactly the same because individuals differ—that is the nature of human beings. It may be possible, however, to reinterpret the doctrine to hold that the "same issue" requirement can be applied at a level of generality that will permit extrapolation in Phase II. A court could impose a procedure that would extrapolate damages to members of the class with the relevant characteristics ("same issue") and then the burden would shift to the parties—plaintiff or defendant—to challenge before the court whether in fact the issue is the same in their case.

An easy case for such a procedure would involve property value. Suppose cases are tried involving a particular type of diminution in value of property, such as by fire, flood or a toxic spill. It might be possible to establish uniformly for all

117 *See* McKenzie, *supra* note 116, at968 (discussing difficulty of certifying mass tort class actions); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 KAN. L. REV. 775, 806 (2010) (noting the reduction in class certifications and the increase in products liability MDLs).

118 *Bellwether Trials*, *supra* note 14, at 577–80; *see also generally Trial by Formula, supra* note 8.

119 *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185, 189, 192 (2018) (discussing bi-modal curves in bellwether trials). *But see* Edward K. Cheng, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 964 (2012) (discussing use of outliers to determine claim value in cases of symmetric distribution).

120 *Bellwether Trials*, *supra* note 14 at 622–23.

121 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (A.L.I 1982).

plaintiffs suffering a particular level of loss what the value of their property loss was based on those trials. Perhaps personal injury could be determined the same way, as long as the personal injury was sufficiently specifically defined. In some ways, this would be establishing the equivalent of the Irish "Book of Quantum"[122] for a specific litigation—each type of injury could be tried to a jury and the results of that trial extrapolated to the larger group. Individual parties who could credibly contest that for them the issue was not the "same issue" would be able to appeal the determination just as they could for any exercise of issue preclusion. But mere assertions that all individuals are unique would be insufficient—the party would have to show that their individual case was sufficiently different to merit being treated as a different issue.

Binding bellwether trials have not been tried because federal courts disfavor the use of offensive non-mutual collateral estoppel in tort cases, although the use of this doctrine is not forbidden under the governing case, *Parklane Hosiery v. Shore*.[123] Of particular concern is the requirement that the plaintiff join in the initial action—mass tort filings are often aggregated but not joined in the same suit. The Court in *Parklane* was worried about plaintiffs taking a wait-and-see attitude, sitting on the sidelines until the defendant lost a case, and then moving to bind the defendant to that ruling even if there had been contrary rulings in previous cases in the defendant's favor.[124] Because in an MDL context, the cases are aggregated and treated similarly across the board, the likelihood that individual cases can escape dispositive motions against the plaintiff is low. A plaintiff in a mass tort MDL who loses their summary judgment motion on an issue that affects all cases, such as general causation, will result in mass dismissals.[125] There are many examples of situations in which

122 AN BORD MEASÚNAITHE DÍOBHÁLACHA PEARSANTA [PERSONAL INJURIES ASSESSMENT BOARD], BOOK OF QUANTUM: GENERAL GUIDELINES AS TO THE AMOUNTS THAT MAY BE AWARDED OR ASSESSED IN PERSONAL INJURY CLAIMS (2016), https://www.injuries.ie/eng/forms-guides/book-of-quantum.pdf [https://perma.cc/A4Y9-7DY3].

123 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979).

124 *Id.* at 330.

125 *See* 6 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS§ 18:47 (6th ed. 2025) ("Some MDLs generate final judgments, for instance, through a summary judgment dismissal."); *see also* FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) (explaining that "[a]lthough the transferee judge has no jurisdiction to conduct a trial in cases transferred solely for pretrial proceedings, the judge may terminate actions by ruling on motions to dismiss, for summary judgment, or pursuant to settlement, and may enter consent decrees" and noting

a dispositive motion in an MDL has resulted in the entire litigation ending even for those cases whose claims were not yet heard.[126]

The Sixth Circuit Court of Appeals recently upheld the application of offensive nonmutual collateral estoppel to establish general causation in a mass tort case.[127] In that situation, cases against DuPont arising out of the contamination of the Ohio river were consolidated pursuant to the multidistrict litigation statute.[128] Several cases had already been tried, and the Court of Appeals affirmed the district court's ruling that the same defendant in a third case could be collaterally precluded from relitigating several common issues.[129] It did not, however, preclude the defendant from contesting damages.[130]There are some unique aspects to that case, particularly the fact that general causation was established using a scientific panel analyzing data gathered from a previous medical monitoring class action, and that the defendant had agreed in the settlement of that previous action to be bound by the panel's determinations.[131]

The appellate court asserted in *DuPont* that if binding bellwethers are used, they are usually preclusive only if the possibility of preclusion was clear at the outset. The Sixth Circuit emphasized the importance of agreement:

> If a bellwether is "binding," the parties designate a subset of overall cases, the results of which are to be extrapolated to the broader whole. Generally, such a

that for cases transferred after the initial transfer of cases to the MDL judge, "rulings on common issues—for example, on the statute of limitations—shall be deemed to have been made in the [later-transferred] action").

126 *See, e.g.*, *In re* Zofran (Ondansetron) Prods. Liab. Litig., 541 F.Supp.3d 164, 206 (D. Mass. 2021) (district court's grant of defendant's motion for summary judgment on federal preemption ended the litigation); Marina v. Bayer Healthcare Pharms., Inc., (*In re* Mirena IUD Prods. Liab. Litig.), 713 F. App'x 11, 13–14 (2d Cir. 2017) (district court's *Daubert* ruling ended the litigation.); *see also In re* Oil Spill by Oil Rig "Deepwater Horizon", 902 F. Supp. 2d 808, 816 (E.D. La. 2012) (dismissing *inter alia* claims that plaintiffs' real property value had been reduced from an oil spill), *aff'd sub nom; In re* Deepwater Horizon, 741 F. App'x 185, 189 (5th Cir. 2018) (district court grant of motion to dismiss ended litigation); Twinam v. Dow Chem. Co. (*In re* Agent Orange Prod. Liab. Litig.), 517 F.3d 76, 104 (2d Cir. 2008) (barring claims based on government contractor defense).

127 *See In re* E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 54 F.4th 912, 927, 935 (6th Cir. 2022).

128 *Id.* at 916–17.

129 *Id.* at 927–28.

130 *Id.* at 928.

131 *Id.* at 918–19.

> procedure requires that the parties "clearly memorialize" an agreement to be bound in future trials, no matter the result, to avoid certain due process concerns.[132]

There are other cases rejecting binding bellwether trials absent a clear statement from the court that subsequent litigation would be barred—but not requiring party agreement.[133] State courts might differ on this question, and they too resolve mass torts.[134]

The *DuPont* case was appealed to the U.S. Supreme Court, which denied certiorari, over a dissent from Justice Thomas.[135] This dissent may have been a sign that the Court is more interested in how multidistrict litigation is resolved than it has been in the past. Justice Thomas made two arguments against the use of issue preclusion in MDLs. First, he argued that MDLs are meant only to shepherd cases until trial but are "not designed to fully resolve the merits of large batches of cases in one fell swoop."[136] The first part of the previous sentence is true; the MDL statute transfers cases for pretrial proceedings only.[137] But the second part is wrong. MDLs routinely resolve

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132 *Id.* at 928 n.8 (quoting *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000)).

133 *See Dodge*, 203 F.3d at 1200 ("If *Boughton I* was to have been the test case in plaintiffs' effort to establish this toxic tort, greater care to assure the jury was properly instructed and the verdict forms were clear was essential to establish results impervious to relitigation."); *In re* TMI Litig., 193 F.3d 613, 622, 726, 729 (3d Cir. 1999) (court in personal injury lawsuit arising out of Three Mile Island nuclear accident rejected defense summary judgment motion applying to non-trial claimants on the grounds that they had not agreed to be bound).

134 *See, e.g.,* State Farm Fire & Cas. Co. v. Century Home Components, Inc., 550 P.2d 1185, 1187, 1194 (Or. 1976) (after three trials in case involving forty-eight injuries, court upheld collateral estoppel as to negligence against defendant). The Court in that case explained: "[O]nce it is accepted that the propriety of collateral estoppel is dependent upon the existence of a prior full and fair opportunity to present a case, there seems little reason to limit its application simply because there are multiple claimants in the picture. Although in our adversary system 'there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence,' the unsubstantiated and conjectural possibility that a party might receive a favorable judgment somewhere down the road is an insufficient reason for refusing to apply collateral estoppel." *Id.* at 107 (citation omitted) (quoting James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 463 (5th Cir. 1971)).

135 E. I. du Pont de Nemours & Co. v. Abbott, 144 S. Ct. 16 (2023).

136 *Id.* at 16–17 (Thomas, J., dissenting from denial of certiorari).

137 28 U.S.C. § 1407(a) (stating that "such actions may be transferred to any district for coordinated or consolidated pretrial proceedings"); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998) (holding that the statute consolidates for pretrial purposes only).

the merits of large batches of cases in one fell swoop when the transferee judge decides dispositive motions.[138] Because the statute gives the transferee judge the power to decide dispositive motions pretrial, MDLs are designed to do this. These merits resolutions only go one way, however: in favor of a defendant. The reason for that is that these are ordinarily defense motions—the best the plaintiff can do is defeat the motion and move on to the next phase of the litigation.[139]

Second, Justice Thomas raised due process concerns, particularly that the defendant would be denied a day in court, that the defendant's right to a jury trial might be violated, or that the defendant's agreement might be required.[140] He ignored the fact that in the case before the Court, the defendant, DuPont, had agreed to be bound by the findings of an objective science panel on the question of general causation.[141] But these concerns would be salient in a case without such an agreement.

Whether an application of preclusion in a bellwether trial context violates either the jury right or the due process clause fundamentally depends on the issue to be precluded.[142] The law is clear that if it is the "same" issue and the defendant has had an opportunity to contest that issue fully and fairly, in a high stakes situation where it is investing in the litigation and has access to all the procedures that it is entitled to, then it can be precluded in future litigation. The tricky question is what will count as the "same" issue.

To the extent that there is a genuine due process concern regarding the use of preclusion in MDL litigation as practiced at present, it is in pretrial determinations of dispositive motions. A Supreme Court ruling that dispositive motions

138 See *supra* note 126 (citing cases in which a motion in a bellwether trial was dispositive of the entire litigation).

139 *See generally* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 83 (1990) (explaining why summary judgment is a defendant's motion).

140 *E. I. du Pont de Nemours & Co.*, 144 S. Ct. at 17 (Thomas, J., dissenting from denial of certiorari).

141 *In re* E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 54 F.4th 912, 918–19 (6th Cir. 2022). On the agreement referenced, see Alexandra D. Lahav, *The Knowledge Remedy*, 98 TEX. L. REV. 1361, 1368 (2020) ("The company agreed that if the study found a 'probable link' between C8 and human disease, it would concede general causation in subsequent litigation.") (quoting Christine H. Kim, Note, *Piercing the Veil of Toxic Ignorance: Judicial Creation of Scientific Research*, 15 N.Y.U. ENV'T L.J. 540, 575 (2007)).

142 For an extended, historically-based response to the argument that extrapolation violates the jury right, see *Bellwether Trials*, *supra* note 14.

could not resolve all cases in an MDL involving the same issues seems highly unlikely and would cause more havoc for defendants than for plaintiffs. There is some symmetry in giving both sides the opportunity to prevail collectively in an MDL.

Binding bellwether trials on damages may be possible in some cases involving relatively straightforward determinations, but those are just as likely to be able to be determined by a class action. They would not be as useful for resolving large numbers of cases on an aggregated basis. If this procedure was tried, and assuming it could bind plaintiffs with heterogenous damages, it would produce consistency among plaintiffs as to the issues that are extrapolated. It would promote rectitude to the extent that the court is able to set up a good screening mechanism to determine whether or not the plaintiffs seeking relief through preclusion suffered the same harms.

VIII
BELLWETHER MEDIATION

Alternative dispute resolution mechanisms can be used without global settlement. Bellwether mediation is one example of courts using alternative dispute resolution mechanisms within their power to address a Phase II problem. A sample of cases is sent to an alternative dispute resolution process and the result is extrapolated to the class by agreement of the parties.

A type of bellwether settlement process was used in the Stryker hip replacement litigation to good effect.[143] In that case, there was a large group (over 2,000) of varied personal injury claims, many of them severe and involving the same product, but different from one another in terms of age of the plaintiff, cause, and nature of the injury.[144] The negotiation was conducted in two phases. First, the parties confidentially mediated over forty settlements.[145] Second, the parties negotiated a global settlement based on the information from those mediations. Notably, these mediations involved both liability and damages issues.[146]

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143 This process is described in Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

144 *Id.* at 2280–81 (describing the *Stryker* litigation).

145 *Id.* at 2281.

146 *Id.* at 2283–84.

In the mediation phase, the plaintiffs produced limited information about each plaintiff whose case was being mediated, such as age, model number of their hip, nature of surgery required to replace the hip, whether a revision surgery was required, and complications from surgery.[147] Unlike other mass tort cases where plaintiff exposure is contested, in *Stryker*, that issue could be resolved based on objective evidence.[148] The judge selected cases for mediation randomly. This meant that neither defendant nor plaintiff could cherry pick the lowest or highest value cases. Individual plaintiffs actively participated in the mediations, explaining their injuries to the mediator. If plaintiff accepted the settlement offer, it would be binding.[149] The parties were able to conduct two mediations a day at a cost of less than $5,000 each.[150] Approximately twenty mediations were conducted over a yearlong period in state court and a similar number in federal court.[151]

After that process was complete, the judge coordinated global settlement conferences.[152] The results of the forty mediations were anonymously collected and used as benchmarks to negotiate a global settlement for all claims.[153] A global settlement was reached with a base award of $300,000 minimum per plaintiff who met basic eligibility criteria, with additional compensation for additional factors such as types of injuries (additional surgeries, complications, etc.).[154] The ultimate settlement involved an objective process for resolving claims and an uncapped settlement.[155]

Adam Zimmerman, who documented this process and interviewed the participants, explained that there were several factors that made this process work: "[B]ellwether settlements can be an effective tool when (1) parties are open to settlement,

147 *Id.* at 2282.

148 As Zimmerman explains: "Unlike other mass torts, where parties sometimes contest whether a plaintiff suffered an injury or was even exposed to the defendant's product, the parties in this case could easily document plaintiffs' injuries based on objective criteria, such as barcodes for each hip, blood tests, and MRIs demonstrating adverse tissue reactions and fractured or dislocated bones." *Id.* at 2283.

149 *Id.*

150 *Id.* at 2284.

151 *Id.*

152 *Id.* at 2284–85.

153 *Id.*

154 *Id.* at 2285.

155 *Id.* at 2285–86.

(2) judges and parties can transparently share settlement information in state and federal court, and (3) diverse groups of law firms and plaintiffs actively participate in the mediation process."[156] The Phase II issues surfaced by this Article lack the critical first component he identifies: The very reason that the judge must proceed with Phase II is that the parties are unable to settle. Nevertheless, it is possible that a series of mediations, even in cases where parties are not initially amenable to settlement, could resolve a litigation globally. The problem is that this proposal ultimately depends on defendant's willingness to settle, and the very purpose of Phase II plans is to have a way of resolving cases without settlement.

IX
THE NEGOTIATION CLASS: A BANKRUPTCY-STYLE PROCEDURE?

The final option for resolving Phase II is a negotiation class.[157] The negotiation class was first proposed by Francis McGovern and William Rubenstein in a law review article and in the very large, very contentious Opioids MDL.[158] The idea was that the class leadership would work together to come up with a mechanism for allocating a lump sum settlement and a way to vote on that settlement and its allocation among the class members.[159] Once the leadership has agreed upon the allocation approach, the next step would be for class leadership move to certify an opt-out class for the "sole purpose of negotiating the lump sum settlement with defendant."[160] At this point, notice would be sent out to the class, which would set out the allocation matrix developed by the class leadership.[161] Any class member who wished to could opt out of the class and the settlement at that point (that is, before negotiations began). Once the opt-out period ended and the parameters of the class membership were clear, the leadership would negotiate a settlement with the defendant. If the parties were able to reach a lump-sum settlement, "the amount of the lump sum [would be] put to a class-wide vote,

156 *Id.* at 2286.

157 Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 78–79 (2020); Alan B. Morrison, Response, *A Negotiation Class: A New, Workable, and (Probably) Lawful Idea*, 99 TEX. L. REV. ONLINE 49, 49–50 (2020).

158 *See* McGovern & Rubenstein, *supra* note 157, at 78–79; *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667–68 (6th Cir. 2020).

159 McGovern & Rubenstein, *supra* note 157, at 79.

160 *Id.*.

161 *Id.*

and if it garner[ed] supermajority support, the entire class [would be] bound by that vote; class counsel and the defendant [would] then move for final judicial approval of the settlement."[162] At that point, even those who object would be bound by the settlement and the allocation scheme associated with it.

The Sixth Circuit struck down this proposal, holding that a negotiation class could not be certified under Rule 23.[163] Although the class action rule does not expressly prohibit a negotiation class, the court held, neither does it permit one, whereas other types of classes (including settlement classes) are expressly referenced in the rule.[164] A negotiation class, the Court said, is "a new form of class action, wholly untethered from Rule 23."[165] The Sixth Circuit also explained that a settlement class could be certified only after a settlement had been reached, but a negotiation class did not allow for that to occur, and it would be impossible for class members to know what they were agreeing to until the final vote. Furthermore, it provided no opportunity for class members to opt out based on their sense that the negotiation was not at arm's length or violated one of the other requirements of Rule 23(e) that judges must evaluate.[166]

The negotiation class was modeled on a provision in the A.L.I.'s *Principles of the Law of Aggregate Litigation*, which proposed a voting mechanism for resolving mass litigation.[167] This proposal is similar to bankruptcy procedures that permit creditors to vote on claim resolution. The key benefit of the negotiation class is the voting mechanism. As McGovern and Rubenstein explain: "By binding everyone to the supermajority vote, [the negotiation class] also guards against strategic opt-outs—often labeled 'holdouts' in related contexts—after a settlement offer has been secured."[168] Some people will have opted out of the negotiation entirely, but once a settlement has

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162 *Id.*

163 *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 677 (striking down negotiation class certification).

164 *Id.* at672.

165 *Id.*

166 *Id.* at 673 ("[E]lements of Rule 23(e) . . . clearly indicate certification of a class for settlement purposes may occur only after a settlement has been proposed. . . . None of these determinations [of 23(e)] can be made in the case of a negotiation class because there is no proposal to consider at the time the negotiation class is presented to the court for approval.").

167 A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION

168 *See* McGovern & Rubenstein, *supra* note 157, at 79.

been reached, the people who had agreed to participate in the class cannot hold out and extract more money for themselves because they are bound by their agreement to the voting mechanism.

Advocating for this solution, McGovern and Rubenstein argue that large stakeholders will prefer the negotiation class because more money will be available through the peace premium.[169] That is predicated on the idea that a defendant will be willing to pay more for global peace. The peace premium is a theoretically appealing idea when the alternative is continued litigation at great cost. For example, if one imagines that cases will continue to be filed and won by plaintiffs over time, a defendant might be willing to pay a larger settlement for collective resolution now rather than the sum of all claims it intends to settle into the future.

But there are reasons to be skeptical of the promise of a peace premium. A risk-seeking defendant might prefer to wear its opposition down. Such a defendant might be better off if it chooses to litigate cases until the other side is exhausted, or to pick off the most valuable cases or those most likely to go to trial and allow other cases to languish. Or a defendant might play the groups of plaintiffs' lawyers against one another by creating auctions for settlement and credibly threatening to refuse to settle with those who lose. For example, suppose a defendant is able to discover the high value cases and settle those. It may be better off settling the high value cases separately and quietly and then pushing off low value cases indefinitely or trying low value cases to send a market signal that the overall litigation is not significant. If a defendant stands to preserve more of its capital by dividing litigation rather than consolidating, and particularly if consolidation comes only with defendant agreement as is currently the case for mass tort class actions, global peace may come with a discount rather than a premium. The peace premium, in sum, depends on quick, credible trials or a risk-averse defendant.

Even so, the negotiation class has two other important benefits that make it unique, or at least stand out, among options for collective resolution of mass claims. First, it promotes participation of every member of the class by giving them a vote.[170] Unlike a class action, in which only class counsel and the class representative have a participatory role,

169 *Id.* at 104–05.

170 *Id.* at 111–12.

in the negotiation class, every class member gets a vote, and they vote not only on the settlement amount but also on the allocation plan.[171] Second, it promotes parity between parties because it does not rely on the defendant to agree to class treatment in order to negotiate, a structural problem that many have noted reduces settlement value.[172] The negotiation class offers a combination of individual participation and collective resolution that is unlike any other proposal described here.[173]

Further support for the negotiation class comes from recent attempts to resolve mass torts through bankruptcy. As noted earlier, the voting structure of the negotiation class action is similar to bankruptcy procedures that require a creditor vote on the restructuring.[174] In a case that recently made headlines, Johnson & Johnson attempted to resolve its talc liabilities through bankruptcy by creating a new entity (called LTL Management) through a reverse merger.[175]The company used LTL to hold its talc business and talc liabilities, while keeping the profitable consumer business in a separate company (called Johnson & Johnson Consumer Inc. or JJCI)

171 *Id.* at 79, 112–13.

172 *Id.* at 118–19. For this critique of settlement classes, see also Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1508–09 (2013); Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 957–65 (2014); Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 701 (1997) ("From the defendant's standpoint, it is a business planner's dream. A massive and contingent liability has become knowable; indeed, the defendant has probably improved its credit worthiness with such an agreement, for so long as res judicata can bar other claims, it has gained control of a great business uncertainty.").

173 I have critiqued voting proposals in mass torts because they do not promote the public reason value of litigation. *See* Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 528 (2015).

174 In asbestos bankruptcies, the tort claimants litigate their claim value before the bankruptcy judge (who is not an Article III judge but something closer to a magistrate judge). Often competing experts are offered on the aggregate claim value of all the tort creditors, and the judge will ultimately determine how much should go into the trust to pay those creditors over time. This determination will then be presented to the impacted tort creditors for a vote. If two thirds of the claimants vote in favor of the trust, the court will approve it, and a compensation system will be set up to determine claim value and pay out claims from the trust. For a description of the system, see Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022); Daniel J. Bussel, *The Mass Tort Claimants' Bargain*, 97 AM. BANKR. L.J. 684 (2023); Michael A. Francus, *Designing Designer Bankruptcy*, 102 TEX. L. REV. 1205 (2024). Unlike bankruptcy, the negotiation class includes a vote on the allocation mechanism. McGovern & Rubenstein, *supra* note 157, at 79.

175 *In re* LTL Mgmt., LLC, 64 F.4th 84, 92–97 (3d Cir. 2023).

which was capitalized at around $61.5 billion. LTL then entered into bankruptcy.[176] The Third Circuit Court of Appeals found that LTL was not, in fact, in financial distress or foreseeable financial distress and reversed the bankruptcy court's approval of the scheme.[177]

The attraction of bankruptcy for a defendant facing elastic mass torts in multiple jurisdictions, even if it is not in financial distress, is twofold. First, the bankruptcy court can stay all cases in all U.S. jurisdictions and effectively transfer those cases into the bankruptcy proceeding through a channeling injunction.[178] Second, the bankruptcy court can create a trust that going forward will pay the tort claims, including future claims, leaving the company with a fresh start without having continuing claims hanging over its head. The negotiation class can achieve the first, but not the second.[179]

There remains a compared-to-what problem in negotiation classes because the class is proposed for settlement negotiation purposes only. Should those negotiations fail, then the question remains what mechanism the court can use to resolve Phase II. Accordingly, there still needs to be some trial structure even with a negotiation class.

How could a damages trial proceed and still incorporate some of the benefits of the negotiation class? A judge could (either through a damages class, an opt-in class, or other consolidation) create a claims administration system that is voted on by a majority of the class prior to approval by the court. The voting mechanism would, in theory, create buy-in among the plaintiffs. The system claimants voted in would be set up to do something along the lines of determining claimant damages using a formula. These awards could be appealed to the trial judge as appropriate. If further protections were needed, plaintiffs could opt out of the system and choose a trial

176 *Id.* at 97.

177 *Id.* at 93, 106.

178 *See* 11 U.S.C. § 524(g)(1)(A), (g)(2)(B) (authorizing channeling injunctions);Francus, *supra* note 174, at 1221 (describing the process of issuing a channeling injunction). For a discussion of the effects of channeling injunctions, see Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 338 (2022).

179 The reason for this is that the Supreme Court's decision in *Amchem* is generally seen as a barrier to certification of a futures class action. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627–28 (1997) (overturning certification of settlement class action of future asbestos victims);*see also Mass Tort Class Actions*, *supra* note 40, at 1009 (discussing difficulty in certifying mass tort class actions).

instead, thereby allowing them to make their own trade-offs of time versus money. Defendant, being only obligated to pay actual damages determined by the court and being given an opportunity to contest damages before the magistrate, would not have a strong due process-based objection to such a procedure.

A negotiation class could resolve large numbers of claims, especially of larger claims, efficiently. The allocation procedure approved of by the class would very likely treat like cases alike, otherwise it would be denied judicial approval or the class members would vote it down.[180] Whether that negotiation would result in an outcome that correctly applies the law to the facts is unknown, as with all settlements, since the point is to avoid such a determination and its attendant costs.

CONCLUSION

This Article has presented a menu of options for judges to resolve Phase II through litigation. In deciding how to structure Phase II, judges should consider three criteria.[181] First, they should consider the capacity of the procedure to evaluate substantial numbers of claims efficiently—even if it cannot provide global peace. Too often, the choice for judges has been presented as between global peace and individualized determinations. But as we have seen, there are many interim types of trials that can move individualized determinations forward without resolving the entire litigation at once. And for many plaintiffs, individualized determinations are not a viable option, even if they would be prepared to go to trial.

Second, judges should consider horizontal equality of treatment between claimants, which is to say whether the procedure yields similar outcomes for similarly situated persons. Procedures such as the determinations of damages by special masters which are then evaluated by a jury are more likely to lead to consistency than individualized summary trials, for example. This is an important systemic benefit,

180 *See* FED. R. CIV. P. 23(e)(2)(D) (To approve a settlement, a judge should consider the extent that "the proposal treats class members equitably relative to each other.").

181 *Cf.* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019) ("Aggregation also raises the same three problems whatever its procedural form: (i) horizontal equity between claimants, (ii) the agent-principal problem between claimants and their lawyers, and (iii) the defendants' and the system's need for global resolution of litigation."). The criteria proposed here are different, although in both cases horizontal equality between claimants is emphasized.

particularly for determinations of damages where the value of injury is contested and where it is difficult for the system to justify why similarly situated individuals should be treated differently.

Finally, courts should consider the possibility for the procedure chosen to achieve rectitude or the correct application of law to the facts of the case. This consideration should not only be compared with a full-blown individual trial, but also with the time that plaintiffs will have to wait to obtain a hearing. This is because at the core of the due process clause is the idea that a person is entitled to a hearing at a reasonable time in a reasonable manner.

If the court's procedures are such that individuals are unable to obtain a day in court under the conditions imposed by those processes, this too is a due process violation just as much as being denied a hearing based on preclusion doctrine, by operation of the class action device, or by any other procedural mechanism that burdens the "day in court" ideal. Another way of putting this argument is that in a world of process scarcity, deviations from individual trials are justified.[182] In the mass tort context, it is considered axiomatic that the cases have sufficient value that they can be litigated individually. This is a highly fact-dependent inquiry, and if trial costs are high enough, it may not be true.[183] But even if the value of the case is high enough to justify a trial, the court must ask what the likelihood is that the plaintiff would be able to bring the case to trial in their lifetime.

In a litigation involving thousands or tens of thousands of cases, the court ought to take into account the realistic likelihood of trial when considering the risk of error. As Robert Bone has explained, the risk of error involves, on the one hand, the risk that a deserving plaintiff will get nothing (a false negative), and on the other, the risk that persons who suffered

182 *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in A World of Process Scarcity*, 46 VAND. L. REV. 561 (1993) (providing a rigorous analysis of when forms of statistical adjudication of the types proposed here are justified); Bone, *supra* note 37, at 657–70 (2017) (explaining the difference between statistical adjudication and statistical proof and analyzing the reasons for justifying procedures against arguments that sampling is too strange, too substance-altering, and too mechanical).

183 For example, consider a victim of a car accident caused by a defect in the vehicle. If the case is worth less than $300,000, it may not be worthwhile to bring an individual suit. *See, e.g.*, Barry Meier & Hilary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES (Dec. 29, 2014), https://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html?smid=url-share [https://perma.cc/CHB5-5ZJP].

no legal wrong will recover (a false positive).[184] Procedures that involve extrapolation will by their nature increase the possibility of false positives, but depending on how high that error rate is and on the underlying substantive policies at stake in the underlying legal regime that is being enforced, such errors may be legally and sociologically justified.

184 Bone, *supra* note 43, at 641.