

DISTRIBUTING JUSTICE

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This Article explores the procedural concerns that arise when regulatory agencies mimic class actions by collecting big monetary judgments on behalf of victims. Over the past decade, agencies have collected over \$10 billion to compensate people hurt by massive frauds, false advertising, and defective drugs, using proceeds from penalties levied against regulatory violators. Today, the Securities and Exchange Commission regularly seeks awards against large public companies and distributes the money to injured investors through “Fair Funds.” The Federal Trade Commission similarly seeks restitution against parties profiting from unfair trade practices and distributes awards to consumers. Even the U.S. Postal Service distributes the ill-gotten profits of scam artists to victims of mail fraud.

However, unlike private lawsuits, agencies afford few safeguards for the victims they compensate. Agencies lack adequate procedures to hear victims’ claims, identify conflicts between different parties, or coordinate with other kinds of lawsuits. I argue that agencies should continue to play a role—albeit a limited one—in compensating victims for widespread harm. However, when agencies compensate victims, they should adopt rules similar to those that exist in private litigation to resolve differences between victims, improve judicial review, and coordinate with private lawsuits.

I propose three solutions to give victims more voice in their own redress, while preserving an agency’s flexibility to enforce the law: (1) that agencies involve representative stakeholders in settlement discussions through negotiated rulemaking; (2) that courts subject agency decisions to hard look review; and (3) that courts and agencies coordinate overlapping settlements before a single federal judge.

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INTRODUCTION

On June 29, 2009, a federal judge condemned Bernard L. Madoff for committing “extraordinarily evil” crimes and sentenced him to 150 years in prison.¹ The sentence, however, provided little solace to his former investors, many of whom naturally expressed concern about recovering their life savings. Since that time, Madoff’s victims have sharply contested the distribution of his remaining assets.² Because of the nature of the fraud, some long-term investors benefited from Madoff’s Ponzi scheme for years, only to ultimately lose nearly all of their savings. Other recent investors, who suspected nothing, cashed out before they suffered any significant losses. And still others lost millions and never even knew their money was invested with Madoff.³

¹ Diana B. Henriques, *Maximum Sentence from Judge Citing ‘Evil’ Crimes*, N.Y. TIMES, June 30, 2009, at A1.

² See Eric Konigsberg, *Investors in a Competition for a Piece of the Madoff Pie*, N.Y. TIMES, June 29, 2009, at B1 (observing rivals’ “warring over” distribution of insurance funds); see also *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. M 47(GBD), 2010 WL 185102, at *1 (S.D.N.Y. Jan. 11, 2010) (denying motion brought by one hundred former investors to appeal distribution plan); *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 126 (Bankr. S.D.N.Y. 2010) (noting that many claimants objected to trustee’s determination of net equity for purposes of distribution).

³ *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. at 132 (describing competing claims of three categories of victims). The bankruptcy trustee now overseeing the claims process for investors, Irving H. Picard, will pay investors based on how they invested with

Little wonder, then, that some compare the asset distribution process to “reality show kind of fighting.”⁴ Indeed, for many, “[i]t’s every man for himself.”⁵

Three different types of proceedings—bankruptcy, private class actions, and Securities and Exchange Commission (SEC) actions—will determine how those victims will be paid. In the case of the bankruptcy proceedings, the Madoff victims will be entitled to an array of procedural protections, separate attorney representation, and payouts based on their different statuses and needs.⁶ For the class actions, a court will resolve claims for a discrete class of victims based on similar procedures.⁷ These well-established rules are premised, in part, on the idea that different victims should have some opportunity to voice their varying interests, to obtain awards based on regular and clear criteria, and to receive an independent judicial review of the fairness and efficiency of the entire settlement.⁸

However, if the SEC exercises its power to compensate the same claimants with the defendant’s same assets—as the SEC originally indicated that it might do in the complaint it filed on the day of Madoff’s arrest⁹—it could do so virtually without any of the

Madoff—directly, indirectly, or through feeder funds—and how much money they withdrew before the scheme collapsed. *Id.* at 137–38; Diana B. Henriques, *It’s Thankless But He Decides Madoff Claims*, N.Y. TIMES, May 29, 2009, at A1 (describing disputed method for paying claims and comparing task to September 11 Victim Compensation Fund).

⁴ Konigsberg, *supra* note 2, at B1.

⁵ *Id.*

⁶ On December 15, 2008, the Securities Investment Protection Corporation moved to liquidate Mr. Madoff’s fifty-year-old firm, Bernard L. Madoff Investment Securities. Trustee’s First Interim Report for the Period December 11, 2008 through June 30, 2009, at ¶¶ 15–16, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 429 B.R. 423 (Bankr. S.D.N.Y. May 3, 2010) (Adv. Pro. No. 08-1789) [hereinafter First Interim Report], available at <http://graphics8.nytimes.com/packages/pdf/business/Interim.pdf> (last visited Mar. 2, 2011). The First Interim Report also summarizes general bankruptcy court proceedings, the victims’ specific objections to claims determinations, and the administration of claims for the first six months of the bankruptcy trust operation. *See id.*; *see also* Securities Investor Protection Act of 1970, 15 U.S.C. § 78eee(b³)-(4) (2006) (permitting appointment of trustee and removal to bankruptcy court when debtor is unable to meet obligations to investors).

⁷ Because a bankruptcy filing stays all other private forms of litigation, the only pending class action claims involving Madoff have been lodged against the bankruptcy trustee. *See* Konigsberg, *supra* note 2, at B1–B2 (describing multiparty litigation against Irving H. Picard, court-appointed trustee overseeing Madoff bankruptcy); *see also Court Filings*, MADOFF TRUSTEE SITE, <http://www.madofftrustee.com/CourtFilings.aspx> (last visited Feb. 28, 2011) (describing all court filings for Madoff bankruptcy docket).

⁸ *See infra* Part I.A (describing rationale for collective compensation rules in class action settlements); *see also* 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:43 (4th ed. 2002) (describing “fairness” criteria for independent judicial review of class action settlements).

⁹ Complaint at 11, SEC v. Madoff, No. 08-10791 (S.D.N.Y. 2009) [hereinafter Civil Complaint]. As it happens, the SEC has consented to the appointment of Irving H. Picard

procedural protections, transparency, or judicial review that exist in traditional civil litigation.¹⁰

For years, private lawsuits in the United States have been the primary tool used to ensure that culpable parties pay damages to those they harm.¹¹ When a large number of people are hurt, special litigation procedures exist for defendants to compensate victims comprehensively.¹² Rules in class action, bankruptcy, and other large-scale lawsuits thus try to accomplish three things: (1) to ensure that parties meaningfully participate in a process that affects their substantive rights, (2) to empower judges to police conflicts of interest between

as the Bankruptcy Trustee. See First Interim Report, *supra* note 6, ¶ 16 (noting district court entered protective decree appointing trustee for liquidation). Accordingly, the SEC likely will not exercise its discretion to pay investors through a process outside of bankruptcy. Notably, however, the SEC has no specific policy guidelines for exercising such power to compensate. In fact, to this day, the SEC continues to pursue claims against third parties who may have wrongfully diverted funds to Madoff, in spite of the parallel proceedings in bankruptcy. See Patrick Danner & Martha Brannigan, *Bernard L. Madoff Victims Still Pursue Justice, Their Money*, MIAMI HERALD, July 6, 2009, at A1 (quoting SEC spokesperson who declared that “[e]verything the SEC collects will be for the benefit of investors”).

¹⁰ Commission rules do require that the Enforcement Division submit a distribution plan to the Commission no later than sixty days after the disgorged funds are received. 17 C.F.R. § 201.1101 (2010) (“[T]he Division of Enforcement shall submit a proposed plan no later than 60 days after the respondent has turned over the funds or other assets pursuant to the Commission’s order . . .”). However, in contrast to civil litigation, distribution by the Commission follows no procedures to ensure that parties in SEC actions are adequately represented by counsel, to police conflicts of interest, to allow parties to intervene, or to otherwise challenge an order approving or modifying the distribution plan. See, e.g., *id.* § 201.1106 (“[N]o person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge [a distribution plan, eligibility determination, or disbursement.]”); see also Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 82–83 (2d Cir. 2006) (limiting judicial review of distribution plans approved by SEC).

¹¹ 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 82 (1859) (“The liability to make reparation for an injury rests upon an original moral duty, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another.” (emphasis omitted)); see also G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 13–19 (1999) (describing evolution of private remedies in tort law); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541–44 (2005) (tracing history of tort law as tool to seek public redress for private harm).

¹² Many procedures evolved out of equitable doctrines that tried to bring together all persons whose rights were affected by “any particular litigation and to render a complete decree adjusting all the rights and protecting all the parties against future litigations.” CHARLES W. BACON & FRANKLYN S. MORSE, *THE REASONABLENESS OF THE LAW: THE ADAPTABILITY OF LEGAL SANCTIONS TO THE NEEDS OF SOCIETY* 204 (1924); see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 921 (1987) (“[F]rom the beginning, equity’s expansiveness led to larger cases . . . than were customary with common law practice.”).

injured parties and their representatives, and (3) to accurately and efficiently facilitate a final resolution to the dispute.¹³

Recently, another body of law—administrative law—has begun to assume the same compensatory role as private aggregate litigation. Over the past twenty years, public administrative agencies have compensated people hurt by massive frauds, false advertising, and defective drugs by collecting money from their wrongdoers. For example, the SEC regularly assesses monetary awards against large public companies and distributes the proceeds to injured investors through “Fair Funds.”¹⁴ When the Federal Trade Commission (FTC) assesses civil awards for false advertising, it retains the right to distribute the award to injured consumers.¹⁵ Even the U.S. Postal Service not only sanctions scam artists who commit mail fraud but seeks to distribute their ill-gotten gains to potential victims.¹⁶

¹³ See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 1.03 (2010) [hereinafter ALI REPORT] (describing general principles underlying aggregate litigation); JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 134–43 (1995) (describing history and purposes of class actions, bankruptcy, and multiparty consolidations in mass tort cases); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115–20 (2010) (describing multiple goals of aggregate litigation).

¹⁴ Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7246 (2006). As set forth below, the SEC has long asserted power to disgorge ill-gotten profits, but since the enactment of Sarbanes-Oxley, distributing civil disgorgement has become a large part of the SEC’s business; the SEC has distributed \$6.6 billion since 2002, including \$2.1 billion in 2009 alone. 2009 SEC PERFORMANCE & ACCOUNTABILITY REP. 11, available at <http://www.sec.gov/about/secpar/secpar2009.pdf#sec1> [hereinafter 2009 SEC REPORT]; see also Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 318–20 (2008) (describing Sarbanes-Oxley “Fair Fund provision” and SEC’s new role in investor compensation); Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1111 (2008) (listing fair funds as one of two SEC mechanisms for compensating injured investors).

¹⁵ See Press Release, FTC, LifeLock Will Pay \$12 Million To Settle Charges by the FTC and 35 States That Identity Theft Prevention and Data Security Claims Were False (Mar. 9, 2010), available at <http://www.ftc.gov/opa/2010/03/lifelock.shtm> (describing distribution to consumers of recently approved LifeLock settlement); Press Release, FTC, FTC Urges Consumers To Cash Restitution Checks Mailed by Wachovia Bank (Jan. 13, 2009), available at <http://www.ftc.gov/opa/2009/01/wachovia.shtm> (describing \$150 million fund established by FTC and Office of the Comptroller of the Currency settlement with Wachovia Bank for victims of telemarketing fraud). But see Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1191–92 (1992) (arguing equitable relief is inconsistent with legislative history of Federal Trade Commission Act).

¹⁶ The U.S. Postal Inspection Service enforces approximately 200 federal statutes in an effort to protect the mail system. It seeks restitution primarily in cases of mail fraud, mail theft, and various other crimes that financially impact the Postal Service. The Civil Asset Forfeiture Reform Act (CAFRA) also provides a mechanism for the Inspection Service to restore stolen property to victims. See, e.g., 18 U.S.C. § 1341 (2006) (mail fraud); *id.* § 1708 (theft of stolen mail).

However, administrative agencies lack many of the well-developed procedures for compensating victims that characterize large-scale private litigation. Administrative agencies may fail to hear victims' claims, identify potential conflicts between parties, or afford anything more than cursory judicial review over the settlement and distribution of awards.¹⁷ Complicating matters, an agency may sue the same wrongdoer, for the same funds, on behalf of the same set of victims, as parties to a privately initiated lawsuit.¹⁸ Even so, few, if any, guidelines exist to instruct agencies as to how or whether they should coordinate with private actions.

This Article argues that public agencies can and should compensate victims of widespread harm. However, an agency should act only when it is in a unique position to compensate victims. Moreover, agencies should consider adopting procedures under the Negotiated Rulemaking Act of 1990¹⁹ to ensure that victims are heard, to formulate guidelines for payment, and to encourage effective judicial review. Negotiated rulemaking, like a class action settlement, provides a process for stakeholders' representatives to participate directly in a large settlement. Finally, courts should review agency settlements using "hard look" review²⁰ to ensure that there are no conflicts of interest between parties and the agency itself.

Many commentators discuss the way regulatory agencies and private lawsuits can both deter the same kinds of harm.²¹ However, very

¹⁷ See, e.g., Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 83 (2d Cir. 2006) ("So long as the district court is satisfied that in the aggregate, the plan is equitable and reasonable, the SEC may engage in the kind of line-drawing [that] inevitably leaves out some potential claimants." (internal quotations omitted)).

¹⁸ For example, a recent study of SEC enforcement actions between 2000 and 2003 showed that the SEC brought 221 enforcement actions against firms whose shares traded on national markets. Michael Klausner, Are Securities Class Actions "Supplemental" to SEC Enforcement?: An Empirical Analysis 23 n.25 (July 13, 2009) (unpublished manuscript), available at http://www.law.upenn.edu/academics/institutes/ile/PNYUPapers/2010/Klausner_Are%20Securities%20Class%20Actions.pdf. Of those, 178 cases had parallel class actions in the same or in different federal courts. *Id.* But see James D. Cox, Randall S. Thomas & Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 749 (2003) (finding comparatively less overlap in cases between 1997 and 2002, before enactment of Sarbanes-Oxley).

¹⁹ 5 U.S.C. §§ 561–590 (2006).

²⁰ Hard look review is already a well-established doctrine in the review of agency decisions. See, e.g., *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980) (discussing roots of hard look review); see also Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2181 (2009) (describing hard look review as tool used "to ensure that agencies disclose relevant data and provide reasoned responses to material objections raised during the rulemaking process").

²¹ See, e.g., Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 605 (2008) ("The question here is: [I]f the function of the class action today is indeed to operate in parallel with public regulation,

few have addressed administrative law's relatively new role in another function historically served by private litigation: compensating people.²² Some have argued that this development is a good thing, noting that agencies can compensate parties more efficiently and accountably than private lawsuits.²³ In contrast, others argue that such awards waste resources and unnecessarily replicate private litigation.²⁴ However, surprisingly few have examined the procedures that agencies should follow—and the principles that should guide them—in the distribution of such awards. Such an analysis presents a different normative question: not whether agencies should act to compensate, but rather, when they do, what rules should govern their actions. This Article argues that agencies should adopt rules from representative litigation, like those that govern class action settlements, when agencies, in effect, perform the same job.

then can that function achieve fruition without supplanting the institutional boundaries on regulatory power?"); Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2084 (2000) (evaluating role of regulatory compliance defense in tort law's attempt to deter undesirable risks); Catherine M. Sharkey, *Preemption By Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 228 (2007) (describing increasing trend of federal agency preemption of state tort law); Kyle D. Logue, *Coordinating Sanctions in Torts 3* (July 7, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430596 ("Viewing tort law as a system of deterrence or regulation is now standard within the legal literature.").

²² See, e.g., Black, *supra* note 14, at 318–20 (describing increasing role of SEC in recovering compensation for defrauded investors); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 954–56 (describing overlapping roles of administrative law, criminal law, and civil law in compensation and deterrence of mass disasters); Winship, *supra* note 14, at 1103 (describing emergence of administrative agencies that act as "public class counsel"); Verity Winship, *Public Agencies and Investor Compensation: Examples from the SEC and CFTC*, 61 ADMIN. L. REV. 137, 139 (2009) (comparing different approaches of SEC and CFTC in recovering compensation for defrauded investors); Tanya D. Senanayake, *Improving Interest Representation in the Public Enforcement of Title VII 28* (Mar. 26, 2011) (unpublished note) (on file with the *New York University Law Review*) (proposing administrative procedures to improve U.S. Equal Employment Opportunity Commission's representation of public and private interests to promote fair compensation of claimants).

²³ President George W. Bush, for example, argued that agency-based settlements minimized the need for class action litigation. See Carrie Johnson, *Bush Weighs in Against Investors in Fraud Case*, WASH. POST, June 13, 2007, at D1. The SEC itself, notably, takes a different view. See, e.g., U.S. SEC. & EXCH. COMM'N, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002 19–20 (2003) [hereinafter SECTION 308(C) REPORT], available at <http://www.sec.gov/news/studies/sox308creport.pdf> (describing need for private litigation to complement agency efforts at enforcement and compensation).

²⁴ See, e.g., Black, *supra* note 14, at 342 ("[N]either the SEC nor the courts have addressed whether increased efforts to collect money on behalf of investors has any distorting effect on the agency's selection of enforcement cases."); Winship, *supra* note 14, at 1139–41 (arguing that agencies that seek recovery on behalf of victims should not duplicate private class action litigation).

Part I describes how large settlements, like class action settlements, traditionally compensate victims. Class actions have long sought to serve diverse groups of people by following three kinds of rules: (1) rules that encourage people to participate in the settlement; (2) rules that allow judges to resolve conflicts of interest between participants; and (3) rules that coordinate the settlement with other forms of litigation.

Part II describes the growing role of regulatory agencies in compensating people for collectively felt harm. I examine compensation procedures for three federal regulatory agencies: the SEC, the FTC, and the Food and Drug Administration (FDA). Over the last decade, these three agencies have sought authority to distribute over \$10 billion,²⁵ pursuing a goal traditionally associated with private law—requiring wrongdoers to “complete justice”²⁶ by fully compensating their victims. However, few rules describe how, if at all, victims should participate; how judges should resolve conflicts of interests between victims and the agency; or, finally, how agencies should coordinate their own settlement efforts with other forms of litigation. In short, agencies lack the requisite rules to distribute justice.

Accordingly, Part III proposes three reforms to agency compensation schemes to give victims a stronger voice in their own redress. These reforms include negotiated rulemaking, judicial hard look review, and coordination by the Judicial Panel on Multidistrict Litigation (JPML). Such reforms will make agency settlements more consistent with large private settlements, while preserving an agency’s flexibility to enforce the law through administrative law procedures.

I

COMPENSATION THROUGH PRIVATE AGGREGATE SETTLEMENT

Before discussing the evolution of agency-based settlements, I briefly describe the goals and procedures of private aggregate settlements, with a particular focus on class actions. Class action settlements are an instructive comparison for agency settlements because they represent one of the most prevalent forms of aggregate claim resolution in the United States.²⁷ For forty years, judges have increas-

²⁵ See *infra* note 118 and accompanying text (highlighting importance of SEC, FTC, and FDA in recent years).

²⁶ *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836) (“The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.”).

²⁷ The most recent data on pending federal class action filings were released in September 2004 by the Administrative Office of the United States Courts. It shows that over

ingly certified settlement-only class actions, simultaneously approving both a class action and a massive settlement on behalf of its members.²⁸ Class action settlements, like many recent agency settlements, also strive to provide more accountability, efficiency, and equity than what one would obtain through one-on-one litigation. They hold defendants accountable for widespread harm at great economies of scale and strive to compensate victims in a way that is commensurate with their losses.²⁹

To accomplish these goals, class action settlements have three kinds of rules—those that encourage people to participate (or not participate) in their own redress, those that allow judges to resolve conflicts of interest, and those that coordinate the settlement with other contemporaneous litigation. Accordingly, in any class action, a court must determine (1) whether members of a putative class sufficiently participate in or control the litigation; (2) whether there is a harmony of interests between the representative and other parties; and (3) whether the representative suit conflicts with other similar lawsuits and thus precludes putative class members from suing again in another forum.³⁰

These rules exist because class action settlements, like other forms of representative litigation, demand that a small group of actors (usually attorneys) represent multiple stakeholders in privately negotiated settlements under some form of public oversight.³¹ Without

5179 class action claims were pending in federal court as of September 2004. LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR 400 tbl.X-4 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/x4.pdf>.

²⁸ See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 9–37 (2000) (describing history of class action mechanism to resolve claims); THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61–62 (1996) (noting large number of settlement-only class actions).

²⁹ See, e.g., FED. R. CIV. P. 23(b)(3) advisory committee's note (observing that Rule 23(b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness").

³⁰ See, e.g., Taylor v. Sturgell, 553 U.S. 880, 889–90 (2008); Hansberry v. Lee, 311 U.S. 32, 42–44 (1940).

³¹ See Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (recognizing that due process requires nonparties in class action to be "adequately represented by someone with the same interests who is [also] a party"); see also Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (noting that judgment binding on trustee will also bind beneficiaries of trust); Pennsylvania v. Kleppe, 533 F.2d 668, 675 (D.C. Cir. 1976) (finding quasi-sovereign interest will justify "representative action by the state").

such rules, a class action settlement could completely preclude class members from having any say in the shape of their final award.

A. Goals of Class Action Settlements

Three identifiable policies behind class actions—accountability, efficiency, and equity³²—provide a background for understanding the structure of class action settlements.

Large private settlements attempt to provide more *accountability* in the legal system by enabling the resolution of claims that otherwise would not be brought in individual litigation. Class certification is thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.³³ In cases involving large damages, the class action device may also provide more access to redress by granting plaintiffs the same economies of scale enjoyed by well-financed defendants.³⁴ In both cases, large settlements hold defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation.³⁵ Class action settlements, at least theoretically, also serve an important democratic

³² See *supra* note 29 and accompanying text; see also Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137–38 (2001) (noting that class actions promote deterrence, justice, and administrative efficiency).

³³ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))); Zimmerman, *supra* note 13, at 1115–17 (describing alternative goals of class action litigation).

³⁴ See David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 27–30 (arguing for aggregative procedures to allow plaintiffs’ counsel to make optimal investment in litigation); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 397–400 (2000) [hereinafter Rosenberg, *Mass Tort Class Actions*] (explaining how aggregating classable claims creates economies of scale favorable to plaintiffs).

³⁵ Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 174 (2008) (observing that procedural benefits include substantial reduction in costs of “discovery, retention of experts, legal research and legal fees”); see also THOMAS E. WILLGING, FED. JUDICIAL CTR., MASS TORTS PROBLEMS AND PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP app. C, at 20 (1999) (observing that aggregation of claims provides “an opportunity to correct more systematically the harms that products have caused, to meet more consistently and completely the compensation goals of the tort system”); Rosenberg, *Mass Tort Class Actions*, *supra* note 34, at 393–94 (noting that, in absence of class actions, defendants naturally aggregate claims through commonly deployed defense strategies, and observing that class actions permit plaintiffs to invest in aggregation of claims in same manner, thus helping to equalize imbalance).

function by allowing groups of individuals to collectively redress widespread harm.³⁶

Class action settlements are also more *efficient* in that they eliminate the time and expense associated with traditional individual litigation, which often involves numerous trials and months or years of the “same witnesses, exhibits, and issues from trial to trial.”³⁷ In other words, by enabling more litigants to pursue their claims and seek redress, while simultaneously avoiding excessive or repetitive costs, class action settlements provide an opportunity to fulfill the compensatory goals of the tort system “more consistently and completely.”³⁸ They also create a “deterrent effect” that equals the “magnitude of the harm.”³⁹

Finally, class action settlements are more *equitable* in that they provide remedies to more claimants than would individual litigation. A class action settlement seeks both to maximize recovery and to provide procedures to ensure that the settlement award reflects the individual claims and interests of the various members of the class.⁴⁰ At the same time, class action settlements seek equality—to split the pie more fairly when defendants with limited funds are accused of massive harm.⁴¹ In such cases, without a class action, the first claimants to

³⁶ See, e.g., Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 382 (1996) (discussing how access to litigation protects and reinforces democratic values).

³⁷ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986); see also WEINSTEIN, *supra* note 13, at 136 (noting that economies of scale reduce discovery and expert fees); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837–38 (1995) (describing problems with duplicative litigation activity that may be remedied through resort to class actions).

³⁸ WILLGING, *supra* note 35, at 20.

³⁹ *Id.*

⁴⁰ See Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 42–46 (1993) (describing “mixed model” of class action fairness, which balances need to maximize total recovery for class against need to assure that no class members are unfairly excluded). The idea that funds should compensate as many eligible claimants as equitably as possible is also reflected in the claim settlement procedures of many mass tort settlements forged through class actions and bankruptcy. See, e.g., NAT’L GYPSUM CO. BODILY INJURY TRUST, FIRST AMENDED CLAIMS RESOLUTION PROCEDURES 1 (2003) (on file with the *New York University Law Review*) (“[T]he NGC Bodily Injury Trust shall treat similar claims with similar circumstances as equivalently as possible.”); UNR ASBESTOS-DISEASE CLAIMS TRUST, FIRST AMENDED UNR ASBESTOS-DISEASE CLAIMS RESOLUTION PROCEDURES 3 (2002), available at http://www.cpf-inc.com/upload/temp/UNR_CRP.pdf (“The purpose of the Procedures is to provide fair payment to all [persons] Settlements shall be favored over all other forms of claim resolution, and the lowest feasible transaction costs shall be incurred in order to conserve resources and ensure, as much as possible, substantially equal payment”).

⁴¹ See FED. R. CIV. P. 23(b)(1)(B) (indicating that class actions are appropriate when individual adjudication might “substantially impair or impede [other parties’] ability to protect their interests”).

bring lawsuits might receive astronomical awards that would deplete defendants' resources, leaving other or future victims with no source of redress.⁴²

In the effort to achieve the goals of accountability, efficiency, and equity, class action settlements increasingly straddle the line between tort and public benefit compensation.⁴³ On the one hand, class action settlements operate through rules that further "distributive justice" among many people who suffer many different kinds of losses, stemming from many, sometimes indistinguishable, causes.⁴⁴ To this end, class action settlements use streamlined procedures to distribute money or goods equitably and efficiently among eligible recipients, not unlike social security, employment benefits, or other forms of social insurance. On the other hand, class action settlements also utilize tort-like rules that value "corrective justice" and "civil recourse."⁴⁵ That is, they force a specific wrongdoer to restore his

⁴² See Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 4 JUST. SYS. J. 197, 211 (1978) ("The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund There is a risk, if litigants are allowed to proceed on an individual basis, that those who sue first will deplete the fund and leave nothing for the late comers."). Additionally, many of the goals of class action settlements, particularly in mass tort cases, also may be accomplished in bankruptcy. See S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 18-27 (2000) (comparing use of bankruptcy and class action procedures to resolve mass tort litigation); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 681-82 (1989) (describing use of bankruptcy rules to estimate value of total claims and provide varied options to claimants in mass tort class action); Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1634 (2008) (describing advantages of bankruptcy proceedings as alternative for resolution of mass tort cases). For this reason, I occasionally refer to class action settlement funds and other forms of "representative litigation" interchangeably.

⁴³ See, e.g., Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 737-38 (2003) (describing commonalities between mass tort settlement funds and social welfare programs).

⁴⁴ See ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 118-20 (Martin Ostwald, trans. Prentice Hall 1999) (c. 384 B.C.E.) (defining justice as proportionate distribution of benefits or burdens among individuals based on some set criterion); TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 5-8 (2007) (applying theories of distributive justice to tort law); JOHN RAWLS, A THEORY OF JUSTICE 266-67 (1999) (articulating prominent theories of distributive justice).

⁴⁵ "Corrective justice" and "civil recourse" are distinct concepts but both have been used to describe values that underlie access to private civil litigation. See, e.g., Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53, 56-58 (D. Owen ed., 1995) (describing "corrective justice" account of tort law); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992) (arguing that injuries to individuals' dignity or intrinsic value are appropriately addressed through corrective or retributive measures); Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 423 (2003) ("[T]ort victims may evaluate offers of compensation and awards, not just in terms of how well these offers and awards match

victims' specific losses through an individualized, but otherwise public, forum.⁴⁶

Class settlements thus follow procedures that strike a balance between the needs of distributive and corrective justice. They attempt to match substantive awards with the merits of individual participants' injuries, but within the bounds of what is practical, feasible, and fair. In order to do this, class action settlements may utilize grids or bureaucratic processes to distribute awards.⁴⁷ As such, many scholars have observed that class action settlement funds often resemble "private" or "miniature" administrative agencies.⁴⁸

B. Class Action Settlement Procedures

Class action settlements, however, need procedural safeguards to serve both goals of corrective and distributive justice. This is largely because of a principal-agent problem that is inherent in the relationship between plaintiffs and attorneys in a class action, much like the problem experienced by managers and shareholders of large corporations.⁴⁹ Participants in a class settlement lack rational incentives to

material losses, but also how well they accord with their sense of personal dignity."); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003) (characterizing tort compensation as permitting "plaintiffs who have been wronged [to be] entitled to some avenue of civil recourse against the tortfeasor who wronged them"). I use both terms here to refer to an interpersonal form of justice that requires a wrongdoer to repair damages to a particular person through a public process.

⁴⁶ See ALI REPORT, *supra* note 13, § 1.04 (observing that principles of aggregate litigation include, among other things, "compensating . . . claimant[s] appropriately" and "enabling claimants to voice their concerns").

⁴⁷ See, e.g., John F. Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 268–69 (2007) (describing "convergence" of "publicly administered systems like workers' compensation" and tort law, where parties use grids to measure damages that arise out of routine injuries); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1626–31 (2004) (describing rise of administrative grids in large settlements); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2019–21 (1997) (discussing Judge Weinstein's role in creating administrative compensation schemes in class settlements).

⁴⁸ See, e.g., Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 921 (1996) [hereinafter Nagareda, *Turning from Tort*] (describing class action settlements as "miniature" private agencies); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 545 (1986) [hereinafter Resnik, *Failing Faith*] (criticizing development of large alternative compensation schemes because they empower private administrators to decide compensation "without providing sufficient justification [for] why they deserve expanded authority"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425 (1982) (arguing that shift to large class action settlements places judges in more administrative or managerial position and creates "opportunities for judges to use—or abuse—their power").

⁴⁹ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*,

monitor the class counsel because monitoring is costly in relation to each individual's comparatively small stake in the enterprise as a whole.⁵⁰ As a result, self-interested attorneys may reach settlements that lack sufficient transparency⁵¹ or deny claimants the political and psychological value that comes with meaningful participation in a formal court proceeding.⁵² Plaintiffs' counsel may forge collusive or "sweetheart" deals with defense counsel, compromising the deterrent effects of a large payout and failing to hold defendants sufficiently responsible for their wrongdoing.⁵³ Settlements may also produce inequitable results by favoring the interests of some plaintiffs over others, settling before parties can learn whether the settlement is (or

86 COLUM. L. REV. 669, 726 (1986) (explaining that one goal of class action reform should be to reduce significant agency costs that exist between class counsel and class members); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991) [hereinafter Macey & Miller, *The Plaintiffs' Attorney's Role*] (arguing that class action attorneys act as quintessential unmonitored agents, operating according to their own personal interests with little oversight).

⁵⁰ See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 81 (2007) ("First, . . . no class member may have enough at stake to expend personal resources on monitoring the class counsel. . . . Second, each individual class member has little, if any, ability to effectively monitor the class counsel."). Others observe that attorneys lack rational incentives to obtain fair settlements for their clients because attorneys may earn larger fees by settling quickly. See, e.g., Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 529 (1994) (observing that judges should "ensure that the contingency fee system and the incentives that it is founded upon operate properly and are not distorted by the nature and size of the cases"); *infra* note 56 and accompanying text.

⁵¹ See, e.g., Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1084–85 (1984) (noting that settlement procedures lack transparency due to being "products of a bargain between the parties rather than of a trial and an independent judicial judgment"); Resnik, *Failing Faith*, *supra* note 48, at 545 (criticizing excessive empowerment of administrators of alternative compensation schemes without adequate justification for, or oversight of, that power).

⁵² See WILLGING, *supra* note 35, at 18 (observing that settlements involving mass torts "make it more likely that individual cases will be disposed of without trial or hearing, raising questions of procedural unfairness in terms of satisfying litigant interests in participating meaningfully in resolving their cases"); see also Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, LAW & CONTEMP. PROBS., Autumn 1990, at 199, 204 ("[H]aving one's day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved.").

⁵³ See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) (describing "sweetheart" settlement as classic agency problem, in which attorneys will trade high fee awards for low recovery); see also Leslie, *supra* note 50, at 79–83 (indicating that interests of plaintiffs' counsel may be more aligned with those of defendants than those of class, which may give rise to collusion and leave class unprotected).

is not) fair, or by awarding attorney's fees in ways that do not serve the interests of the class.⁵⁴

Because of their potential problems, class action settlements—as well as other large representative settlements, such as in mass bankruptcies, trustee suits, and state attorney general actions—generally contain three types of rules. A court must determine (1) whether the absent parties have a way to participate in the litigation; (2) whether there is a harmony of interests between the class representative and other parties; and, eventually, (3) whether the settlement overlaps with other similar lawsuits and thus precludes those purportedly represented parties from suing again in another forum.⁵⁵

Many rules exist to ensure class action settlements comport with these three requirements. First, class actions offer parties many chances to participate. The Federal Rules require that any class action settlement provide individual notice of the action to all putative class members.⁵⁶ Judges may appoint special masters to oversee negotiations between representative parties.⁵⁷ Judges may divide parties into specific interest groups—called “subclasses”—represented by separate counsel;⁵⁸ or they may hold fairness hearings, designed to solicit

⁵⁴ Many courts have found settlements in class actions to be collusive or otherwise beneficial to attorneys at the expense of plaintiffs. *See, e.g.*, *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 118 (S.D.N.Y. 1999) (“[T]his settlement has earmarks of a non-arm's length, ‘politely’ collusive settlement: one providing a nonpecuniary benefit of very little value to shareholders and a fairly substantial award of attorney's fees to plaintiff's counsel for a modest amount of work.”); *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 645 (N.D. Cal. 1991) (“Class counsel's fee application is presented to the court with the enthusiastic endorsement, or at least acquiescence, of the lawyers on both sides of the litigation, a situation virtually designed to conceal any problems with the settlement not in the interests of the lawyers to disclose.”); *see also* Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 485 (1997) (articulating concerns about class counsel settling for less than reasonably possible).

⁵⁵ *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008) (“A party's representation of a nonparty is ‘adequate’ for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.” (citations omitted)).

⁵⁶ FED. R. CIV. P. 23(c)(2); *see also* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (requiring individualized notice in class action settlements that award damages).

⁵⁷ *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.91 (2004) (observing that judges may appoint magistrate judges, special masters, or even settlement judges to oversee and facilitate settlement); *see also* *In re Simon II Litigation*, No. 00-CV-5332, 2002 WL 862553, at *1 (E.D.N.Y. Apr. 23, 2002) (memorandum for discussion purposes) (describing efforts by special master to reach negotiated global tobacco settlement); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 917 (D. Nev. 1983) (appointing special master to coordinate settlement).

⁵⁸ FED. R. CIV. P. 23(c)(5); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.23 (2004) (describing subclassing as procedural mechanism that may be used to effectuate settlement in aggregate litigation).

objections and produce other evidence about the equitable nature of the settlement.⁵⁹

Second, class action settlements require close judicial supervision. Unlike in individual settlement negotiations, where judges exercise very little judicial review out of respect for the parties' litigation choices, judges in representative litigation carefully review settlements to police potential conflicts of interest between counsel and the represented parties.⁶⁰ Judges also may apply heightened scrutiny to certain types of settlements depending on the factual circumstances surrounding them. These include "shotgun" settlements that occur early in the litigation, before parties test the claims and defenses through discovery or other adversarial processes,⁶¹ as well as settlements that award more to some class members at the expense of others.⁶² Judges also may require counsel, mediators, or experts in the settlement to offer detailed explanations of proposed settlement terms in order to police against possible collusion or otherwise ensure that the settlement is fair.⁶³ Even the judges themselves are reviewed for any abuse of discretion on interlocutory appeal.⁶⁴

⁵⁹ Of course, parties who do not want to participate may sometimes opt out of the settlement. See FED. R. CIV. P. 23(e).

⁶⁰ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004) ("Class actions certified solely for settlement . . . sometimes make meaningful judicial review more difficult and more important.")

⁶¹ See Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 192 (2009) [hereinafter Macey & Miller, *Judicial Review*] (recommending heightened judicial scrutiny for "shotgun" class action settlements that occur very early in litigation); see also *In re Matzo Food Prod. Litig.*, 156 F.R.D. 600, 604 (D.N.J. 1994) (noting importance of sufficiently developed factual record before any class settlement can be approved).

⁶² See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (indicating need for heightened attention to protections for absentees in class action settlement context); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement when certain class members settled for no consideration without reasoned explanation); see also John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products— or, Why Attorneys Still Need Consent To Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1545 (1998) (observing occasions where class counsel will have "no incentive to resist an allocation plan favored by the defendant, who often has an interest in preferring one subgroup within the class over another").

⁶³ See, e.g., *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996) (requiring courts, when determining fairness of settlements, to consider "strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement"); *Murillo v. Tex. A&M Univ. Sys.*, 921 F. Supp. 443, 445–46 (S.D. Tex. 1996) (requiring that counsel engage in "sufficient discovery" in order to establish presumption of fairness of settlement).

⁶⁴ See FED. R. CIV. P. 23(f) (providing interlocutory review of court's decision to certify a class); *Amchem*, 521 U.S. at 620 (calling for "undiluted, even heightened attention" to adequacy of representation and other class certification requirements); see also MANUAL

Third, class action procedures allow for increased coordination amongst parties and judges. The JPML may appoint a single federal judge to coordinate pretrial proceedings for overlapping civil actions pending in different districts.⁶⁵ In addition, class action settlements seek to coordinate potential recipients of settlement payouts by barring them from participating in future related actions, so long as they participate voluntarily or receive adequate representation in the original suit.⁶⁶ Finally, class actions coordinate with individual litigations by utilizing rules that identify those occasions when individual litigation may provide fairer compensation for victims than a large aggregate payout. Courts, for example, will not certify a national class action when there is too much variation among state laws or individual claims.⁶⁷ Courts may also deny certification when putative class members, their class representatives, or their class counsel have insuperable conflicts of interest.⁶⁸

As a result of these procedural protections, class actions take into account what the American Law Institute (ALI) calls claim “variation” and “viability.”⁶⁹ Class action settlements are more difficult, and thus less likely, when claims are too variable. That is, courts

FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004) (collecting cases where courts apply “close[] judicial scrutiny” for potential conflicts of interest, particularly when there has been “little or no discovery” to test strengths and weaknesses of each party’s position).

⁶⁵ 28 U.S.C. § 1407 (2006). In practice, the Multidistrict Litigation Statute has led to global settlements and resolutions for thousands of complex cases. See Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47 (2007) (collecting cases); Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation’s Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 329–42 (2009) (collecting and evaluating more than four years of multidistrict litigation transfer orders).

⁶⁶ See 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4455, at 448–94 (2d ed. 2002) (“Preclusion by representation lies at the heart of the modern class action”); see also Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1063–68 (2002) (discussing due process limitations on binding litigants to different types of class proceedings).

⁶⁷ See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (stating that claims are not manageable if they are to be adjudicated under laws of fifty states and multiple territories); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743–44 (5th Cir. 1996) (reversing class action certification because of variances in state law); *Spence v. Glock*, 227 F.3d 308, 311 (5th Cir. 2000) (observing that variations in law “may swamp any common issues and defeat predominance” (quoting *Castano*, 84 F.3d at 741)).

⁶⁸ See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) (denying class settlement in light of “suspicious circumstances” of settlement negotiations); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864–65 (1999) (denying settlement for class action due to conflicts of interest between class counsel, class members, and plaintiffs excluded from class); *Amchem*, 521 U.S. at 625–26 (denying certification for class with too diffuse and conflicting interests between parties).

⁶⁹ ALI REPORT, *supra* note 13, § 2.02 cmt. b.

tend to avoid certifying classes at the outset if individuals’ claims are too different from one another. When claims are less viable, private parties and attorneys may lack resources or incentives to pursue individual litigation.⁷⁰ Consider the following chart, reproduced from the ALI’s *Principles on the Law of Aggregate Litigation*, which outlines occasions when class actions (and other forms of private aggregation) are better than other forms of individual litigation:

TABLE 1⁷¹

	<i>Low Variance Between Individual Claims</i>	<i>High Variance Between Individual Claims</i>
<i>Low Value of Individual Claims</i>	Class actions indispensable for private prosecution	Private enforcement difficult because of manageability concerns
<i>High Value of Individual Claims</i>	Class actions necessary but greater concern for individual opt-out and other right of control	Aggregate treatment not essential and class actions held suspect

Mass torts claims, for example, are both highly variable and valuable: Injuries may range in exposure, severity, timing, and cause.⁷² As a result, a court may refuse to certify a class in a mass tort lawsuit because the cost of managing a class action may not be justified when compared to the cost of permitting many individual lawsuits.⁷³ By comparison, consumer class actions that involve only small dollar amounts are neither marketable nor variable, particularly when they present economic awards or consumer refunds for alleged commercial misconduct that occurred over a short period of time. Accordingly,

⁷⁰ See *id.* (“The strength of the justification for class certification in the low-viability and low-variation scenario is well recognized in the law of class actions.”); see also Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135, 149 (1999) (“Where the uniformity of the defendant’s conduct defines the perimeter of the lawsuit, and where the individual stake in the case is too low to make private enforcement viable, aggregation through a class action is an indispensable mechanism for allowing private enforcement of consumer claims.”).

⁷¹ ALI REPORT, *supra* note 13, § 2.02 cmt. b.

⁷² See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT, at xii–xvi (2007) [hereinafter NAGAREDA, MASS TORTS] (identifying numerosity, geographic distribution, temporal dispersion, and factual patterns as defining features of mass tort); WEINSTEIN, *supra* note 13, at 15–19 (providing typology of disasters and some problems legal system has with each type).

⁷³ In the massive coordinated litigation involving the anti-inflammatory drug Vioxx, for example, a court rejected a class action because the individual circumstances that gave rise to each claim varied substantially. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006); see also *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1087 (N.J. 2007) (rejecting class certification when proposed members were “a diverse group of entities” which did not “react[] in a uniform or even similar manner”).

courts are inclined to certify consumer class actions because they may be far more efficient than thousands of individual lawsuits.

In this way, class actions incorporate rules common to many forms of representative litigation. Class action procedures provide parties multiple opportunities to participate (or not participate) in the award, attempt to harmonize interests between class counsel and other parties through judicial review, and identify those times where other forms of litigation provide a superior means of resolving the dispute.

As discussed in Part II, regulatory agencies increasingly mimic the goals of class actions. Like class action settlements, agencies seek more accountability than what exists in private individual litigation by pursuing large monetary settlements on behalf of a large number of victims. Like class action settlements, agencies achieve greater efficiency than traditional litigation by operating at economies of scale. Finally, agency action is likewise consistent with goals of distributive and corrective justice—paying people according to their losses, while taking into account principles of equality and efficiency. On the other hand, agencies lack most of the procedural safeguards that exist in private litigation. Few rules describe how, if at all, agencies afford victims a voice in the process; how judges should resolve conflicts of interest in agency settlements made on behalf of a diverse group of people; or when agencies should coordinate with other forms of litigation.

II

COMPENSATION THROUGH AGENCY SETTLEMENTS

While regulatory agencies have begun to compensate victims only recently, other administrative agencies have long done so, particularly through disaster relief, welfare, unemployment, workers' compensation, and other forms of social insurance. In the early 1800s, Congress passed laws designed to compensate victims of natural disasters, the War of 1812, and other calamities.⁷⁴ As Michele Landis Dauber observes, executive branch commissioners oversaw public funds that

⁷⁴ See, e.g., Act of Apr. 9, 1816, ch. 40, 3 Stat. 261 (indemnifying private property losses in War of 1812); Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 293 (2003) ("By the time that Congress appropriated direct relief following a devastating 1827 fire in Alexandria, Virginia, it had already granted dozens of separate claims for relief, encompassing thousands of claimants and millions of dollars, following such events as the Whiskey Rebellion, the slave insurrection on St. Domingo (Haiti), and numerous floods, fires, storms, and earthquakes."); Michele L. Landis, "Let Me Next Time Be 'Tried By Fire': Disaster Relief and the Origins of the American Welfare State 1789–1874," 92 NW. U. L. REV. 967, 983 n.82 (1998) (noting shift to administrative method of distributing public funds following disasters).

resembled modern administrative agencies and assumed broad authority to evaluate claims, accept evidence, and distribute money according to well-defined rules.⁷⁵ Early examples include public funds created in the wake of the Whiskey Rebellion,⁷⁶ the Haitian slave insurrection,⁷⁷ and the War of 1812.⁷⁸

Today, agency compensation schemes assume a variety of forms. Some are permanent, like workers' compensation or national flood insurance.⁷⁹ Others involve ad hoc public settlement funds, narrowly designed by legislators or public officials to induce people to forgo traditional litigation in favor of alternative dispute systems, such as the September 11 Victim Compensation Fund,⁸⁰ or, more recently, the British Petroleum Gulf Coast Claim Facility.⁸¹ Finally, regulatory agencies may distribute monetary compensation to victims of civil wrongdoing.⁸²

While many of the principles addressed in this Article may apply to various forms of agency compensation, this Article addresses the problems raised when regulatory agencies mimic class action settlements by forcing wrongdoers to compensate their victims. Agency compensation raises unique problems because regulatory agencies have historically served another function—to create and enforce rules that maximize social welfare. As set forth below, agencies face new challenges as they increasingly seek to balance their traditional regulatory role with the new task of providing compensation for those harmed by regulatory violators.

⁷⁵ See Dauber, *supra* note 74, at 290–91 (comparing administrative efforts to compensate victims in aftermath of War of 1812 and September 11, 2001); Landis, *supra* note 74, at 981–88 (tracing development of disaster relief funds from 1794 through 1822).

⁷⁶ See Act of Feb. 27, 1795, ch. 33, 6 Stat. 20 (indemnifying citizens who lost property in Whiskey Rebellion).

⁷⁷ See Act of Feb. 12, 1794, ch. 2, 6 Stat. 13 (providing \$15,000 for relief of white planters fleeing slave insurrection on St. Domingo).

⁷⁸ See 3 Stat. at 261 (indemnifying private property losses in War of 1812).

⁷⁹ Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (2006) (providing employment-injury and occupational-disease protection for workers who are injured or contract occupational diseases on navigable waters of United States) (§ 943 repealed 1965; §§ 945–947 repealed 1984); National Flood Insurance Act, 42 U.S.C. §§ 4001–4129 (2006) (authorizing flood insurance program by which flood insurance can be made available on nationwide basis) (§ 4021 repealed 1973; § 4103 repealed 1994).

⁸⁰ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)).

⁸¹ At the time of this writing, British Petroleum has agreed to establish an unprecendented \$20 billion fund to be administered by Kenneth R. Feinberg. Jackie Calmes, *For Gulf Victims, Mediator with Deep Pockets and Broad Power*, N.Y. TIMES, June 23, 2010, at A17.

⁸² Weinstein, *supra* note 22, at 952 (describing increasing role of administrative agencies, such as FTC, SEC, and EPA, in providing compensation through “disgorgement, mediation, settlement, and other techniques”).

A. *The Origins of Agency Settlements*

Modern agency-based compensation is technically rooted in the equitable powers of federal courts, not of agencies.⁸³ However, since the birth of the modern administrative state, agencies have used equitable remedies to strengthen their hand in regulatory enforcement. Beginning in the 1940s, agencies primarily brought such actions to deter bad conduct; accordingly, any resulting monetary proceeds generally flowed directly into the U.S. Treasury.⁸⁴ In the 1990s, however, regulatory agencies aggressively began to use their enforcement power to compensate victims rather than solely to punish wrongdoers.⁸⁵

The growth of agency-based compensation raises many questions that have yet to be answered, or even addressed. First, what procedures will ensure that all victims are adequately represented when an agency distributes money? Second, what substantive criteria should agencies use to determine when to return funds to the Treasury or to distribute awards to victims? Finally, what principles should agencies follow to determine how to distribute relief among victims? Such questions form the center of the debate that now exists with regard to large civil lawsuits and class actions;⁸⁶ accordingly, it is well worth asking the same questions when agencies attempt to compensate victims.

Section 1 traces the origins of agency-based compensation to the Supreme Court's early jurisprudence involving administrative agencies. Even in those early cases, the Supreme Court gave agencies the power to force wrongdoers to reimburse claimants for massive losses. However, agencies rarely did so, viewing such an award as a form of relief connected to the agency's law enforcement duties.

Section 2 demonstrates the legacy of those decisions for federal agencies. Today, most agency settlements afford only the most minimal level of process. Agencies may provide victims with limited

⁸³ See, e.g., *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 403 (1946) (holding that wartime price administrator may seek—and district court may provide—restitution against landlords charging excessive rents); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 290–92 (1960) (extending *Porter* to Secretary of Labor's domestic power to seek restitution for lost wages against employers).

⁸⁴ See *infra* Part II.A.1; see also James R. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779, 1781–84 (1976) (describing history of agencies' authority to seek equitable relief).

⁸⁵ See *infra* Part II.A.2.a (describing evolution of SEC actions for civil disgorgement).

⁸⁶ See ALI REPORT, *supra* note 13, at 1 (“Lawsuits alleging product defects, securities fraud, or other wrongs may include tens, hundreds, thousands, or even millions of claimants, and may involve many respondents as well. These large cases, which present significant management problems, entail significant costs, and pose serious risks of underrepresentation, are the focus of this project.”).

opportunities to comment on distribution plans, to participate in a nonarbitrary distribution process, or to receive some limited form of judicial review. But few rules describe how agencies should coordinate actions with private litigation, how agencies should hear victims' claims, or how judges should review the overall fairness of a settlement reached by an agency on behalf of many different people.

1. *Agencies' Historical Power To Seek Monetary Remedies*

Agencies have sought monetary sanctions for civil wrongdoing since the beginning of the modern administrative state. During the late 1920s and early 1930s, the Supreme Court rejected laws that gave agencies authority to make rules regulating the economy, like price controls or wage-and-hour regulations.⁸⁷ Simultaneously, lower federal courts and many state courts also rejected laws that gave agencies the authority to sanction those who violated administrative regulations.⁸⁸

Within a few years, however, the Supreme Court reversed course, recognizing that Congress could broadly delegate authority to agencies to make new rules and regulations. In less than a decade, as the existence of administrative agencies became a political reality, the Supreme Court found that agencies also had considerable power to enforce their rules through monetary sanctions or other forms of relief.⁸⁹

The growing power of the administrative state, however, raised new questions for private compensation. In *Porter v. Warner*, the

⁸⁷ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (rejecting wage-and-hour and unfair competition regulations as impermissible delegation of power); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (rejecting provision of National Industrial Recovery Act that permitted executive to prohibit transportation of oil as impermissible delegation of legislative authority).

⁸⁸ See, e.g., *Jasper v. Hellmich*, 4 F.2d 852, 856 (E.D. Mo. 1925) (“The case at bar presents the fairly simple situation, in the final analysis, of administrative officers attempting to enforce the collection of a penalty for the violation of a criminal statute. This is a thing, which as baldly presented here, an administrative officer has no power, in my opinion, to do.”); Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1439 n.20 (1979) (collecting cases). As a result, many early regulatory statutes imposed very specific, narrowly defined monetary penalties. *Id.*

⁸⁹ See, e.g., *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“By the proscription of retaliatory acts . . . and its enforcement in equity by the Secretary . . . , Congress sought to foster a climate in which the substantive provisions of the Act would be enhanced.”); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (announcing that, with exception of damages, equity courts may “issue whatever ‘other order’ may be necessary to vindicate the public interest [and] compel compliance with” Emergency Price Control Act of 1942 (EPCA) (quoting EPCA, Pub. L. No. 77-421, § 205(a), 56 Stat. 23, 33)); *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938) (approving of delegation, to administrative agencies, of power to impose fines).

Supreme Court made available to agencies the traditional equitable remedies of disgorgement and restitution, ostensibly to empower agencies to recover funds from wrongdoers.⁹⁰ However, another motivation for this power was rooted in compensation.⁹¹ Agency-based compensation provided a way for wrongdoers to compensate aggrieved parties for their losses, but at great economies of scale. In authorizing such compensation, *Porter* created the tension that now exists when both class actions and administrative agencies seek to compensate groups of people for the same civil wrong.

In *Porter*, the Supreme Court found that the Office of Price Administration (OPA) could effectively force landlords to reimburse tenants for the excess rent charged during the height of World War II in violation of the Emergency Price Control Act of 1942 (EPCA).⁹² Congress originally created the OPA to set rent controls across the country.⁹³ The defendant in *Porter* overcharged tenants for eight months but argued that the agency had no right under the plain language of the law to collect and reimburse tenants for excessive rent payments.⁹⁴ According to the defendant, if the tenants wanted that kind of relief, they would have to sue under the EPCA, which expressly gave tenants the right to do so.⁹⁵ Nonetheless, the Supreme Court held that the OPA was not limited to the express remedies described in the EPCA. Because the EPCA gave the agency power to obtain injunctive relief against landlords who overcharged their tenants, the Court held that the OPA was entitled to seek other equitable remedies available in federal court, including restitution and disgorgement.⁹⁶

The Supreme Court provided two alternative reasons for this conclusion. The first was premised on the idea of ancillary jurisdiction. According to the Court, restitution and disgorgement were part of the express set of remedies that Congress had in mind when it gave an

⁹⁰ 328 U.S. at 398–99.

⁹¹ See *infra* notes 101–15 and accompanying text (describing OPA as seeking compensation-providing remedy).

⁹² Technically, the question presented to the Court was whether the district court had jurisdiction to issue the contested equitable remedy in a suit brought by the OPA. See 328 U.S. at 398–99.

⁹³ EPCA, Pub. L. No. 77-421, § 1(a), 56 Stat. 23, 23–24 (“[T]he purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents”) (codified as amended at 50 U.S.C. §§ 901–946 (1946)) (repealed 1947).

⁹⁴ 328 U.S. at 401–02.

⁹⁵ See *id.* at 401 (explaining that EPCA “authorizes an aggrieved purchaser or tenant to sue for damages on his own behalf”).

⁹⁶ See *id.* at 403 (distinguishing situations where statute has created narrow right and has provided “special and exclusive” remedy).

agency power to seek an injunction, a form of equitable relief.⁹⁷ Nothing in the statute suggested that Congress intended to limit the court's ancillary jurisdiction to grant, or the agency's power to ask for, other forms of equitable relief. "The great principles of equity, securing complete justice," the Court stated, "should not be yielded to light inferences, or doubtful construction."⁹⁸ Complete justice, the Court reasoned, permitted the distribution of funds that had "been illegally acquired and which ha[d] given rise to the necessity for injunctive relief."⁹⁹

Just as important, such relief was necessary for an agency to enforce the law in light of its purpose. At a minimum, agencies needed to be able to send a message to would-be violators that, if caught, they would have to "restore [their] illegal gains."¹⁰⁰ The purpose of the EPCA, which was designed to prevent inflation during wartime, was better served if agencies could force landlords to return illegal rents.

The OPA, however, was just as interested in providing the kind of efficient and accountable compensation that exists in a modern class action. After all, a separate provision of the EPCA already allowed the OPA to deter violations of the EPCA and control inflation.¹⁰¹ Overcharged tenants could also sue privately to recover illegally inflated rent, so long as they sued within thirty days.¹⁰² More importantly, that same provision also allowed the OPA *itself* to sue to recover any excessive rents not recovered by victims.¹⁰³ If the Supreme Court's central concerns were to reduce inflation and to ensure that landlords bore the full social cost of their actions, the remedies that Congress had expressly provided in the EPCA should have already accomplished both of those goals.¹⁰⁴

⁹⁷ *Id.* at 399 ("Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.")

⁹⁸ *Id.* at 398 (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

⁹⁹ *Id.* at 399.

¹⁰⁰ *Id.* at 400.

¹⁰¹ Compare EPCA, Pub. L. No. 77-421, § 205(a), 56 Stat. 23, 33 (1942) (creating right for OPA to pursue injunctive or other relief) (codified as amended at 50 U.S.C. § 925(a) (1946)) (repealed 1947), with § 205(e), 56 Stat. at 34 (creating private right for OPA to seek damages for excessive rents) (codified as amended at 50 U.S.C. § 925(e) (1946)) (repealed 1947).

¹⁰² See 50 U.S.C. § 925(e) (stating that if private party fails to sue in thirty days, and if government commences suit, private party "shall thereafter be barred from bringing an action for the same violation or violations").

¹⁰³ *Id.* (stating that if private party fails to sue in thirty days "or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period").

¹⁰⁴ Writing for the dissent, Justice Rutledge made a similar argument. *Porter*, 328 U.S. at 404-06 (Rutledge, J., dissenting). The dissent observed that the result ran counter to the

The OPA likely was more concerned about efficiently reimbursing tenants for their rent. Had the OPA sought damages under the statute, it would have had to deposit the recovered funds with the U.S. Treasury.¹⁰⁵ Equitable restitution, however, could be directly distributed to the injured parties at great economies of scale.¹⁰⁶ Equity allowed the OPA to compensate individuals who otherwise lacked incentive or money to pursue individual actions at a lower cost. After all, the hundreds of families overcharged by the defendant would be entitled only to the excess rent paid out over eight months—an amount not worth the cost of numerous, redundant individual lawsuits, but an amount that still would be welcome near the end of the Depression.

Equitable relief also held the defendant accountable for his wrongdoing. Theoretically, the OPA could have imposed additional rent controls or subsidized rents with a tax on the public at large.¹⁰⁷ Instead, the OPA sought a remedy that, like a private lawsuit, would force a specific wrongdoer to pay money directly to certain aggrieved parties.

Notably, the formal answer offered by a majority of the Supreme Court implicated a very different concern: the longstanding distinction between law and equity. The Court acknowledged that there was a provision under the EPCA that allowed aggrieved renters to sue for damages on their own behalf; and if that person failed to sue, the OPA could seek damages on behalf of the U.S. government.¹⁰⁸ However, the government was seeking restitution. That, according to the Court, was an altogether different *equitable* remedy. “Such action is within . . . the highest tradition of a court of equity.”¹⁰⁹

This new power for agencies came with a catch: It lacked many of the procedural safeguards that would have existed in private litigation

EPCA’s statutory scheme, which drew a sharp line between the role of the agency to ensure compliance with regulations and the ability of individuals to obtain compensation through private litigation. Agency compensation thus created an end-run around the ECPA’s private right of action, which limited reimbursement to only those who sued within thirty days. *Id.* at 406.

¹⁰⁵ See *id.* (noting that recovered damages are to be returned to Treasury, not overcharged person).

¹⁰⁶ Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 615 (7th ed. 2007) (observing that if “the fixed cost [of litigation] can be spread over many claims, it may be possible to litigate more claims, with a resulting reduction in the error costs of the legal system yet without prohibitive litigation costs”).

¹⁰⁷ See Coleman, *supra* note 45, at 54–55 (distinguishing corrective justice remedies, such as agent-specific restitution or compensation, from other obligations, like distributive justice, which may apply broadly to all members of relevant political community through exercise of taxes).

¹⁰⁸ *Porter*, 328 U.S. at 402.

¹⁰⁹ *Id.*

to ensure that the OPA fairly distributed rents to the various tenants.¹¹⁰ Technically, the (then) newly enacted Federal Rules of Civil Procedure for class actions could have provided the same economies of scale, but with more procedural protections for individual plaintiffs.¹¹¹ In fact, had class actions been as popular in the 1940s as they are today, it is difficult to say whether the Supreme Court would have needed to afford agencies the power of equitable restitution to reimburse aggrieved parties. In this way, *Porter* previewed the modern debate about whether agencies should be in the harm-compensation business. After *Porter*, the Supreme Court and lower appellate courts afforded agencies the right to seek restitution and disgorgement for back pay under the Fair Labor Standards Act,¹¹² restitution for unlawfully marketed devices under the Food, Drug, and Cosmetic Act,¹¹³ restitution for gains made from insider trading and material misstatements under Rule 10b-5 of the Securities Act of 1934,¹¹⁴ and disgorgement for unfair trade practices and antitrust violations under section 13 of the Federal Trade Commission Act.¹¹⁵

¹¹⁰ The only direction provided by the Supreme Court was that, should there “appear to be conflicting claims” between tenants, the district court could “bring in all the interested parties and settle the controversies.” *Id.* at 403. The Court did not, however, consider the possibility that agencies would settle such actions. Such consent decrees are afforded very little judicial review. *See* SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) (observing that civil settlement that includes agency dismissal of underlying action is “close to unreviewable”); *see also, e.g.*, SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983) (“Because of its limited resources, the SEC has traditionally entered into consent decrees to settle most of its injunctive actions [and is] thus able to conserve its own and judicial resources”); Consent Decree of Permanent Injunction, United States v. Abbott Labs., No. 99C 7135, 1999 U.S. Dist. LEXIS 18897, at *11 (N.D. Ill. Nov. 2, 1999) (stipulating that any judicial review of FDA’s review of drug company’s compliance with federal regulations would be under deferential “arbitrary and capricious” standard and based exclusively on FDA’s factual record).

¹¹¹ *See, e.g.*, Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 699–700 (1941) (providing first comprehensive analysis of newly codified class action device and identifying plaintiff protections, including class certification, notice, and participation).

¹¹² *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 290 (1960) (extending *Porter* to Secretary of Labor’s domestic power to seek restitution for lost wages against employers).

¹¹³ *See, e.g.*, *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 762 (6th Cir. 1999) (affirming lower court injunction and restitution order after finding FDCA does not limit court’s equitable authority to order restitution).

¹¹⁴ *See* SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971) (affirming power of SEC to seek restitution).

¹¹⁵ *See* FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (finding disgorgement available under Federal Trade Commission Act); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (extending *Porter* to antitrust violations). This list is not exhaustive. Other agencies, including the Interstate Commerce Commission, rely on *Porter* to seek equitable remedies. *See, e.g.*, *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1184–86 (1st Cir. 1980) (applying *Porter* to permit restitution under Motor Carrier Act).

However, many questions were left unanswered: (1) What procedures would ensure that all the parties would be adequately represented? (2) How would courts police such settlements for potential conflicts of interest? (3) What effect would an agency settlement have on the victim's right to obtain relief through private litigation?

As set forth below, many of those questions still remain unanswered. One of the reasons for this is that many agencies, for forty years after *Porter*, generally declined to exercise their express power to seek equitable relief. Even though the Supreme Court expressly gave agencies the power to compensate victims, regulatory agencies saw themselves differently. Agencies came to rely upon the formal distinction that the Supreme Court drew between equity and law. That is, the relief sought by agencies was a power to sanction those who violated regulations, not to compensate individuals.¹¹⁶ Indeed, even when agencies sought equitable relief against wrongdoers, they generally did not have to grapple with difficult questions of distribution. Rather, they paid the money directly into the U.S. Treasury.¹¹⁷

The practical absence of harm compensation began to change in the early 1990s. Policymakers recognized that the equitable restitution and disgorgement remedies could serve another goal tacitly

¹¹⁶ See, e.g., *SEC v. Fischbach Corp.*, 133 F.3d 170, 175–76 (2d Cir. 1997) (describing disgorgement as primarily to deter securities laws violations by depriving violators of illegal gains); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (“Once the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without inquiring whether, or to what extent, identifiable private parties have been damaged by [the] fraud.”); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (observing that, unlike damages, “the primary purpose of disgorgement” is to “forc[e] a defendant to give up the amount by which he was unjustly enriched”); Diver, *supra* note 88, at 1456 (observing that purposes of administrative, monetary remedies were to deter and, conceivably, to generally compensate society, but not to compensate individuals or make them whole); Richard B. Smith, Comm’r, SEC, Remarks at the Program of Continuing Education of the Bar of the State of California 14 (Jan. 12, 1968), available at <http://www.sec.gov/news/speech/1968/011268smith.pdf> (observing that SEC “attempts to avoid being a collection agency for injured investors”).

¹¹⁷ The SEC’s hesitance to compensate investors may also be attributed to a broader commitment to the separation of powers concerns that animate the Anti-Deficiency Act and the Miscellaneous Receipts Act, federal laws that require executive branch agencies to avoid spending funds without congressional approval and to deposit any monies “collected” into the general Treasury account. See 31 U.S.C. § 1341(a) (2006); 31 U.S.C. § 3302(b) (2006). Such laws do not specifically cover occasions, like those described here, where a federal agency or the Department of Justice enters a settlement with a defendant. See, e.g., Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 342–47 (describing “sweeping” authority of executive branch to exercise its power to settle cases in conformity with its discretion to enforce federal law). Recent commentators have argued, however, that such settlements unduly interfere with the power of Congress to appropriate funds. See *id.* at 331.

recognized in *Porter*—to make sure that wrongdoers compensated their victims efficiently and justly.

2. *The Modern Use of Agency Settlements*

Over the past twenty years, the administrative law system has increasingly sought equitable remedies to make sure that wrongdoers fully compensate their victims. In this section, I examine compensation by three such federal administrative agencies: the SEC, FTC, and FDA. Generalizing compensation schemes across different agencies is difficult. However, these three agencies illustrate the spectrum of procedures, from the most to the least elaborate, that agencies follow when seeking disgorgement and restitution. The SEC, FTC, and FDA also serve as very useful examples because, over the last decade, they have together collected—and, in many cases distributed—over \$10 billion for victims.¹¹⁸

As discussed below, the procedural differences between agency compensation and private settlements are striking. Private litigation affords process based on the notion that each victim is entitled to a unique set of procedural rights when recovering funds. The evolving system of agency-based compensation, in contrast, affords only the minimum level of process required in administrative law. The most sophisticated procedures, like those used by the SEC, permit some “notice and comment” or other review by an administrative hearing officer—procedures that are generally associated with administrative rulemaking or adjudication. However, few procedures encourage victim participation, provide for independent judicial review, or guide agencies in coordinating claims with private class action litigation.

a. Securities and Exchange Commission

Historically, the SEC did not believe that collecting damages for injured investors was an important part of its mission.¹¹⁹ Recovering money for investors’ losses, instead, was served by private securities fraud class actions.¹²⁰ In 1971, courts recognized that the SEC could

¹¹⁸ See *infra* notes 133–34, 162–63, 177 and accompanying text (summarizing total sums collected by each agency).

¹¹⁹ In the late 1960s, then-Commissioner Richard Smith stated that the SEC tries not to be a collection agency and views favorably investors’ own private suits for monetary redress. See SMITH, *supra* note 116, at 14.

¹²⁰ See *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090-E, 1990 WL 454747, at *5 (S.D. Cal. Aug. 30, 1990) (describing usefulness of private securities litigation and need for private litigants to have access to counsel to pursue such actions); SECTION 308(C) REPORT, *supra* note 23, at 20 (“[T]he aim of private litigation is solely to compensate injured investors. The ability of investors to fully recover their losses, indeed, may largely depend on the use of private actions.”). *But see* John C. Coffee, Jr., *Reforming the Securities Class Action*:

seek restitution and, in particular, the illegal profits of corporate executives who traded on inside information.¹²¹ The Securities and Exchange Act did not expressly provide for such relief. However, just as in *Porter*, courts found that the SEC's authority to seek emergency injunctions also gave the SEC power to seek restitution and disgorgement.¹²² Significantly, however, throughout the 1970s and 1980s, the SEC viewed disgorgement as an enforcement tool and not as a means to compensate investors.¹²³ Because the agency's primary goal was to take money from defendants, it was less concerned with what ultimately happened to the funds.

That began to change in 1990, when Congress passed the Securities Enforcement Remedies and Penny Stock Reform Act.¹²⁴ The Penny Stock Reform Act recognized the SEC's traditional power to seek equitable restitution and disgorgement and expressly authorized the SEC to design rules for the distribution of such awards.¹²⁵ Since that time, the SEC has aggressively sought disgorgement in insider trading cases and other securities fraud cases.¹²⁶ The most egregious of these cases involve Ponzi schemes, like the scandal that now plagues former investors of Bernard Madoff Securities LLP.¹²⁷

An Essay on Deterrence and Its Implementation, 106 COLUM. L. REV. 1534, 1535–36 (2006) (questioning compensation function of securities class actions).

¹²¹ SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971). According to Professor Barbara Black, “[t]he insider trading cases were compelling opportunities for the SEC to seek the disgorgement remedy because they involved identifiable gains from illegal conduct and requiring disgorgement was a logical deterrent to future violations.” Black, *supra* note 14, at 320.

¹²² See *Tex. Gulf Sulphur Co.*, 446 F.2d at 1307–08 (finding that SEC may seek remedial relief beyond injunction because holding otherwise would circumvent court's equity power).

¹²³ See SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987) (noting disgorgement primarily prevents profiting from wrongdoing); see also SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978) (“[T]he primary purpose of disgorgement is not to compensate investors.”).

¹²⁴ Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified as amended in scattered sections of 15 U.S.C.).

¹²⁵ *Id.* §§ 202, 203, 104 Stat. at 937–40 (codified at 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2006)).

¹²⁶ One study demonstrated that SEC disgorgement between 1984 and 1992 reached a combined total of \$1 billion. See Rory C. Flynn, *SEC Distribution Plans in Insider Trading Cases*, 48 BUS. LAW. 107, 107–08 (1992) (observing that while money came from only handful of defendants, “big-money judgments are becoming more frequent in other areas” of securities fraud). While sizable, this amount pales in comparison to the nearly \$2.1 billion recovered by the SEC in 2009 alone. See *infra* notes 131–34 and accompanying text (detailing SEC's increased focus on compensation).

¹²⁷ See Black, *supra* note 14, at 322 (describing targets of SEC disgorgement actions); see also SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1112–13 (9th Cir. 2006) (appointing receiver and disgorging gains from Ponzi scheme).

The most recent change to the SEC's power to seek disgorgement and restitution for investors came in 2002, after the collapse of both Enron and Arthur Anderson.¹²⁸ Congress enacted section 308 of the Sarbanes-Oxley Act of 2002 (Fair Fund Act), authorizing the SEC to distribute civil penalties and disgorgement to investors for federal securities laws violations.¹²⁹ In enacting the Fair Fund Act, Congress expressly gave the SEC power to collect funds to compensate investors for their losses with the money obtained by corporate fines, civil disgorgement, and restitution.¹³⁰ Marking the shift in attitudes from the 1970s and 1980s, the SEC's most recent Performance and Accountability Report states that its primary goals are "to take prompt action to halt . . . misconduct, sanction wrongdoers effectively, and, where possible, return funds to harmed investors."¹³¹ There is almost no legislative history to the Fair Funds Act; however, the SEC's increased focus on compensating victims was probably a response to the fall of Enron, where employees lost substantial value from their 401(k) savings plans.¹³²

Whatever the cause, SEC-based compensation has increased dramatically since the Fair Funds Act. In the six complete fiscal years since Congress passed the Fair Funds Act, the SEC has brought between 218 and 335 judicial enforcement actions per year.¹³³ In the

¹²⁸ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 745, 784–85 (codified as amended at 15 U.S.C. § 7246 (2006)).

¹²⁹ *Id.* § 305(b), 116 Stat. at 779 (codified at 15 U.S.C. § 78u(d)(5)) (granting SEC authority to seek "any equitable relief that may be appropriate or necessary for the benefit of investors").

¹³⁰ Section 308 provides, in relevant part:

If in any judicial or administrative action . . . the Commission obtains an order requiring disgorgement against any person . . . , or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains . . . a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

Id. § 308, 116 Stat. at 784 (codified as amended at 15 U.S.C. § 7246).

¹³¹ 2009 SEC REPORT, *supra* note 14, at 6.

¹³² For an account of the Fair Fund's legislative history, see Winship, *supra* note 14, at 1121–23. See also 148 CONG. REC. 15,261 (2002) (statement of Rep. John E. Sununu) ("This conference report . . . includes key provisions [to] . . . better protect investors in such cases of fraud. . . . [T]he investor restitution provision in this bill will enable investors who lose money in the markets as a result of corporate malfeasance to reclaim the gains of corporate criminals."); *id.* at 15,274 (statement of Rep. Juanita Millender-McDonald) ("I rise . . . most importantly in support of all those investors, employees, and retirees who have fallen victim to the criminal acts of corporate wrongdoers.").

¹³³ In fiscal year 2003, the SEC brought 271 judicial enforcement actions. 2003 SEC ANN. REP. 17. In fiscal year 2004, it brought 264 actions. 2004 SEC PERFORMANCE & ACCOUNTABILITY REP. 25. In fiscal year 2005, it brought 335 actions. 2005 SEC PERFORMANCE & ACCOUNTABILITY REP. 7. In fiscal year 2006, it brought 218 actions. 2006

2009 calendar year alone, the SEC distributed over \$2.1 billion to investors—more than twice as much as the amount the SEC collected between 1984 and 1992.¹³⁴ Fair Funds now exist for high-profile financial scandals like WorldCom,¹³⁵ AIG,¹³⁶ and Fannie Mae.¹³⁷

The SEC's new compensatory focus has led some scholars to compare the SEC to "public class counsel"¹³⁸ or to a collection agency.¹³⁹ Ironically, courts and scholars have criticized many class actions, bankruptcies, and other forms of representative litigation for the lack of judicial oversight, effective representation, and potential conflicts of interest that can characterize these actions.¹⁴⁰ By comparison, the SEC employs only a very modest number of protections for claimants. Among other things, the SEC does not provide victims an active role in the distribution plan's design, receive consistent judicial review, or follow regular guidelines to determine when recouped funds should go to the U.S. Treasury.

First, unlike private litigation, the SEC lacks procedures that would ensure different victims' participation in the formation of the distribution plan. For example, unlike a class action or bankruptcy,

SEC PERFORMANCE & ACCOUNTABILITY REP. 8. In fiscal year 2007, it brought 262 actions. 2007 SEC PERFORMANCE & ACCOUNTABILITY REP. 25.

¹³⁴ Compare 2009 SEC REPORT, *supra* note 14, at 11, with *supra* note 126 (describing total SEC disgorgement between 1984 and 1992, totalling one billion dollars).

¹³⁵ See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 75 (2d Cir. 2006) (affirming approval of SEC's Fair Fund distribution plan).

¹³⁶ See Press Release, SEC, Litigation Release No. 19560 (Feb. 9, 2006), available at <http://www.sec.gov/litigation/litreleases/lr19560.htm> (describing \$700 million disgorgement); see also 2009 SEC REPORT, *supra* note 14, at 29 (describing efforts to distribute more than \$843 million to over 250,000 investors in AIG Fair Fund).

¹³⁷ Press Release, SEC, SEC Announces Start of \$357 Million Fair Fund Distribution Process in Fannie Mae Settlement (Apr. 30, 2007) [hereinafter Fannie Mae Press Release], available at <http://www.sec.gov/news/press/2007/2007-81.htm>.

¹³⁸ Winship, *supra* note 14, at 1107.

¹³⁹ See Black, *supra* note 14, at 318 (describing newly prominent role of SEC in collecting damages for investors).

¹⁴⁰ See, e.g., Taylor v. Sturgell, 553 U.S. 880, 898 (2008) (rejecting government's argument that party's "virtual representation" of another was basis for preclusion); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999) (rejecting applicability of Federal Rule of Civil Procedure 23(b)(1)(B) to limited fund "purporting to liquidate actual and potential tort claims"); *In re* Combustion Eng'g, Inc., 391 F.3d 190, 244–45 (3d Cir. 2004) (rejecting attempt to resolve asbestos claims through prepackaged Chapter 11 bankruptcy reorganization under 11 U.S.C. § 524(g)); see also Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648, 688–91 (2010) (describing perverse effect of reduced transaction costs on productiveness of creditor committees); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 336–44 (2003) (detailing self-interested litigation strategies of class action counsels at expense of class members); Martin H. Redish & Nathan D. Larson, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1588 (2007) ("[W]e believe [class actions] give rise to serious constitutional problems under the autonomy model of procedural due process . . .").

parties in an SEC action have no formal ability to intervene, shape, or challenge the original distribution plan designed by a hearing officer.¹⁴¹ Moreover, there are no guarantees that different interests will be adequately represented. Unlike class actions or bankruptcy, SEC compensation actions offer no procedures to divide the many conflicting interested parties in a settlement, such as shareholders (purchasers, sellers, or holders), creditors, or institutional investors. Furthermore, no procedures exist for “subclassing” parties so that varying interests are represented by separate trustees, class representatives, or counsel.¹⁴²

Second, judicial review of Fair Funds is very limited. As the Second Circuit recently noted, agencies may draw reasonable lines between differently affected parties, even if those lines bar viable claims by investors or creditors.¹⁴³ The “Fair Fund provision provides the SEC with flexibility by permitting it to distribute civil penalties among defrauded investors.”¹⁴⁴

Finally, SEC rules also do not discuss how or when the SEC will decide to distribute funds to claimants on its own, as opposed to depositing funds with a court registry where a private class action is pending, or in the U.S. Treasury.¹⁴⁵ Rather, such transfers to a court

¹⁴¹ See 17 C.F.R. § 201.1106 (2010) (“Other than . . . the opportunity to submit comments . . . no person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise challenge an order of disgorgement or creation of a Fair Fund . . .”).

¹⁴² Compare *id.*, with FED. R. CIV. P. 23(c)(5) (allowing subclasses in class actions), and 11 U.S.C. § 524(g) (2006) (imposing subclassing and voting requirements in bankruptcy reorganizations involving asbestos liability). For example, a court employing a § 524(g) channeling injunction in a bankruptcy proceeding, which is specifically designed to resolve future asbestos claims against a company, must determine that the injunction is “fair and equitable” to future claimants, § 524(g)(4)(B)(ii), and must appoint a legal representative to represent their interests, § 524(g)(4)(B)(i). The court must also determine that the plan treats “present claims and future demands that involve similar claims in substantially the same manner.” § 524(g)(2)(B)(ii)(V). Finally, the statute requires that a seventy-five percent supermajority of claimants whose claims are to be addressed by the trust vote in favor of the plan. § 524(g)(2)(B)(ii)(IV)(bb).

¹⁴³ See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 83 (2d Cir. 2006) (approving fair and reasonable review of distribution plan in aggregate, even though plan excluded some claimants).

¹⁴⁴ *Id.* at 82; see also SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997) (“Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal.”).

¹⁴⁵ Indeed, a 2007 study criticized the SEC because it had “no mechanism for designating a case as critically important.” MINORITY STAFF OF S. COMM. ON FIN. AND S. COMM. ON THE JUDICIARY, 110TH CONG., THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT 7 (Comm. Print 2007), available at <http://purl.access.gpo.gov/GPO/LPS86499>; see also Black, *supra* note 14, at 342 (“[T]he SEC provides little elaboration as to the implementation of its mission and goals.”).

registry or court-appointed receiver are made “as the Commission . . . shall deem appropriate.”¹⁴⁶

SEC Fair Fund distributions do observe some procedures that parallel private litigation. For example, the SEC will accommodate divergent investors’ interests in a Fair Fund by affording time for notice and comment on a proposed distribution plan, not unlike the notice that may accompany a private class action settlement.¹⁴⁷ Moreover, the SEC also requires, like Rule 23(e) of the Federal Rules of Civil Procedure,¹⁴⁸ that any distribution plan be reviewed by a hearing officer for fairness.¹⁴⁹ Finally, the SEC can ensure that potential victims obtain the full benefits of private litigation by depositing funds directly into a court registry or by consensual withdrawal of an action, the latter of which occurred in the case of Bernard Madoff, where the SEC recently consented to a distribution overseen by a single trustee in bankruptcy.¹⁵⁰

Nonetheless, the failure to offer procedures to encourage victim participation, procedural regularity, and judicial review is problematic, particularly when the SEC chooses to distribute awards in ways that differ from distribution schemes used in private litigation. Typically, securities class actions and Fair Funds distribute awards in a very similar manner: on a pro-rated basis, based on the degree of harm suffered by those entitled to sue in private litigation.¹⁵¹ The amount of an investor’s claim is divided by the total amount of claims and then multiplied by available funds in the settlement.¹⁵² However, this will not always be the case. When the SEC established a Fair Fund for

¹⁴⁶ 17 C.F.R. § 201.1102(a) (2010). The only guidance that the SEC provides for Treasury disbursements is that the Commission may pay fines and disgorgement directly to the Treasury when the costs of administering a plan, in light of the number of potential claimants and the value of the award, would not justify the distribution. 17 C.F.R. § 201.1102(b).

¹⁴⁷ Compare 17 C.F.R. § 201.1103 (providing that such notice shall be published in *SEC Docket*, website, and “other publications” as required by Commission), with FED. R. CIV. P. 23(c)(2) (requiring notice in class actions).

¹⁴⁸ See FED. R. CIV. P. 23(e) (requiring judicial review of class settlements to ensure they are “fair, reasonable, and adequate”).

¹⁴⁹ 17 C.F.R. § 201.1104 (providing for order that approves, approves with modifications, or disapproves plan of disgorgement within thirty days after expiration of notice-and-comment period).

¹⁵⁰ See 17 C.F.R. § 201.1102 (describing SEC discretion to provide payment to court registry or court-appointed receiver); *supra* note 9 and accompanying text (describing Irving Picard’s appointment as Bankruptcy Trustee).

¹⁵¹ SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 407 (S.D.N.Y. 2009) (“Usually, investor damages far exceed the settlement funds and distributions are made on a pro-rata basis, i.e., the amount of an investor’s claim divided by the total amount of claims multiplied by available funds.”).

¹⁵² *Id.*

investors of WorldCom after it had declared bankruptcy, for example, the agency failed to include large groups of unsecured creditors in the distribution.¹⁵³ By distributing WorldCom assets to investors, the Fair Fund arguably frustrated the remedies available to creditors in bankruptcy.¹⁵⁴ Putting aside whether the distribution was proper, few commentators have addressed how victims should participate in the formation of such a plan, how such settlements receive meaningful judicial review, and how the Commission should coordinate large settlements with other forms of relief.

b. Federal Trade Commission

Like the SEC, the FTC has sought restitution for victims only recently.¹⁵⁵ The FTC first sought to assert this authority in the 1970s by relying on its decades-old power to issue cease and desist orders in cases involving unfair or deceptive business practices, although this position was rejected in court.¹⁵⁶ In 1975, Congress specifically amended the Federal Trade Commission Act to allow the FTC to provide restitution for consumers in defined circumstances.¹⁵⁷ Beginning

¹⁵³ See *SEC v. WorldCom, Inc.*, No. 02-CV-4963, 2004 WL 1621185, at *1–2 (S.D.N.Y. July 20, 2004) (excluding creditors and observing that “[w]hen funds are limited hard choices must be made”); Don Carrillo, Comment, *Disgorgement Plans Under the Fair Funds Provision of the Sarbanes-Oxley Act of 2002: Are Creditors and Investors Truly Being Protected?*, 6 DEPAUL BUS. & COM. L.J. 315, 342–43 (2008) (describing some parties excluded from Fair Fund).

¹⁵⁴ Compare Zack Christensen, *The Fair Funds for Investors Provision of Sarbanes-Oxley: Is It Unfair to the Creditors of a Bankrupt Debtor?*, 2005 U. ILL. L. REV. 339, 375 (2005) (arguing that Congress should amend Fair Fund provision to prevent it from “alter[ing] the well-established distributional priorities of the Bankruptcy Code”), with Douglas A. Henry, Comment, *Subordinating Subordination: WorldCom and the Effect of Sarbanes-Oxley’s Fair Funds Provision on Distributions in Bankruptcy*, 21 EMORY BANKR. DEV. J. 259, 262–63 (2004) (arguing that Fair Fund provision should be applied in bankruptcy).

¹⁵⁵ The FTC enforces the Federal Trade Commission Act (FTCA), which prohibits, among other things, “unfair methods of competition.” 15 U.S.C. § 45 (2006). “[U]nfair” practices are defined as those that “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.*; see *id.* § 45(n) (defining unfair practices in negative).

¹⁵⁶ See Ward, *supra* note 15, at 1141–42, for a brief history of the FTC’s restitutionary power.

¹⁵⁷ Federal Trade Commission Improvement Act, Pub. L. No. 93-632, 88 Stat. 2183, 2201–02 (1975) (codified as amended at 15 U.S.C. § 57b (2006)); see also Ward, *supra* note 15, at 1142 (describing 1970s changes to FTCA). Although section 19 of the FTCA now authorizes the FTC to seek “such relief as the court finds necessary to redress injury,” 15 U.S.C. § 57b(b) (2006), the FTC has used this power to win awards for consumers sparingly. The FTC typically relies on section 13(b) to pursue actions for restitution and disgorgement. See Stephen Calkins, *Corporate Compliance and the Antitrust Agencies’ Bimodal Penalties*, LAW & CONTEMP. PROBS., Summer 1997, at 127, 134–35 n.32 (describing FTC’s traditional reliance on section 13(b)).

in the 1980s, courts authorized the FTC to seek “any ancillary equitable relief” as an extension of the agency’s broad authority to enjoin unfair trade practice under section 13(b) of the FTCA.¹⁵⁸ Those equitable powers form the basis for awarding restitution, disgorgement, and other forms of “consumer redress.”¹⁵⁹ Since the 1990s, the FTC has also sought disgorgement and restitution for violation of the Clayton Act.¹⁶⁰

Since the early 1970s, the cumulative amount of FTC-based compensation to victims has increased tremendously. The FTC views its mission as one of aggressive monitoring and compensation-seeking on behalf of consumers, observing that its “enforcement efforts aim to identify violators quickly in order to limit consumer harm, to obtain compensation for injured consumers, and to modify orders when necessary to provide additional protection for consumers.”¹⁶¹ The FTC’s 2009 annual report goes on to say that “[f]rom March 2008 through February 2009, the FTC filed 64 actions in federal district court and obtained 83 judgments and orders requiring defendants to pay more than \$371.2 million in consumer redress or disgorgement of ill-gotten gains.”¹⁶² Moreover, the report touts recent multimillion dollar recoveries for victims of cold-remedy marketing scams, subprime home mortgage lenders, and telemarketing schemes.¹⁶³

¹⁵⁸ See, e.g., *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (“We hold that in a proceeding under section 13(b), the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers.”); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997) (relying on *Amy Travel Services* to hold same). Some commentators complain that such decisions allow the FTC to bypass consumer redress requirements that Congress imposed under section 19. See, e.g., Ward, *supra* note 15, at 1143 (“[T]he FTC has ignored section 19’s statute of limitations and proof of intent restrictions instead seeking injunctions and restitutionary relief under the broad equitable powers inappropriately found by the courts in section 13(b).”).

¹⁵⁹ See *Febre*, 128 F.3d at 534 (“The power to grant ancillary relief includes the power to order repayment of money for consumer redress as restitution or recession.”); *id.* at 531 (affirming award of \$16 million in consumer redress); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 467 (11th Cir. 1996) (ordering \$487,500 in disgorgement to consumers, or, if impractical, to U.S. Treasury).

¹⁶⁰ See, e.g., Final Order and Stipulated Permanent Injunction at 1–2, 23, *FTC v. The Hearst Trust*, No. 1:01CV00734 (D.D.C. Nov. 20, 2001) (decreeing defendants place \$19 million in escrow to settle FTC’s allegations of FTCA and Clayton Act violations), *available at* <http://www.ftc.gov/os/2001/11/hearstorder.pdf>. Federal antitrust laws prohibit violations of section 7 of the Clayton Act, which includes unlawful monopolies and mergers. 15 U.S.C. § 18 (2006). See generally LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 548–73 (2d ed. 2006), for an overview of mergers and government responses, including the Clayton Act.

¹⁶¹ FTC, *THE FTC IN 2009*, at 54 (2009), *available at* <http://www.ftc.gov/os/2009/03/2009ftcrptpv.pdf>.

¹⁶² *Id.* at 45.

¹⁶³ *Id.* at 46, 49–51.

Notwithstanding the growth and frequency of FTC actions that provide relief to consumers, the FTC still does not possess many procedures for compensating victims. The FTC lacks safeguards to ensure that different consumer interests are adequately represented in the formation of a distribution plan. The FTC offers no right to intervene in cases or to contest or object to distributions. Moreover, there are no guarantees that diverse parties' needs will be adequately met by counsel, class representatives, or other interested parties. FTC rules provide no guidelines for how or when the FTC should release escrowed funds or deposit funds with the registry of a court overseeing a private class action. Finally, judicial review of FTC disgorgement or restitution plans is very limited, as it is for SEC plans.

Like the SEC, the FTC has some procedures that parallel private litigation. In some cases, a court will review an FTC distribution plan for fairness.¹⁶⁴ In antitrust cases, the FTC has developed additional criteria for determining when to commence actions for restitution, giving particular weight to the presence of parallel class litigation.¹⁶⁵ The FTC can deposit funds in an escrow account or a court-based registry, both of which can then be used to pay plaintiffs who bring parallel class actions.¹⁶⁶

In response to the FTC's request for comments on disgorgement procedures, the American Bar Association and other organizations criticized the FTC for providing awards that duplicate or distort remedies available in private litigation.¹⁶⁷ For example, several years ago,

¹⁶⁴ However, courts tend to review such plans deferentially, as in the review of consent decrees. *See, e.g.*, Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, *FTC v. Rite Aid Corp.*, No. 1:09-CV-0133 (M.D. Pa. July 20, 2009), available at <http://www.ftc.gov/os/caselist/0723236/090713riteaidstipfinalord.pdf> (order granting stipulated judgment).

¹⁶⁵ In 2001, the FTC published a request for public comment on a series of specific questions relating to the use of restitution and disgorgement in cases involving alleged antitrust violations. Remedial Use of Disgorgement, 66 Fed. Reg. 67,254 (Dec. 28, 2001). In 2003, the FTC adopted a final policy statement establishing conditions that would have to be met in order for the FTC to seek restitution and disgorgement in competition law cases. Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003). One of the considerations was whether and when private actions would be insufficient: "[S]ituations can arise, for example, when significant aggregate consumer injury results from relatively small individual injuries not justifying the cost of a private lawsuit, or when direct purchasers do not sue." *Id.* at 45,822. However, no regulations exist for consumer redress actions, which constitute a far larger portion of FTC restitutionary actions.

¹⁶⁶ *See* Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,823 (Aug. 4, 2003) (discussing methods to avoid duplicative payments with private class actions).

¹⁶⁷ *E.g.*, Letter from Roxane C. Busey, Chair, Am. Bar Ass'n Section of Antitrust Law, to Donald S. Clark, Sec., FTC (Mar. 11, 2002) [hereinafter Busey Letter], available at <http://www.ftc.gov/os/comments/disgorgement/aba.pdf> (arguing that disgorgement not only is

the FTC collected \$19 million for consumers shortly before a private class action settled with the same defendant for \$26 million, for the same alleged harm.¹⁶⁸ Because the award duplicated the remedy made available in private litigation, the reviewing court offset the entire FTC award, but only after the FTC had committed substantial public resources to the litigation.¹⁶⁹ In another case, the FTC was criticized for distributing proceeds to consumers who were indirectly affected by antitrust violations.¹⁷⁰ Ordinarily, plaintiffs who purchase goods indirectly from an antitrust violator cannot recover damages under federal law.¹⁷¹ Critics complained that the FTC distribution distorted antitrust law by enlarging the class of victims who could obtain relief.¹⁷² As set forth in Part III, the FTC may have authority to supplement, and in some cases, provide relief that does not perfectly mirror private litigation. However, as with the SEC, there should be clear rules for when and how the FTC may do so.

c. Food and Drug Administration

The FDA recently has sought restitution and disgorgement against businesses that violate the marketing and branding requirements of the Food, Drug, and Cosmetic Act (FDCA).¹⁷³ However, unlike the FTC or SEC, the FDA has, each time, distributed funds to

often unnecessary because of private rights of action, but also discourages those private suits); Letter from Steven A. Stack, Jr., et al. to the FTC (Mar. 26, 2002) [hereinafter Stack Letter], available at <http://www.ftc.gov/os/comments/disgorgement/stackstephena.pdf> (urging FTC to seek disgorgement only for clear violations and if all other remedies have been exhausted).

¹⁶⁸ See *In re* First Databank Antitrust Litig., 209 F. Supp. 2d 96, 97–98 & 98 n.3 (D.D.C. 2002) (describing class action that tracked FTC disgorgement and won only a few additional million dollars); Final Order and Stipulated Permanent Injunction at 23, *FTC v. The Hearst Trust*, No. 1:01CV00734, (D.D.C. Nov. 20, 2001), available at <http://www.ftc.gov/os/2001/11/hearstorder.pdf>.

¹⁶⁹ See Stack Letter, *supra* note 167, at 9 (arguing such approach wasted resources); *cf.* Press Release, FTC, FTC Charges Hearst Trust with Acquiring Monopoly in Vital Drug Information Market (Apr. 4, 2001), available at <http://www.ftc.gov/opa/2001/04/hearst.shtm> (quoting dissenting Commissioners Swindle and Leary, who assert that disgorgement would be duplicative of private remedies).

¹⁷⁰ *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (holding FTC may recover same relief on behalf of consumers), *reconsidered on other grounds*, 99 F. Supp. 2d 1 (D.D.C. 1999); *cf.*, e.g., Busey Letter, *supra* note 167, at 6 (“We do not believe that the extent of the harm to . . . indirect purchasers who may be unable to pursue a claim should be considered by the Commission.”); Press Release, FTC, FTC Reaches Record Financial Settlement To Settle Charges of Price-Fixing in Generic Drug Market (Nov. 29, 2000), available at <http://www.ftc.gov/opa/2000/11/mylanfin.shtm> (quoting Commissioner Leary’s dissent and calling monetary relief “backdoor approach” around *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

¹⁷¹ See *Illinois Brick*, 431 U.S. at 745–47 (limiting antitrust liability to direct purchasers).

¹⁷² See *supra* note 170.

¹⁷³ 21 U.S.C. §§ 301–399 (2006).

the U.S. Treasury arguing that the overall funds are too small to distribute to private parties—even though such awards, in the past, dramatically exceeded FTC distributions.¹⁷⁴ Accordingly, the main problem with the FDA is *not* that it lacks procedures for distributing awards to victims; rather, it is that the FDA lacks standards to determine whether such recoveries should be deposited with the U.S. Treasury in the first place.

Under section 332(a) of the FDCA, the FDA has power to “restrain” businesses that sell misbranded or adulterated drugs.¹⁷⁵ However, like other agencies, the FDA rarely sought restitution or other forms of monetary relief until very recently. Between 1942—the year *Porter* was decided—and the early 1990s, courts reviewed the FDA’s attempts at restitution only once.¹⁷⁶ Since 1999, however, the FDA has aggressively pursued restitution and disgorgement against businesses that misbrand drugs, sell drugs without authorization, or violate good manufacturing practice requirements. Between 1999 and 2003, the FDA recovered over three-quarters of a billion dollars from pharmaceutical companies for violations of good marketing practices.¹⁷⁷ The FDA’s Deputy Chief Counsel for Litigation has stated

¹⁷⁴ See *infra* notes 177–88 and accompanying text.

¹⁷⁵ 21 U.S.C. § 331 (2006) (prohibiting commerce in adulterated or misbranded drugs); § 332(a) (giving district courts jurisdiction to “restrain” § 331 violations).

¹⁷⁶ And it was rejected. *United States v. Parkinson*, 240 F.2d 918, 919–20 (9th Cir. 1956) (distinguishing FDCA from statute in *Porter* and denying restitution). Notably, some commentators reach the same conclusion as the *Parkinson* Court and argue that *Porter* and *Mitchell* do not, or should not, authorize courts to order restitution or disgorgement under the FDCA. See, e.g., Jeffrey N. Gibbs & John R. Fleder, *Can FDA Seek Restitution or Disgorgement?*, 58 FOOD & DRUG L.J. 129, 138–47 (2003) (using legislative history and statutory construction to distinguish FDCA from statutes in *Porter* and *Mitchell*); Erika King & Elizabeth M. Walsh, *The Authority of a Court To Order Disgorgement for Violations of the Current Good Manufacturing Practices Requirement of the Federal Food, Drug, and Cosmetic Act*, 58 FOOD & DRUG L.J. 149 (2003) (arguing FDA does not have statutory authority, nor do courts have inherent equitable power under *Porter* and *Mitchell*, to seek disgorgement under FDCA); cf. William W. Vodra & Arthur N. Levine, *Anchors Away: The Food and Drug Administration’s Use of Disgorgement Abandons Legal Moorings*, 59 FOOD & DRUG L.J. 1 (2004) (arguing FDA is misapplying doctrines of disgorgement). The central claim of these authors is that awarding restitution under the FDCA improperly expands the remedies available under the statute. The FDA’s ability “to restrain violations,” under 21 U.S.C. § 332(a), so the argument goes, contemplates only forward-looking remedies and excludes restitution. To date, no court has adopted this line of argument. See, e.g., *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 762 (6th Cir. 1999) (“[W]e hold that nothing in the FDCA precludes a court sitting in equity from ordering restitution in appropriate cases.”), *cert. denied*, 530 U.S. 1274 (1999); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005) (applying *Porter* and finding that § 332(a) gives district courts power to order restitution).

¹⁷⁷ Between 1999 and 2003, there were several major consent decrees. In 1999, Abbott Laboratories agreed to pay \$100 million to the government as part of a consent decree. Consent Decree of Permanent Injunction, at 9, *United States v. Abbott Labs.*, No. 99C 7135, 1999 U.S. Dist. LEXIS 18897, at *9 (N.D. Ill. Nov. 2, 1999), available at <http://>

that the agency will continue to pursue restitution and disgorgement.¹⁷⁸

However, unlike the SEC and the FTC, the FDA does not reimburse victims with funds obtained in disgorgement or restitution. The FDA acknowledges the well-accepted principle that restitution is designed to restore victims to the position they were in before they were harmed. However, in cases where the FDA has sought restitution, it has claimed that distributing funds was not practical or economically feasible in light of the total value of its awards and the number of consumers hurt.¹⁷⁹ The FDA—like the SEC of the 1970s—appears to be using disgorgement and restitution to sanction regulatory violators, instead of to reimburse victims.

Indeed, few procedural safeguards constrain the FDA's decision to deposit funds with the U.S. Treasury instead of with victims. FDA decisions to distribute funds to the Treasury have received very little judicial scrutiny. This is because court-entered awards are typically based on consent decrees—agreements that are negotiated by the parties behind closed doors.¹⁸⁰ Victims have no formal mechanism to challenge the ultimate distribution of the award to the Treasury. And

www.fda.gov/downloads/MedicalDevices/ResourcesforYou/Industry/ucm111119.pdf. In October 2000, Wyeth-Ayerst agreed to pay \$30 million in disgorgement as part of the remedial measures implemented under a consent decree. Consent Decree of Condemnation and Permanent Injunction, *United States v. Various Articles of Drug*, No. 3:00-CV-359 (E.D. Tenn. Oct. 3, 2000), *reprinted in* American Home Products Corp., Quarterly Report (Form 10-Q) (Nov. 14, 2000), *available at* <http://sec.gov/Archives/edgar/data/5187/000000518700000015/0000005187-00-000015-0007.txt>. Finally, Schering-Plough paid \$500 million for equitable disgorgement as part of a consent decree. Consent Decree of Permanent Injunction, *United States v. Schering-Plough Corp.*, No. C-02-2397, at 23–24 (D.N.J. May 20, 2002), *available at* <http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/UCM095945.pdf>. All of those funds went to the U.S. Treasury. *See* Vodra & Levine, *supra* note 176, at 5–6 (contrasting FDA's policy of disgorging to U.S. Treasury with other agencies' policies).

¹⁷⁸ Eric M. Blumberg, *Abbott Laboratories Consent Decree and Individual Responsibility Under the Federal Food, Drug, and Cosmetic Act*, 55 *FOOD & DRUG L.J.* 145, 147 (2000) (“When facts of particular cases show that disgorgement or restitution is appropriate, FDA will seek those remedies in settlements and, failing settlement, from the courts.”); *cf.* Eric M. Blumberg, *Universal Management, Abbott, Wyeth, Schering-Plough, and . . . : Restitution and Disgorgement Find Another Home at the Food and Drug Administration*, 58 *FOOD & DRUG L.J.* 169, 189 (2003) [hereinafter Blumberg, *Universal*] (arguing that disgorgement is necessary to deter manufacturers).

¹⁷⁹ *See* Blumberg, *Universal*, *supra* note 178, at 179 (“It was not practicable to identify the [millions of] aggrieved consumers and directly make them whole.”); Vodra & Levine, *supra* note 176, at 5–6 (noting that FDA places disgorged funds in Treasury and arguing that distribution of funds is not practicable or economically feasible).

¹⁸⁰ *See* Vodra & Levine, *supra* note 176, at 7–9 (discussing how FDA has avoided judicial scrutiny of disgorgement policy by securing disgorgement in decrees); *see also* cases described *supra* note 177.

to date, courts have not invited victims to participate before such awards are distributed to the government.

For example, in 2003, the FDA obtained \$500 million from Schering-Plough in victim restitution.¹⁸¹ The settlement was the outgrowth of complaints arising out of allegedly defective inhalers. Schering-Plough had experienced chronic problems in the manufacture of its albuterol inhaler products, which are used by patients with asthma.¹⁸² In March 2000, the company recalled 60 million inhaler canisters because some did not contain the active ingredient.¹⁸³ In March 2001, Public Citizen's Health Research Group petitioned the FDA to investigate Schering-Plough for this major failure.¹⁸⁴ According to the Public Citizen Health Research Group, seventeen deaths were attributable to the defective inhalers.¹⁸⁵

Defense attorneys involved in the settlement complained about the substantial bargaining power of the FDA because the agency could extract large settlements under threat of additional fines or product recall.¹⁸⁶ Later the FDA announced its intention to return the proceeds to the U.S. Treasury. The court accepted the FDA's plan without affording victims an opportunity to intervene, issuing a written decision based on the FDA's statement that a distribution to victims was impractical.¹⁸⁷ Commentators criticized the decision to distribute funds to the U.S. Treasury, in part noting that the FTC and SEC regularly distribute settlement proceeds that are far less than \$500 million.¹⁸⁸

B. Problems with Administrative Settlements

To varying degrees, the SEC, FTC, and FDA increasingly seek remedies that serve many of the same goals as class action settle-

¹⁸¹ Consent Decree of Permanent Injunction at 23–24, *United States v. Schering-Plough Corp.*, No. C-02-2397 (D.N.J. May 20, 2002), available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/UCM095945.pdf>; King & Walsh, *supra* note 176, at 149 (describing settlement as “record-breaking”).

¹⁸² *Schering-Plough GMP Consent Decree Puts Drug Industry on Notice*, THE FOOD & DRUG LETTER, June 7, 2002, at 4, available at 2002 WLNR 13995661.

¹⁸³ Melody Petersen, *Drug Maker To Pay \$500 Million Fine for Factory Lapses*, N.Y. TIMES, May 18, 2002, at A1; Melody Petersen, *Faults Found at Schering Plant*, N.Y. TIMES, Mar. 2, 2001, at C3 [hereinafter Petersen, *Faults Found*].

¹⁸⁴ Petersen, *Faults Found*, *supra* note 183.

¹⁸⁵ Melody Petersen, *Group Faults Drug Inhalers in 10 Deaths*, N.Y. TIMES, Aug. 10, 2001, at C1.

¹⁸⁶ See King & Walsh, *supra* note 176, at 168 (describing FDA's “negotiating leverage” in discussions of consent decrees); *id.* at 160 (expressing concern with FDA's “refusal to approve pipeline products during consent decree negotiations”).

¹⁸⁷ *Cf.* Vodra & Levine, *supra* note 176, at 5–6 (noting that FDA says disgorgement to victims is impractical).

¹⁸⁸ See, e.g., *id.* at 5–6.

ments. The agencies hold wrongdoers to account, seeking remedies that are, at least theoretically, designed to compensate victims collectively, efficiently, and commensurately with their losses by exploiting economies of scale. Agencies use settlements to achieve distributive justice among many people, hoping to distribute money or goods equally, efficiently, and affordably among eligible recipients. In addition, agency settlements force wrongdoers to restore losses in a public forum. In so doing, the SEC, FTC, and FDA settlements distribute justice much like class action settlements.

Given that class actions and administrative compensation schemes serve many of the same compensatory goals, this section first examines whether administrative compensation should exist at all. After all, because many class actions often follow on the “coattails” of an administrative enforcement action,¹⁸⁹ it is worth asking whether an administrative agency need ever bother with a large restitution fund. As set forth below, administrative agencies should pursue collective compensation only in limited cases, in light of the costs they impose on both the civil justice and regulatory system.

Because this section ultimately concludes that administrative agencies can play a useful role in compensating some victim groups, it then examines the kinds of safeguards needed to assure fair compensation. Class action settlements have long demanded procedural protections that do not exist in other areas of law. This is because, as discussed in Part I, class actions suffer from a principal-agent problem. Just as managers of a large corporation may not always serve the interests of their corporate shareholders, the same misalignment of incentives may exist between lawyers and plaintiffs to a large, class-wide settlement.¹⁹⁰ Rules thus exist to align the interests of lawyer-managers with victims. Principal-agent problems also affect public administrative officials who are charged with representing victims’ interests.¹⁹¹ As discussed below, these problems are compounded by the lack of three types of procedural safeguards found in class actions that (1) ensure that victims have a meaningful right to participate in their own redress, (2) ensure that judges police potential conflicts of interest, and (3) coordinate relief with other lawsuits.

¹⁸⁹ Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2–4 (2000) (describing increasing number of private class actions that follow administrative suits).

¹⁹⁰ See Coffee, *supra* note 49, at 726 (explaining that goal of class action reform should be to reduce agency costs between class counsel and its members); Macey & Miller, *The Plaintiffs’ Attorney’s Role*, *supra* note 49, at 4, 7–8 (same).

¹⁹¹ See *infra* notes 251–65 and accompanying text for a discussion of judicial scrutiny of principal-agent problems in an SEC settlement with Bank of America.

1. *Should Agencies Ever Distribute Justice?*

To determine when regulatory agencies should distribute justice, one must first determine whether they should ever demand compensation for large classes of victims. Seeking and managing large funds imposes enormous administrative and opportunity costs on agencies. Certainly, agency settlements offer advantages because they do not require plaintiffs to pay lawyers to obtain compensation. But government agencies have long acknowledged that they have limited resources and, in some cases, must rely on private parties to enforce and compensate for violations of public law.¹⁹² Agencies may require private counsel to distribute awards, bring additional enforcement efforts to collect them, and bear significant opportunity costs.¹⁹³ Efforts spent distributing awards divert resources needed to develop regulations, prevent other violations, or commence other enforcement actions. It is unsurprising that the SEC, which has aggressively pursued large administrative settlements over the past ten years, has long maintained that agency-based settlements cannot replace private class actions.¹⁹⁴

Alternatively, agencies wield enormous power when they forge massive settlements. Just as some commentators attacked class actions as “legalized blackmail,”¹⁹⁵ some have criticized the overpowering

¹⁹² Cf. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-830, SECURITIES AND EXCHANGE COMMISSION: ADDITIONAL ACTIONS NEEDED TO ENSURE PLANNED IMPROVEMENTS ADDRESS LIMITATIONS IN ENFORCEMENT DIVISION OPERATIONS 23 (2007) [hereinafter GAO, SEC: ADDITIONAL ACTIONS], available at <http://www.gao.gov/new.items/d07830.pdf> (noting that Fair Fund program was too decentralized and not yet staffed); Erichson, *supra* note 189, at 17 (discussing increased agency reliance on private lawyers).

¹⁹³ See GAO, SEC: ADDITIONAL ACTIONS, *supra* note 192, at 25–28 (describing contributions of SEC attorneys, plan administrators, broker-dealers, and outside consultants in Fair Fund distribution).

¹⁹⁴ See *Securities Litigation Abuses: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., and Urban Affairs*, 105th Cong. 45 (1997) (statement of Arthur Levitt, Chairman, SEC), available at http://banking.senate.gov/97_07hr/072497/witness/levitt.htm (“The Commission has long maintained that private actions provide valuable and necessary additional deterrence . . . thereby supplementing the Commission’s own enforcement efforts.”); SECTION 308(C) REPORT, *supra* note 23, at 19–20 (“Thus, while the Fair Fund may facilitate investor compensation in some cases, in other cases private litigation remains the best mechanism for investor recovery of losses.”). But see Amanda M. Rose, *Reforming Securities Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1304 (2008) (arguing that private class actions do not serve compensatory function and may overdeter).

¹⁹⁵ Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971); see also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (“Judge Friendly . . . called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’” (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))).

leverage agencies hold in negotiations involving a regulatory enforcement action.¹⁹⁶ Of course, one also could argue the opposite—that agency restitution agreements let corporations off the hook too easily. Recent agency settlements, such as the SEC’s \$550 million settlement with Goldman Sachs on behalf of investors, may pale in comparison to the total harm caused.¹⁹⁷ Indeed, as set forth in Part II.B.4, there are some cases where corporations arguably receive lighter penalties when agency regulators can tout the benefits of a large victim settlement. Given that some restitution funds require claimants to give up rights to recover money in private litigation, a targeted corporation may end up saving money by agreeing to an agency-based settlement.

Nor is it clear that victims will receive more opportunities to participate in an agreement forged by an agency. Agency settlements can be improved to ensure victims submit written statements, consult with agency representatives, and raise formal objections in federal court. But claimants already enjoy all of those rights in a class action settlement.¹⁹⁸ In addition, there are no guarantees that an agency will provide a more equitable distribution than a class action settlement. Victims do not necessarily benefit just because their claims are managed by public, rather than private, attorneys.

In light of these costs, the comparative benefits of a large agency restitution fund seem small, particularly when private parties already have resolved their claims in a class action settlement. Some argue that class actions could be improved by competition, and have called for competing alternative civil class actions—where attorneys organize separate class actions to attract claimants unsatisfied with another, already approved, class settlement.¹⁹⁹ Agency settlements could conceivably play a similar, competition-fostering role. However, the limited benefits of competition are likely to be outweighed by the additional costs of the duplicative, large-scale litigation.²⁰⁰

¹⁹⁶ See *supra* note 186 and accompanying text (discussing leverage disparity in FDA negotiations).

¹⁹⁷ At the time of this writing, Goldman Sachs has agreed to a record \$550 million settlement with the Securities and Exchange Commission, part of which will compensate injured investors. Press Release, SEC, Goldman Sachs To Pay Record \$550 Million To Settle SEC Charges Related to Subprime Mortgage Fraud (July 15, 2010), available at <http://sec.gov/news/press/2010/2010-123.htm>.

¹⁹⁸ See *supra* Part I.B (describing class action settlement procedures).

¹⁹⁹ See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 436–37 (2000) (arguing that competing alternative could yield more efficient outcome).

²⁰⁰ See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 520 (1996) (arguing that parallel class actions will require two sets of discovery requests, witness appearances, and factual records); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462–63 (2000) (detailing problems of waste in dueling class actions).

Large agency restitution funds offer some other advantages, however. They may, for example, be warranted when there are legal or practical obstacles to a class action. When many different state laws apply to a business that commits nationwide fraud, attorneys may not be able to get a class action certified.²⁰¹ As discussed in Part I, courts may also deny certification when putative class members, their class representatives, or their class counsel have insuperable conflicts of interest.²⁰² In contrast, a federal agency may be able to provide compensation to many different people under an otherwise single federal action.²⁰³

Federal agency settlements also offer advantages in cases where there are practical obstacles to civil litigation: for instance, where victims fear retaliation or reprisal. Tenants, like those in *Porter*, may fear a lawsuit that jeopardizes their ability to stay in their homes. Employees of a company may avoid lawsuits under wage and hour laws out of a fear of losing their jobs.²⁰⁴ Undocumented aliens shy away from litigation out of a fear of deportation.²⁰⁵ In such cases,

²⁰¹ See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (stating that claims are not manageable if they are to be adjudicated under laws of fifty states and multiple territories); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (reversing class action certification because of differences in state law).

²⁰² See *supra* note 68 and accompanying text.

²⁰³ Such a determination may raise federalism concerns that are beyond the scope of this paper. For almost 20 years, class action scholars have debated the merits of a single federal law to permit parties to bring class action claims. See AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.01 cmt. a (1994) (explaining desirability of applying law of single state to particular issue that is common to all claims); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 548–49 (1996) (finding consensus among experts that choice-of-law practices should be replaced by single law approach for complex litigation); Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 859 (1994) (same). It is worth considering whether competing concerns of efficient restitution may, in some cases, override such federalism concerns.

²⁰⁴ See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”); Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1328 (2008) (“Even if the notice says, as it should, that retaliation is prohibited by the FLSA, businesses do not always follow the law.”).

²⁰⁵ See, e.g., Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in an Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1612 (2010) (“Unauthorized peoples are more vulnerable to threats because they know that efforts to seek legal recourse can result in protracted immigration detention, criminal prosecution, and, of course, removal.”); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid To Call the Police*, 91 IOWA L. REV. 1449, 1453–54 (2006) (describing how fear of deportation keeps unauthorized aliens from reporting abuse or seeking recourse through government challenge).

regulatory agencies may find that actions to collectively compensate victims are still warranted.

It follows that agencies may seek settlement outcomes that complement, rather than compete with, private litigation.²⁰⁶ Part III argues that agencies should consider large restitution funds when there are legal or practical obstacles to a civil lawsuit.

2. *Agencies Lack Coordination*

Even when class actions are warranted, agency settlement funds lack rules to coordinate effectively with civil actions involving the same defendants and plaintiff-victims. Private litigation affords procedures to coordinate and preclude duplicative litigation. The JPML coordinates pretrial proceedings in different judicial districts.²⁰⁷ Class action settlements also bar eligible recipients from participating in future related actions.²⁰⁸

Agencies lack standards to identify when they should create large settlement funds. The SEC and FTC have vague guidance to account for the presence of private litigation when deciding to take action.²⁰⁹ The FDA has not published regulations describing its policies for restitution or disgorgement, much less how it accounts for private litigation involving the same misconduct.²¹⁰ Finally, the JPML expressly does not apply to certain SEC and FTC actions; and courts lack criteria for evaluating the preclusive effect, if any, of a large agency settlement.²¹¹ Uncoordinated agency settlements waste agency and

²⁰⁶ Professor Verity Winship also argues that agency settlements should complement, but not replace, private litigation. *See* Winship, *supra* note 14, at 1134. In an insightful article devoted to SEC Fair Funds, Professor Winship proposes that the SEC prioritize Fair Funds when, among other things, defrauded investors have no private legal remedy. *Id.* at 1141. This is a perfectly sound rule for securities fraud, where federal law controls. However, other agencies, like the FTC or FDA, may prioritize cases where plaintiffs with otherwise valid state law tort or contract claims cannot certify a class action because of differences in state law. *Cf.* Ramirez v. Dollar Phone Corp., 668 F. Supp. 2d 448, 450 (E.D.N.Y. 2009) (rejecting class action lawsuit because of superiority of FTC action in light of applicability of fifty different state laws). I introduce the concepts of claim “marketability” and “variability,” set forth in Part III.A.1, *infra*, to explore when agencies should step in to provide collective relief that class actions cannot.

²⁰⁷ 28 U.S.C. § 1407(a) (2006) (authorizing Judicial Panel on Multidistrict Litigation to transfer pending lawsuits involving “common questions of fact” to single district court for consolidated proceedings); *see also supra* note 65 and accompanying text (describing Judicial Panel on Multidistrict Litigation procedures).

²⁰⁸ *See supra* note 66 and accompanying text.

²⁰⁹ *See supra* Part II.A.2(a), (b).

²¹⁰ *See supra* Part II.A.2(c) (remarking on FDA’s lack of procedural safeguards in restitution).

²¹¹ FTC antitrust actions are exempted from the Judicial Panel on Multidistrict Litigation. 28 U.S.C. § 1407(g) (2006). SEC actions are too. However, the SEC can consent to multidistrict consolidation. 15 U.S.C. § 78u(g) (2006).

judicial resources, may overcompensate victims, and frustrate the goals of finality and peace ordinarily sought in class action settlements and other forms of representative litigation.

One could argue that agency settlements need not coordinate with other forms of private compensation because the awards simply serve a different function. After all, agency settlement awards are incidental to agencies' primary purpose—to sanction people when they violate the law.²¹² In addition, settlements are nonexclusive; if people do not like an agency distribution plan, they can still, at least theoretically, pursue private litigation. Finally, the distribution is completely discretionary. The agency can decide, by statute or otherwise, to pursue or forgo any action for restitution or disgorgement.²¹³ Because equitable relief serves a different function than damages, as the Supreme Court held long ago in *Porter v. Warner Holding Co.*,²¹⁴ there may simply be no need to coordinate with other forms of relief.

However, agency settlements represent more than just another administrative form of relief. When agencies settle with defendants, their settlements threaten to crowd out private litigation. Agency settlements may exhaust the limited funds of a defendant, they may require that the claimants waive rights to private litigation in exchange for the distribution,²¹⁵ or they may foreclose private class

²¹² See, e.g., *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 83 (2d Cir. 2006) (noting deterrence has always been the SEC's purpose in seeking disgorgement); cf. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (“[U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.”); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–98 (1946) (“[T]he Administrator invoke[s] the jurisdiction of the District Court to enjoin acts and practices made illegal by the [Emergency Price Control Act of 1942] and to enforce compliance with the Act. . . . [S]ince the public interest is involved in a proceeding of this nature, [the District Court’s] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.”).

²¹³ See, e.g., 15 U.S.C. § 7246(a) (2006) (“[C]ivil penalty shall, on the motion or at the direction of the [SEC], be added to and become part of the disgorgement fund”); *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (noting that court can reasonably require any individual who claims under its judgment to relinquish his right to bring separate private action); *SEC v. Fischbach Corp.*, 133 F.3d 170, 176 (2d Cir. 1997) (noting that proceeds of disgorgement funds need not be distributed to investors).

²¹⁴ 328 U.S. at 401–02 (stating that court granting damages under statutory provisions must act as court of law, rather than equity).

²¹⁵ See, e.g., *Gen. Tel. Co.*, 446 U.S. at 333 (observing, in massive EEOC settlements, that “[i]t also goes without saying that the courts can and should preclude double recovery by an individual”); *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971) (establishing escrow fund to prevent “double liability”).

action litigation.²¹⁶ Indeed, with respect to this third concern, some courts refuse to certify a class action when an agency acts to address the same harm, on the grounds that the agency action is ostensibly superior to a class settlement.²¹⁷ Given that agency settlement efforts are growing—the SEC alone recovered ten times the amount of money in the past six years than it did between 1985 and 1990²¹⁸—such awards are increasingly becoming a significant form of compensation for potential litigants.

Agencies need settlement guidelines that account for private litigation and settlement. Part III accordingly recommends changing multidistrict litigation rules to encourage agencies to coordinate overlapping settlements before a single federal judge.

3. *Agencies Lack Rules for Effective Participation*

Unlike class action settlements, agencies lack rules to ensure that victims have an adequate voice in the restitution process. Class action settlements have long observed rules that encourage participation, thereby allowing plaintiffs to hold defendants accountable and to do so efficiently and commensurately with individual losses.²¹⁹ Accordingly, class action settlements require that all class members receive individualized notice, offer opportunities to members to intervene or object, and divide members with different interests into subclasses that are each entitled to separate representation in settlement negotiations.²²⁰

²¹⁶ See, e.g., *Gardner v. First Am. Title Ins. Co.*, No. Civ. 00-2176, 2003 WL 221844, at *9 (D. Minn. Jan. 27, 2003) (“Where Congress has charged an administrative agency with global oversight and provided attorneys’ fees for individual enforcement, Plaintiffs must climb a steep hill to prove that a class action is superior to another method of adjudication.”); *Ford Motor Co. v. Magill*, 698 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 1997) (dismissing purported class action because National Highway Traffic Safety Administration “accorded present owners of the vehicles a remedy to secure a correction of the problem to their vehicle”).

²¹⁷ See, e.g., 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1779 (3d ed. 2005) (collecting cases); Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Actions*, 18 *GEO. J. LEGAL ETHICS* 1419, 1422–25 & n.25 (2005) (collecting cases).

²¹⁸ Compare *Stoneridge Inv. Partners v. Scientific Atl.*, 552 U.S. 148, 166 (2008) (observing that between September 2002 and 2008, SEC collected “over \$10 billion in disgorgement and penalties, much of it for distribution to injured investors”), with Flynn, *supra* note 126, at 107 (finding SEC recoveries between 1985 and 1990 totaled \$1 billion).

²¹⁹ See Hensler & Rowe, *supra* note 32, at 137 (noting that class actions promote deterrence, justice, and administrative efficiency); see also *supra* Part I.A. (discussing goals of class action settlements).

²²⁰ See *supra* Part I.B (describing procedural safeguards afforded by class actions).

Agencies do not observe any such rules. Aside from minimal opportunities for notice and comment, the SEC and the FTC deny parties any voice in the formation of a distribution plan. As discussed above, these two agencies and the FDA all generally limit parties' ability to intervene to challenge distributions.²²¹ No attempt is made to identify divergent interests in the award, much less encourage counsel to represent parties according to different subclasses.²²²

Take the highly touted multimillion dollar settlement between the SEC and the nation's largest investment banks.²²³ In April 2002, former New York Attorney General Eliot Spitzer announced a landmark settlement with the nation's ten largest investment banks, after revelations that banks improperly influenced their supposedly independent research analysts.²²⁴ The SEC followed suit in 2003, alleging that the investment banking groups at these institutions exerted "inappropriate influence over captive research analysts, compromising their objectivity and spawning conflicts of interest."²²⁵ The settlement resulted in a Fair Fund, and over \$400 million was set aside to pay injured investors.²²⁶

According to the federal district court that reviewed the settlement years later, the proposed Fair Fund failed to offer any framework for "formulating and implementing a distribution plan."²²⁷ Rather, the deal struck between the SEC and the defendants appeared designed to "quiet the public furor quickly and shift the formulation" of the distribution to another day.²²⁸ When the court invited the SEC to define the components of the distribution plan, no victims participated. Indeed, while the SEC "professed its interest in restitution," it never identified relevant securities and potential claims of injured investors.²²⁹

²²¹ See *supra* Part II.A.2 (discussing each agency's rules regarding participation).

²²² See *supra* Part II.A.2.

²²³ SEC v. Bear, Stearns & Co., No. 03 Civ. 2937, 2003 WL 22466156, at *3 (S.D.N.Y. Oct. 31, 2003) (approving distribution of \$399 million federal payment to aggrieved investors).

²²⁴ SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 404 (S.D.N.Y. 2009) (describing background); see also Barbara Moses, *They Were Shocked, Shocked: The "Discovery" of Analyst Conflicts on Wall Street*, 70 BROOK. L. REV. 89, 100–02 (2004) (describing evolution of global settlement between investment banks, government actors, and self-regulating organizations such as New York Attorney General, SEC, National Association of Securities Dealers, and New York Stock Exchange).

²²⁵ *Bear, Stearns & Co.*, 626 F. Supp. 2d at 404.

²²⁶ See *id.* at 404–07 (establishing that \$432.75 million in federal disgorgement was paid through Fund).

²²⁷ *Id.* at 404.

²²⁸ *Id.* at 405.

²²⁹ *Id.* at 411. The investment banks and the SEC were more than capable of doing so since "each had trade data permitting [it] to analyze the number of shares purchased or

As a result, many of the millions spent toward the settlement were unconnected to any investor losses. Over the six years that the SEC administered the Fair Fund, the cost of the Fund—including efforts to locate and notify claimants—climbed to over \$10 million, and over \$79 million remained undistributed.²³⁰ In June 2009, the district court chastised the SEC for “tortured restructuring and embarrassing consequences” that resulted from the SEC’s failure to identify investor losses.²³¹ In the end, the court was left with no choice but to return the remaining funds to the U.S. Treasury.²³²

In sum, when agencies fail to include victims in the formation of the settlement, they sacrifice important values associated with class action lawsuits.²³³ They also may miss an important opportunity to calculate damages, identify different interests, and force wrongdoers to accurately account for the harm they cause.

Different procedural and distributive standards, of course, may be justified by differences in administrative law. After all, agency procedures do not have to mimic the procedures and standards that exist in private litigation. Commentators and courts have observed that agencies, at least theoretically, may alter substantive rights more accountably than courts, particularly when they use rulemaking procedures subject to notice and comment.²³⁴ One could argue that agency settlements do not need to offer as much process as is offered by litigation, so long as the agency subjects a distribution plan to a political process, like notice-and-comment rulemaking.²³⁵

sold for any security through any given investment bank and the relevant market prices for any time period.” *Id.*

²³⁰ See *id.* at 410–12 (stating that first phase of Fund cost \$9.3 million, second phase cost \$3.8 million, with \$79 million remaining unclaimed).

²³¹ *Id.* at 403.

²³² See *id.* at 420 (ordering that undistributed funds minus additional remedial payments and costs and fees be returned to Treasury).

²³³ See Resnick et al., *supra* note 36, at 382 (arguing that courts offer better opportunities for public participation than administrative regulation); see also *supra* notes 35–38 and accompanying text (explaining how class actions empower individuals by allowing them to act as group).

²³⁴ See, e.g., NAGAREDA, MASS TORTS, *supra* note 72, at 235–36 (offering rationale for allowing administrative agencies to compromise individual rights through rulemaking processes); Nagareda, *Turning from Tort*, *supra* note 48, at 969 (arguing that administrative agencies have legitimate power delegated by Congress that private plaintiffs’ attorneys lack). *But see* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard.”).

²³⁵ See NAGAREDA, MASS TORTS, *supra* note 72, at 64–65 (citing case in which Supreme Court held agency could use rulemaking to bind individual even though enabling statute required hearing); see also *Bi-Metallic*, 239 U.S. at 445 (“[Individuals’] rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”).

In practice, however, notice-and-comment rulemaking falls far short of the kind of victim participation traditionally available in large settlements. Under notice-and-comment rulemaking, an agency must afford all interested persons “an opportunity to participate in the rule making through submission of written data, views, or arguments”²³⁶ However, few people read the Federal Register, and even fewer comment on distribution plans. The SEC, for example, invites people to comment on Fair Fund distribution plans published in the Federal Register and on its website.²³⁷ In all but three of these thirteen published settlement funds—which together account for over \$3 billion in victim restitution—no one responded to the invitation for public comment.²³⁸

When agencies limit victim participation in a settlement, they risk compromising their own goals of accountability, efficiency, and equity. Agency settlements need rules that identify different stakeholders and encourage their involvement early in the settlement process. Part III.B proposes the use of negotiated rulemaking—a solution that in many ways resembles the way a judge might settle a class action—as a possible answer.

4. *Agencies Lack Judicial Review for Conflicts of Interest*

Finally, agency settlement funds lack meaningful judicial review. As set forth above, in other forms of representative litigation, judicial review exists principally to address conflicts of interest. Unlike one-on-one litigation where courts rarely need to scrutinize a proposed settlement,²³⁹ class action lawsuits differ because a select number of managers primarily control the progress of litigation.²⁴⁰ In such cases,

²³⁶ Administrative Procedure Act, 5 U.S.C. § 553(c) (2006).

²³⁷ See *supra* note 147 and accompanying text (comparing notice-and-comment procedures for Fair Fund distribution with notice requirements in class action settlements).

²³⁸ See *Distributions in Commission Administrative Proceedings: Notices and Orders Pertaining to Fair Funds*, SEC, <http://www.sec.gov/litigation/fairfundlist.htm> (last updated Nov. 8, 2010). At the time of this writing, for example, no person registered comments for the following Fair Funds, according to the SEC Fair Fund website: John W. Adams and AIP LLC (\$2.4 million Fair Fund), Alliance Capital Management L.P. (\$250 million Fair Fund), Ameriprise Financial Services, Bear, Stearns & Co., Commonwealth Equity Services, Founding Partners Capital Management Company, Stephen R. Moynahan (\$140,000 Fair Fund), Ritchie Capital Management (\$40 million Fair Fund), Michael Scarborough and Royal Alliance Associates, Inc. (\$2.3 million Fair Fund). Only Janus Capital, Invesco Funds, and Franklin Advisers received comments, and those came from just two investors, Merrill Lynch and the Spark Institute.

²³⁹ In fact, “an ordinary civil settlement that includes dismissal of the underlying action is close to unreviewable.” SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) (citing *Hester Indus. v. Tyson Foods*, 160 F.3d 911, 916 (2d Cir. 1998)).

²⁴⁰ ALI REPORT, *supra* note 13, § 1.05 cmt. b (providing that judges may appoint parties or attorneys to control litigation in aggregate proceedings).

judges must review settlements to ensure the lawyers serve their clients and that the settlement fairly allocates awards among different parties.²⁴¹ Accordingly, judges often apply heightened scrutiny to class actions settled early in the settlement process, where it is otherwise difficult to assess the strengths and weaknesses of each party's claims.²⁴² Judges also look for signs of collusion, such as settlements that seem small relative to the harm alleged, or that leave out whole classes of victims.²⁴³

In contrast, many agency settlements lack meaningful judicial review. In most cases, federal courts review settlement plans with great deference to agency discretion.²⁴⁴ For example, FDA distributions to the Treasury, the product of consent decrees, receive almost no judicial scrutiny.²⁴⁵

There may be good reasons for agency settlements to follow different rules from those that govern class action settlements. Agencies, unlike private attorneys in a class action, will not have an independent financial stake in the outcome.²⁴⁶ Moreover, unlike class counsel, an agency may be allowed to limit the rights of some parties in favor of other parties, so long as it follows a set of democratic, regular, and transparent procedures.²⁴⁷ For example, courts have historically permitted administrative agencies to compromise claims and rights when the agencies follow a fair process of notice and comment.²⁴⁸

²⁴¹ See *supra* notes 60–63 and accompanying text (noting measures judges take in effort to account for competing interests within class).

²⁴² See *supra* notes 60–63 and accompanying text (noting judges' recognition of importance of developing factual record through adversarial process).

²⁴³ See *supra* note 64 and accompanying text (citing settlements rejected because of inequitable treatment of class members).

²⁴⁴ Compare, e.g., Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 82–83 (2d Cir. 2006) (limiting judicial review of distribution plans approved by SEC), with *Bank of Am.*, 653 F. Supp. 2d at 512 (rejecting settlement reached as inadequate given court's skepticism of relationship between parties).

²⁴⁵ See *supra* notes 177–88 and accompanying text (summarizing cases from 1999 to 2003 in which FDA recovered hundreds of millions of dollars from pharmaceutical companies who violated fair marketing practices).

²⁴⁶ When private attorneys initiate class action litigation, they may act in ways that conflict with the clients they represent. As a result, a substantial body of class action scholarship concerns how such attorneys can advance the interests of their clients. This is, in part, because private attorneys may have a different financial stake than their clients in large lawsuits. See *supra* notes 49–54 and accompanying text (describing principal-agent problem existing between plaintiffs' attorneys and plaintiffs in class actions).

²⁴⁷ NAGAREDA, MASS TORTS, *supra* note 72, at 64–65 (describing authority of administrative agencies to compromise individual rights through rulemaking processes); see, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“In considering this case in this court we must assume that the proper state machinery has been used . . .”).

²⁴⁸ See NAGAREDA, MASS TORTS, *supra* note 72, at 64–65 (noting that Supreme Court has allowed agencies to bind individuals through rulemaking).

Some commentators even argue that class actions could more legitimately serve the interests of claimants by observing principles of governance from administrative law.²⁴⁹

Finally, courts owe agencies some deference to the extent that a settlement reflects an agency's decision not to prosecute violations of law. In contrast to purely private actions, which ordinarily implicate only private interests, actions brought by an agency serve the public interest.²⁵⁰ Agencies need flexibility to evaluate their own capabilities and resources.²⁵¹ Judicial review of agency settlements should defer to the agency's expertise in making enforcement decisions.

However, agencies, like class counsel, may have different interests from those of the victims they compensate. Agency settlements may insufficiently account for the stakes of diverse claimants.²⁵² Agencies may succumb to capture by the businesses they regulate;²⁵³ agencies may seek quick settlements to resolve embarrassing missteps in regulatory policy;²⁵⁴ or, most importantly, after reaching a settlement, agencies may lack incentives and input to address victims' interests.²⁵⁵ All of these conditions raise obstacles to the ultimate fairness of any final agency settlement.

²⁴⁹ See Nagareda, *Turning from Tort*, *supra* note 48, at 945 (“[C]ourts should analyze the creation of private administrative regimes for mass torts in a manner similar to that already developed for scrutiny of their public regulatory counterparts.”).

²⁵⁰ *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (“[I]t is the policy of the law to encourage settlements. . . . That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.” (citations omitted)); *SEC v. Bear, Stearns & Co.*, No. 03 Civ. 2937, 2003 WL 22000340, at *3 (S.D.N.Y. Aug. 25, 2003) (“[T]he SEC, in its role as *parens patriae*, is presumed to represent the interests of the investing public aggressively and adequately.”).

²⁵¹ See *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (arguing that court should defer to agency's judgment on consent decrees as long as they are reasonable instead of attempting to find solution in the “public's best interest”); *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) (“While it gives up a number of advantages when it proceeds by injunction rather than by litigation, including the filing of findings of fact and court opinions clearly setting forth the reasons for the result in a particular case, the SEC is thus able to conserve its own and judicial resources . . .”).

²⁵² *But see, e.g.*, *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 83 (2d Cir. 2006) (discussing and ultimately rejecting arguments that some classes of claimants were unfairly excluded); *supra* notes 153–54 and accompanying text (explaining conflict between claimants in WorldCom Fair Fund).

²⁵³ See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 394–95 (2007) (comparing “capture” by special interest groups of public agencies to collusion between defense and class counsel at expense of plaintiff class).

²⁵⁴ See *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 412 (S.D.N.Y. 2009) (noting that SEC could have saved \$79 million if it had corrected mistake earlier).

²⁵⁵ See *id.* at 412 & n.9 (revealing that SEC deposited money in fund but could not disburse it in timely fashion); *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 512

For example, in September 2009, Judge Jed S. Rakoff famously rejected a proposed \$33 million settlement between the SEC and Bank of America.²⁵⁶ In its civil action against Bank of America, the SEC alleged that the defendant materially lied to its shareholders in proxy statements seeking shareholders' approval of its \$50 billion acquisition of Merrill Lynch & Co. (Merrill).²⁵⁷ According to the SEC, Bank of America falsely promised its shareholders that Merrill had agreed not to pay year-end performance bonuses. In fact, Bank of America allowed Merrill to pay up to \$5.8 billion in discretionary bonuses—nearly 12% of the total value of the merger.²⁵⁸ The court rejected the settlement, finding that: (1) the \$33 million fine was a “trivial penalty”²⁵⁹ compared to the scope of the multibillion dollar merger, (2) the settlement occurred without investigation or discovery,²⁶⁰ and (3) conflicts of interest between the SEC and Bank of America jeopardized the fairness of the settlement to shareholders, who ultimately bore the brunt of the fine. According to the court:

The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth.²⁶¹

The Bank of America settlement illustrates the importance of judicial review as a check against conflicts of interest in agency settlements. After extensive discovery, testimony, and briefing, Judge Rakoff finally approved a far more generous settlement in February 2010—a \$150 million Fair Fund to be paid to Bank of America shareholders.²⁶² The court noted, with approval, that the final distribution would exclude former Merrill shareholders, in effect transferring \$75 million from Merrill “legacy” shareholders to Bank of America “legacy” shareholders.²⁶³ Despite some notable misgivings

(S.D.N.Y. 2009) (observing that settlement between SEC and Bank of America suggested “a rather cynical relationship between the parties”).

²⁵⁶ *Bank of Am.*, 653 F. Supp. 2d at 512.

²⁵⁷ *Id.* at 508.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 512.

²⁶⁰ *Id.* at 510–11.

²⁶¹ *Id.* at 512.

²⁶² SEC v. Bank of Am. Corp., Nos. 09-6829 (JSR), 10-0215 (JSR), 2010 WL 624581, at *5–6 (S.D.N.Y. Feb. 22, 2010).

²⁶³ *Id.* at *5 (“Put another way, it serves to renegotiate the price that Bank shareholders would have paid to Merrill shareholders for purchasing Merrill shares if the disclosures had been made.”).

with the deal,²⁶⁴ the court found that the settlement was “considerably improved,” and that it benefited from “a much better developed statement of the underlying facts” and judicial scrutiny.²⁶⁵

Some commentators question the effectiveness of judicial review even in class action settlements, noting that courts may themselves lack information necessary to evaluate the fairness of a settlement.²⁶⁶ Agency settlements, however, may well benefit from such oversight. At a minimum, courts can demand that agencies produce information, explain the complex trade-offs they have made in arriving at a settlement, and require that agencies follow a reasonable decision-making process when they arrive at a settlement. By performing these functions, courts police conflicts of interest in agency settlements without compromising areas of agency expertise. Part III accordingly argues that courts review agency settlements with the hard look that Judge Rakoff endorsed in the Bank of America settlement.²⁶⁷

C. *Intersection Between Agency Compensation and Class Action Settlements*

Agency settlements increasingly serve the same goals as large-scale litigation; they use a single action to ensure accountability, efficiency, and equity for thousands of victims by distributing money secured from civil wrongdoers. With a few exceptions, courts and agencies have neglected the consequences of this phenomenon. As a result, agency settlements lack rules to resolve issues commonly associated with other complex lawsuits—such as how to resolve conflicts between claimants and the agency in settlement, determine whether claimants sufficiently participate in the settlement, and ensure that such lawsuits do not overlap or interfere with other forms of private relief.

Agency settlements need a new theoretical framework to distribute justice. Agencies may find guidance in class action and other kinds of aggregate litigation settlement procedures. The problems that agencies face when compensating victims are problems common to all aggregate settlements. Agency settlements, like class action and other

²⁶⁴ The court questioned whether the settlement’s punitive, compensatory, and remedial measures were enough. According to the court, the settlement was “half baked justice, at best.” *Id.*

²⁶⁵ *Id.*

²⁶⁶ See Coffee, *supra* note 199, at 378 (“[S]ome low-level, less visible conflicts will necessarily escape judicial detection”); Macey & Miller, *Judicial Review*, *supra* note 61, at 176 (noting view that judges may be “potential bulls in the china shop of class action litigation”).

²⁶⁷ See *infra* Part III.C. (describing hard look review as tool to ensure agencies disclose information and provide reasoned explanations to objections raised).

large settlement funds, straddle the line between tort and public benefit compensation.²⁶⁸ In each case, the settlement fund formally forces the wrongdoer to restore victims' losses. But such funds also seek distributive justice when the wrong touches many people, suffering many different kinds of loss, and stemming from many, sometimes indistinguishable, causes.²⁶⁹ Accordingly, agencies must take additional care to assure that parties meaningfully participate in a process that resolves their varying interests fairly and efficiently.²⁷⁰

This is not to say that class action settlements set the gold standard for procedural justice. Commentators still criticize many class actions for producing unfair outcomes for plaintiffs and defendants. Some attack plaintiffs' class counsel for forging collusive settlements for their own financial benefit.²⁷¹ Others question whether expensive procedures, like personalized notice, are always justified, particularly when the settlement offers class members only very small awards or coupons.²⁷² In fact, one could argue that regulatory agencies, as publicly accountable officers, may accomplish traditional class action goals more fairly and inexpensively than private attorneys. As government bodies, agencies are subject to other public forms of review, including internal procedures and congressional oversight.²⁷³ Agencies arguably possess more authority to rely on political processes, like formal rulemaking, to invite public participation.²⁷⁴ Finally, agency

²⁶⁸ See *supra* Part II.A.1 (discussing how agency actions can meet goals of both sanctioning wrongdoers and providing equitable relief to victims).

²⁶⁹ See *supra* Part II.A.1 (concretizing this point through example of Supreme Court case, *Porter v. Warner*).

²⁷⁰ See ALI REPORT, *supra* note 13, § 1.04 cmt. f (“Rough justice also occurs in conventional lawsuits However, in conventional lawsuits, claimants accept settlements voluntarily, and their consent gives rough justice a normative foundation. . . . In some aggregate lawsuits, consent cannot be practicably obtained, and the normative foundation for settlements must stem from judicial review and approval.”).

²⁷¹ See, e.g., Robin J. Efron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2033 (2010) (collecting commentary that criticizes class actions where plaintiffs' lawyers rather than plaintiffs seem to reap most benefit from settlement).

²⁷² See, e.g., ALI REPORT, *supra* note 13, § 3.04 (recommending courts weigh “cost of notice” and “likely recovery involved” to determine whether individual notice is necessary); *id.* cmt. a (“In many cases, personal notice may not make economic sense.”); Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 118–19 (questioning usefulness of individual notice to class members).

²⁷³ See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121–30 (2006) (outlining various forms of congressional review of agencies, including oversight hearings and oversight institutions such as Government Accountability Office); Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2104–16 (2010) (outlining forms of formal agency oversight and informal agency political accountability mechanisms, such as media attention).

²⁷⁴ *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (“[E]ven where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking

settlements serve many of the same functions as class action settlements but do not seek large contingency fees.

However, agency settlements still raise significant concerns. In addition to imposing administrative and institutional costs on the agency, agencies force defendants to negotiate settlement funds under the coercive threat of an enforcement action. Moreover, as discussed above, agencies lack critical safeguards that otherwise exist in private litigation to assure that massive victim restitution schemes are fair, efficient, and equitable.

However, both agency and class action settlements share a common structural feature of representative litigation—the loss of control by persons who otherwise would get their day in court.²⁷⁵ Class action settlements and agencies rely on similar bureaucratic procedures with limited direct participation by, or on behalf of, victims.²⁷⁶ In both class action and agency settlements there are practical limits to how much any massive scheme can fully represent the interests of so many people, all of whom possess varying degrees of interest in a settlement.²⁷⁷ Precisely for these reasons, courts cannot certify class

authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.” (citations omitted)); *Fed. Power Comm’n v. Texaco, Inc.*, 377 U.S. 33, 44 (1964) (“To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. . . . We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled.”); *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956) (approving FCC adjudication through formal rulemaking).

²⁷⁵ See, e.g., Fiss, *supra* note 51, at 1084–85 (arguing settlement procedures are not adjudicative; instead, they are “products of a bargain between the parties rather than of a trial and an independent judicial judgment”); Resnick, *Failing Faith*, *supra* note 48, at 545 (criticizing development of large alternative compensation schemes and trusts because they empower private administrators to decide compensation “without providing sufficient justification of why they deserve expanded authority”).

²⁷⁶ NAGAREDA, *MASS TORTS*, *supra* note 72, at 57–70 (describing use of administrative and workers’ compensation–like grids in mass tort settlements and other compensation schemes to assess damages); see also WEINSTEIN, *supra* note 13, at 155–62 (describing examples and critiques of aggregation procedures used to assess damages in administration of compensation funds in large settlements).

²⁷⁷ See, e.g., Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–97 (finding that quality of lawyer-client relationship did not differ in formal aggregations, like class actions, and informal aggregations, when individual plaintiff’s attorneys or firms represented hundreds or thousands of claimants).

action settlements without meeting strict requirements.²⁷⁸ In contrast, agency settlements lack any equivalent set of rules.²⁷⁹

Accordingly, agencies should explore ways to improve claimant control using procedures common to class actions. To do so, agencies should consider adopting rules used in private aggregate litigation and settlement. However, agencies also can encourage additional participation, judicial review, and coordination in ways that reflect the public nature of an agency-based settlement. Part III proposes three such reforms.

III

TOWARD A NEW PROCEDURAL FRAMEWORK FOR AGENCY SETTLEMENTS

Class action settlement rules offer a useful starting point for developing new agency settlement procedures. However, agency settlements differ enough in their operation from class action settlements that it may be appropriate for agencies to observe other rules. For example, when an agency adopts comprehensive compensation grids to resolve many kinds of claims, such a decision is arguably more legitimate than it would be in a class action settlement because of the agency's rulemaking authority.²⁸⁰

Similarly, because agency settlements reflect the work of a publicly created body, agencies need to balance the victim's interest in litigation against the agency's public mission. It follows, then, that agencies should consider adopting procedures that assure settlement awards are fair but also reflect the public nature of an agency-based settlement. I explore three potential reforms—multidistrict coordination, negotiated rulemaking, and judicial hard look review—all administrative law concepts with analogies in private aggregate settlement.

A. *Coordination of Agency Settlements*

Agencies need guiding principles and procedures to coordinate agency settlements with other forms of private litigation. This section

²⁷⁸ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845–65 (1999) (decertifying mandatory class settlement of asbestos claims for failure to satisfy limited fund rationale and requirements regarding inclusiveness and fairness of distribution); *Amchem Prods. v. Windsor*, 521 U.S. 591, 622–29 (1997) (affirming decertification of class settlement of asbestos claims).

²⁷⁹ See, e.g., *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 324–34 (1980) (rejecting argument that Rule 23's "adequate-representation requirement" in class actions applies to EEOC enforcement actions brought under plain terms of Equal Employment Opportunity Act).

²⁸⁰ See *supra* notes 234–36 and accompanying text (discussing why agencies may not need to offer as much process as in litigation if they apply rulemaking procedures).

argues that agency settlements, at the least, should complement private aggregate settlements. Agencies should assess whether a parallel class action settlement is likely before seeking to disburse a settlement award on its own. Otherwise, agency settlements may duplicate or undermine private litigation at an unnecessary cost to the agency's regulatory, investigative, and enforcement efforts.²⁸¹

In addition, federal courts should coordinate litigation across state lines when agencies and private parties file overlapping lawsuits. A procedural mechanism, such as the JPML, could centralize proceedings before a single judge to avoid duplication, unnecessary expense, and unfair settlement distributions.

1. *Complementary Agency Settlements*

Agencies, with few exceptions, do not attempt to coordinate their actions with private litigation. There are good arguments for why this is so.²⁸² After all, agencies need discretion to determine when to enforce their own regulations. However, when an agency settles and attempts to compensate victims, its failure to coordinate with large private settlements may result in outcomes that are duplicative, inefficient, or otherwise unfair.

Accordingly, agencies should seek large-scale compensation only when there is strong evidence that neither a class action nor individual private litigation will hold defendants accountable, efficiently resolve multiple claims, and equitably distribute victim compensation. When a class action will achieve the goals of accountability, efficiency, and equity, a parallel agency settlement may waste resources, overcompensate victims, and frustrate the finality ordinarily sought in other forms of representative litigation.²⁸³ Similarly, there will be some cases where a class action would be too unwieldy and expensive, and individual private litigation will offer superior procedural protections to victims, while effectively holding defendants accountable. However, when neither class actions nor private litigation adequately achieves these goals, agencies may intervene.

²⁸¹ See *supra* Part II.B.1 (discussing whether agencies should ever demand and administer compensation for large classes of victims).

²⁸² See *supra* Part II.B.2 (discussing reasons for lack of agency coordination with civil actions involving same plaintiff-victims and defendants).

²⁸³ In other contexts, commentators have argued that public actors should seek outcomes that complement private litigation to avoid waste and duplication. See, e.g., Black, *supra* note 14, at 318 (describing SEC's new role in providing investor compensation in securities fraud cases); Winship, *supra* note 14, at 1131–41 (discussing unique features of compensation obtained by SEC as public class counsel and circumstances that make it appropriate for SEC rather than private class to seek compensation).

In many cases, this determination will be straightforward. Agencies should presume that private aggregate litigation will provide an efficient and equitable resolution of the matter and adequately hold defendants accountable when there are multiple victims. As discussed in Part I, private representative litigation has sophisticated procedures to resolve cases involving widespread harm, and there is little reason to assume that agencies can do it better. However, when barriers exist to civil litigation, agency-based compensation may be warranted, for example, in cases in which the victims fear the defendant will retaliate in the event of a lawsuit.²⁸⁴ Agencies may do so for particular categories of cases, like whistleblower or employee suits under the Fair Labor Standards Act.²⁸⁵ Or they may do so in particular cases involving a credible fear of retaliation, like Ponzi schemes that result from organized crime.²⁸⁶

There will be times, however, where agencies must make decisions about compensation before a class action is filed or settled and when the barriers to civil litigation are less obvious. In such cases, agencies need guidelines to determine when to seek settlements, and such procedures must take into account their complementary role in the collective compensation of victims.

An agency may make an enforcement decision by evaluating the variability and marketability of potential claims in much the same way that courts decide the appropriateness of a class action.²⁸⁷ As discussed in Part I, a group of claims are highly variable when they differ significantly from each other and are less viable when they promise small verdicts or settlement values.²⁸⁸ Courts often refuse to certify class actions when claims are highly variable. When claims are less viable, private parties and attorneys may lack resources or incentives

²⁸⁴ See *supra* notes 204–05 and accompanying text (describing circumstances in which fear of retaliation constitutes obstacle to civil action).

²⁸⁵ See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”); Becker & Strauss, *supra* note 204, at 1325–29 (citing fear of retaliation as one reason employees are not likely to opt in to class actions under Fair Labor Standards Act §16(b), 29 U.S.C. 216 (2006)).

²⁸⁶ See, e.g., *United States v. Agate*, 613 F. Supp. 2d 315 (E.D.N.Y. 2009) (awarding restitution in sixty-two defendant criminal action involving Gambino crime family).

²⁸⁷ See ALI REPORT, *supra* note 13, § 2.02 (enumerating principles according to which courts should authorize aggregate treatment of common issue by way of class action); Issacharoff, *supra* note 70, at 149–50 (expressing appropriateness of class action as function of variation between, and value of, individual claims); *supra* notes 67–72 and accompanying text (discussing courts’ denial of class certification when claims are variable or individual lawsuits promise large settlements).

²⁸⁸ See *supra* notes 69–71 and accompanying text.

to pursue individual litigation, and thus class certification is a good alternative.

Agencies seeking to complement private litigation efforts should thus consider both the variation and viability of the individual claims. Class actions are arguably most effective and legitimate—and agency action least necessary—when the viability of individual claims is small and the variation nonexistent. Class actions are most suspect—and unlikely—where individual claims are wildly different and valuable enough to encourage one-on-one litigation. In the latter case, agencies may also wish to allow compensation through private litigation, especially if they do not put sufficient safeguards in place during the settlement process.

Between those two extremes, agencies may be able to compensate or regulate more legitimately than class actions or other forms of complex adjudication. Claim variation and viability, for example, played a key role in a recent decision by Judge Jack B. Weinstein to reject a class action in the national phone card litigation.²⁸⁹ Plaintiffs sought a nationwide class action, alleging that the defendants imposed undisclosed junk fees, charged exorbitant rates, and sold phone cards that expired shortly after consumers started using them.²⁹⁰ The court found that the class action was inferior to any future potential FTC action. In so doing, the court underscored that class members would not receive “meaningful recovery”²⁹¹ were the case to proceed as a class action. Each individual claim would amount to little more than a few dollars. Given the low value of each claim and the variability of claims involving fifty different applicable state laws, Judge Weinstein held that a national FTC action would be superior.²⁹²

In the same way, agencies can complement private collective efforts at settlement by accounting for claim viability and variation. Notably, there will be some cases where the SEC and FTC can rely on

²⁸⁹ In *Ramirez v. Dollar Phone Corp.*, 668 F. Supp. 2d 448, 468 (E.D.N.Y. 2009), Judge Weinstein held:

[T]he only adequate and appropriate way to protect the rights of the Rule 23(b)(3) class is through regulation and enforcement by a federal administrative agency. An effective remedy for the harms alleged would be a uniform system of regulation of the prepaid calling card industry based on legislation or public administrative rulemaking, including public hearings, resulting in rules that would cover the entire country and take account of international implications.

²⁹⁰ *Id.* at 451 (citing remarks of Florida Senator Bill Nelson regarding abusive practices in calling card industry that prompted introduction of Calling Card Consumer Protection Act of 2009).

²⁹¹ *Id.* at 467.

²⁹² *Id.* at 467–68 (discussing superiority of federal regulation over any relief available through civil action).

private class actions to distribute funds. Securities law class actions comprised the greatest share of class action settlements over the past decade.²⁹³ Consumer class actions represented a smaller, but still substantial, portion of such settlements.²⁹⁴ This is because both kinds of actions tend to involve low variable claims. In such cases, a complementary approach would require agencies to avoid using settlement proceeds for victims absent some determination that they can accomplish the same goals more effectively than a class action.

In contrast, the FDA should be more empowered to seek restitution for victims. Recent cases rejecting class certification for pharmaceuticals suggest that FDA actions involving mislabeled drugs may be too variable for class treatment.²⁹⁵ In some of those cases, the FDA may have been able to recover and distribute awards more efficiently than private class litigation. Of course, in the most highly variable and viable claims, like those seen in the Vioxx litigation,²⁹⁶ it may be the case that more individualized litigation would do a better job because the circumstances of individual claims vary greatly. Patients react to Vioxx in different ways; different state laws govern substantive liability; patients may learn about Vioxx from their doctors or directly from Merck at different times; exposure and onset of a cardiovascular event will vary.²⁹⁷ In cases with this much variability, individualized questions of reliance, causation, and damages make claims

²⁹³ See generally John C. Coffee, Jr. & Stefan Paulovic, *Class Certification: Developments Over the Last Five Years 2002–2007: The Future of Class Actions*, in PRACTISING LAW INST., CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES 193, 196–98 (2008) (explaining that securities class actions have been and remain largest single category of class actions).

²⁹⁴ Almost half of the 5179 class action claims pending in federal courts as of September 2004 were securities class actions. See MECHAM, *supra* note 27. In contrast, tort, contract, and antitrust class actions, all of which may overlap with the FTC's jurisdiction, constituted approximately twenty-five percent of all class actions. *Id.*

²⁹⁵ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459–61 (E.D. La. 2006) (finding that factual variations between individual cases barred class certification); *Zehel-Miller v. Astrazenaca Pharm., LP*, 223 F.R.D. 659, 662–63 (M.D. Fla. 2004) (discussing lack of uniformity of medical monitoring laws across states as barrier to class certification); *In re Baycol*, 218 F.R.D. 197, 204, 206, 215–16 (D. Minn. 2003) (holding that factual differences among class members' claims and defenses to which they were subject failed typicality test required for certification); *In re Paxil Litig.*, 212 F.R.D. 539, 551–52 (C.D. Cal. 2003) (finding it undesirable to concentrate individual claims into class action); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 144–47 (E.D. La. 2002) (citing unmanageable variations in state law applicable to putative class as among reasons for denying certification); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 65–67 (S.D.N.Y. 2002) (denying class certification because individual questions predominated and disparities among putative class members were too great).

²⁹⁶ See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. at 461 (denying class certification because claims were "highly individualized and inappropriate for classwide adjudication").

²⁹⁷ See *id.* at 459 ("[I]ndividualized factual issues concerning specific causation and damages dominate this litigation and create independent hurdles to certification.").

unsuitable for class treatment.²⁹⁸ Nevertheless, FDA decisions to repay victims should account for the potential of private litigation to serve the same compensatory function.

Absolute barriers to civil litigation are not the only factors that agencies may consider when they evaluate whether mass compensation is appropriate. Agencies also should consider other issues long contemplated by courts when assessing the fairness of a complex civil settlement, such as: the amount of time it will take for the civil system to resolve claims, the potential for a flood of lawsuits to overwhelm the civil courts, the negotiating strength of the defendant relative to the victims, and the degree to which victims know the extent of their damages.²⁹⁹

As set forth above, agencies do not have guidelines to make comparative judgments about the value of distributing awards. Aside from the public relations value of an agency settlement, this analysis suggests that agencies should consider claim viability and variation when deciding whether to bring an action. Additionally, agencies must adopt accessible guidelines that explain their decision-making processes.

2. *Multidistrict Coordination*

Coordination by an agency alone will not be enough to avoid overlapping settlements in multiple jurisdictions. An amendment to the rules governing multidistrict litigation,³⁰⁰ however, could centralize agency and nonagency proceedings before a single federal judge.

Without a centralized forum, multiple courts may oversee agency settlement distributions and private class action settlements involving the same parties. This, in turn, may create confusion, leading to unfair, overlapping awards for some and insufficient awards for others.³⁰¹ Moreover, as illustrated by the Bank of America and Bear Stearns settlements,³⁰² courts more effectively review the adequacy of a settle-

²⁹⁸ See, e.g., *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625, 631–33 (W.D. Wash. 2002) (denying class certification because individual questions of causation and damages overwhelmed common questions).

²⁹⁹ See CONTE & NEWBERG, *supra* note 8, § 11:43 (listing general criteria for class action settlement approval).

³⁰⁰ See 28 U.S.C. § 1407(a) (2006) (authorizing multidistrict litigation panel to transfer pending lawsuits involving “common questions of fact” to single district court for consolidated proceedings).

³⁰¹ See, e.g., *supra* notes 167–69 and accompanying text (describing problems associated with lack of procedural guidelines for FTC settlements, including duplicative awards and distortion of remedies available in private litigation).

³⁰² See *supra* notes 223–32 and accompanying text (discussing Bear Stearns case as example of what happens when agencies fail to include victims in formation of settlement

ment when they have a record developed through some adversarial process. When class actions and agencies settle before different judges, courts may lack the critical information necessary to ensure fairness.

An amendment to the rules governing multidistrict litigation, however, could allow the JPML to select a single federal judge to coordinate and oversee the pretrial phases of cases in which an administrative agency pursues restitution for a minimum number of victims. The JPML is well disposed to evaluate whether a case is large and complex enough to warrant pretrial coordination.³⁰³ The JPML generally certifies an action for multidistrict litigation on a petition from either plaintiffs or defendants when parties bring lawsuits in many different courts. However, agency-based settlements, on their face, will not generally satisfy JPML requirements unless plaintiffs file a large number of separate actions in separate federal jurisdictions.³⁰⁴ Moreover, certain FTC and SEC actions are exempt from the JPML.³⁰⁵ Thus, Congress must enact a formal amendment to implement this proposal.

An amendment could allow consolidation for extremely large agency settlements that parallel class action litigation. An agency settlement that promises payouts to more than 500 putative claimants, for example, could automatically qualify for pretrial coordination with another class action settlement. A centralized mechanism to coordinate actions would save resources and assure that both agency and class action settlements would not overcompensate victims. A single federal court would conduct hearings to assess the adequacy of

plan); *supra* notes 256–65 (explaining how court only approved Bank of America settlement after extensive record was developed).

³⁰³ See Ostolaza & Hartmann, *supra* note 65, at 47–50 & n.2 (discussing purpose of JPML to centralize management of complex cases). The JPML maintains detailed statistical summaries of its activities. See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (2007), available at http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2007.pdf. According to calculations current through September 30, 2007, there have been 265,269 actions subjected to MDL proceedings since the MDL Panel's inception in 1968. *Id.* at 4. This total figure consists of 202,601 actions transferred by the MDL Panel and 62,668 actions filed directly in the transferee courts. *Id.* Of this total, 176,424 actions were terminated in the transferee courts, while 393 actions were reassigned to transferor judges within the transferee courts. *Id.*

³⁰⁴ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004) (“[T]hose advocating transfer bear a heavy burden of persuasion when there are only a few actions, particularly those involving the same parties and counsel.”).

³⁰⁵ See 28 U.S.C. § 1407(g) (2006). The SEC, however, can consent to consolidation. See 15 U.S.C. § 78u(g) (2006) (addressing consolidation of actions and consent of Commission).

individual awards from two different settlements and offset overlapping administrative awards to putative class members.³⁰⁶

To address concerns about “forum shopping,” such an amendment should restrict petitions for multidistrict coordination to the federal judge where the agency first filed suit.³⁰⁷ Permitting a court, instead of private parties, to petition for coordination would limit the potential for abuse, while assuring that a single judge would have power to oversee overlapping actions.

Coordinated proceedings also would further the other recommendations I propose in this Part. Coordination would bring together potential stakeholders, providing a springboard for selecting representatives to a negotiated rulemaking committee.³⁰⁸ Coordination also would save resources by permitting a single court to conduct a hard look review of any offered settlement. Finally, coordination would ensure that a court would be familiar with the fairness of the process leading up to settlement, be it in the form of a negotiated rulemaking or a class action settlement.

B. Negotiated Rulemaking

Agency settlements need a way to encourage parties to participate in large settlements that affect diverse interests. History has shown that notice and comment is insufficient to promote participation in early stages of agency settlements.³⁰⁹ Further, notice and comment falls far short of the pre-settlement notice required for a class action settlement, which requires, at a minimum, opportunities for

³⁰⁶ To cite one very recent example, the Reserve Fund, the first money market fund in the United States, held over \$785 million in Lehman Brothers debt the day before Lehman declared bankruptcy. The next day, investors panicked, flooding the Fund with redemption requests that surpassed \$40 billion. Class actions, individual lawsuits, and an SEC action followed. The Judicial Panel on Multidistrict Litigation consolidated the actions, with the SEC’s consent, before a single judge in the Southern District of New York. *In re The Reserve Fund Sec. and Derivative Litig.*, 673 F. Supp. 2d 182, 182–90 (S.D.N.Y. 2009).

³⁰⁷ The American Law Institute has made a similar proposal. See AM. LAW INST., *supra* note 203, app. a, at 438–42 (proposing Complex Litigation Panel, composed of federal judges, that would be responsible for transfer and consolidation of cases); William W. Schwarzer et al., *Judicial Federalism: A Proposal To Amend the Multidistrict Litigation Statute To Permit Discovery of Large Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1551–53 (1995) (expanding on ALI proposal regarding initiation of proceedings for consolidation of action).

³⁰⁸ Cf. NAGAREDA, MASS TORTS, *supra* note 72, at 260 (observing potential of MDL process to facilitate negotiated rulemaking regarding compensation grid and attorneys’ fees in mass tort litigation).

³⁰⁹ See *supra* note 238 and accompanying text (describing failure of notice-and-comment rulemaking to elicit participation).

interested parties to raise objections and submit testimony in a fairness hearing.³¹⁰

Accordingly, agencies should consider employing procedures under the Negotiated Rulemaking Act³¹¹ to provide private parties a voice in making a distribution plan. Such a process would resemble the kinds of judicially supervised mediations that have preceded other aggregate settlements.³¹² Under a negotiated rulemaking procedure, the agency would appoint a mediator, who would identify parties interested in a final settlement. The parties could then develop a settlement distribution plan under a negotiated rulemaking process, subject to agency oversight.

Congress passed the Negotiated Rulemaking Act in 1990 to provide agencies with a less adversarial process to design regulations.³¹³ In negotiated rulemaking, administrative agencies allow parties “significantly affected” by a regulation to negotiate the language of a proposed regulation in advance of the rulemaking process.³¹⁴ Those rules are then subject to the same rules of judicial review.³¹⁵

By using private negotiation and public oversight, a negotiated rulemaking process aspires to make participation in an agency settlement more comprehensive and transparent.³¹⁶ The agency may appoint a convener in order to assist in identifying stakeholders that have been significantly affected by a rule.³¹⁷ With the assistance of the convener, the agency then convenes a committee that represents all interests that will be “significantly affected” in formulating a potential distribution plan.³¹⁸ The agency publishes a notice in the Federal

³¹⁰ See *supra* notes 56–59 and accompanying text (discussing notice requirements and other procedures for class action settlement).

³¹¹ 5 U.S.C. §§ 561–570 (2006).

³¹² See DAVID M. PRITZKER, ADMIN. CONFERENCE OF THE U.S., & DEBORAH S. DALTON, ENVTL PROT. AGENCY, NEGOTIATED RULEMAKING SOURCEBOOK 1–9 (1990) (providing background on operation of negotiated rulemaking procedures). Compare MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004) (describing authority of court to appoint lead counsel or committees of counsel), and *id.* § 21.91 (describing use of special masters or settlement judges to oversee or facilitate settlement), with Philip J. Harter, *Negotiating Regulations: A Cure For Malaise*, 71 GEO. L.J. 1, 28–31, 77–79 (1982) (offering original description and proposal for negotiated rulemaking).

³¹³ Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 2, 104 Stat. 4969, 4969 (codified as amended at 5 U.S.C. §§ 561–570 (2006)).

³¹⁴ 5 U.S.C. § 563(a) (2006).

³¹⁵ *Id.* § 570.

³¹⁶ See Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 138–42 (1985) (describing operating theory behind negotiated rulemaking).

³¹⁷ 5 U.S.C. § 563(b) (2006).

³¹⁸ *Id.* § 565(a) (2006). In addition, those who believe they will not be adequately represented on the committee may apply, or nominate another representative, for membership. *Id.* § 564(b).

Register, announcing its intention to use a negotiated rulemaking committee to develop rules, naming the members of the committee, and describing the interests that will likely be affected by the rule.³¹⁹ The agency may adopt the rule developed through negotiated rulemaking, in whole or in part.³²⁰

Although originally conceived as a way of avoiding contentious court battles over environmental regulations,³²¹ negotiated rulemaking is still an effective tool to allow administrative agencies to include parties in the formulation of an agency settlement. Many agencies already informally reveal proposed distributions to major stakeholders before finalizing a large settlement.³²² Negotiated rulemaking makes that process more regular and transparent, while offering an unusual public forum for parties to participate in their own redress.

Negotiated rulemakings in agency settlements would thus track settlement methods commonly used in representative litigation to encourage participation. Judges often appoint magistrates or special settlement masters to oversee settlement negotiations between members of plaintiff and defense steering committees, as well as other representatives in aggregate litigation.³²³ Negotiated rulemaking in this

³¹⁹ *Id.* § 564.

³²⁰ An agency may rely on the committee's results only "to the maximum extent possible consistent with [its] legal obligations." *Id.* § 563(a)(7).

³²¹ See Henry H. Perrit, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1674–82 (1986) (describing EPA's early use of negotiated rulemaking); Susskind & McMahon, *supra* note 316, at 142–65 (same).

³²² The SEC, for example, may consult informally with large institutional investors before submitting its Fair Fund distribution plan for notice and comment. The FTC also frequently consults with state attorneys general while bringing lawsuits on behalf of consumers under the Hart Scott Rodino Act, 15 U.S.C. § 18a (2006). See, e.g., Press Release, FTC, LifeLock Will Pay \$12 Million To Settle Charges by the FTC and 35 States that Identity Theft Prevention and Data Security Claims Were False (Mar. 9, 2010) (describing "one of the largest FTC-state coordinated settlements on record" between FTC and thirty-five state attorneys general offices), available at <http://www.ftc.gov/opa/2010/03/lifelock.shtm>. The most prominent example of this practice took place in the September 11 Victim Compensation Fund, where a government-appointed Special Master used informal discussion and test cases to encourage victim participation. See David W. Chen, *Family of 9/11 Victim Accepts \$1.04 Million in U.S. Compensation*, N.Y. TIMES, Aug. 8, 2002, at B4; see also Diller, *supra* note 43, at 754–63 (describing Special Master's "highly personal form of justice," but criticizing Fund's lack of transparency and procedural regularity).

³²³ See, e.g., *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 265–67 (E.D. Pa. 1994) (describing negotiations between plaintiff and defense steering committees); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004) (describing authority of court to appoint lead counsel or committees of counsel); *id.* § 21.91 (describing use of special masters or settlement judges to oversee or facilitate settlement); WEINSTEIN, *supra* note 13, at 144–45 (describing negotiation tactics of special settlement masters in Brooklyn Naval Yard, Dalkon Shield, and Agent Orange cases).

context could involve the same limited number of parties that would otherwise participate in a private aggregate settlement.

Many common criticisms of negotiated rulemaking would not apply to its use in the context of agency-based settlements. Some critics fear that negotiated rulemaking leads to regulations that fall outside the statutorily authorized objectives of agency action.³²⁴ However, negotiated rulemaking would not prevent an agency from meeting its statutory objectives in an aggregate settlement. Rules for resolving and distributing a massive settlement are very different from new rules governing ongoing future conduct, like the sales of derivatives or executive compensation.

Others have argued that negotiated rulemaking is costly and time consuming.³²⁵ To be sure, there may be times where individual awards will be too small to justify a negotiated rulemaking. Negotiated rulemaking, however, may be useful in cases involving medium to large settlement awards, such as in a Madoff-like settlement, where a comparable private aggregate settlement will be equally, if not more, time consuming. Moreover, negotiated rulemaking for settlement purposes would resolve grievances among a very narrow set of interests—specific parties with specific injuries. It is no less likely to fail than discussions involving comparably sized class action settlements.

Negotiated rulemaking does raise questions of power imbalances, timing, and ripeness. First, powerful interests at the bargaining table arguably may exploit negotiated rulemaking to benefit defendants or select plaintiffs.³²⁶ Commentators routinely criticize class action settlements for the same kind of abuse, complaining that powerful defendants will conduct “reverse auctions,” searching out under-resourced plaintiffs’ counsel to orchestrate sweetheart deals at the expense of class members.³²⁷ Opening agency distributions to negotiation may

³²⁴ See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1375 (1997) (“[L]aw becomes nothing more than the expression of private interests mediated through some governmental body.”).

³²⁵ See, e.g., MATTHEW MCKINNEY & WILLIAM HARMON, *THE WESTERN CONFLUENCE* 115 (2004) (observing that negotiated rulemaking is uncommon because of time-consuming nature of appointing facilitator and scheduling negotiation sessions among diverse parties).

³²⁶ See, e.g., Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L. J. 1206, 1211 (1994) (suggesting that negotiated rulemaking may be inadequate when there is “[a]greement among only the subset of interests that have organized advocates”).

³²⁷ See, e.g., BARBARA J. ROTHSTEIN & THOMAS F. WILLGING, *FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 14 (2005) (describing “reverse auctions”); *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21.61 n.952 (2004) (collecting cases identifying “reverse auctions”); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995)

expose agency settlements to the same danger. However, agencies could minimize the potential for collusion with other procedures by, for instance, regulating fee arrangements between attorney representatives and their stakeholders and by ensuring that parties with sizable stakes in the settlement assume leadership roles on the committee.³²⁸

Second, the agency will need to give thought to the timing of a negotiated rulemaking. Should the negotiated rulemaking take place before or after the agency assesses monetary awards penalties? On the one hand, the agency's determination of any final award will substantially affect potential claimants' interests.³²⁹ Moreover, by involving putative claimants, agencies may increase the accuracy of the settlement process. Plaintiffs, after all, are in the best position to know the scope of their damages and the potential divisions between other plaintiffs.³³⁰ If the SEC had involved plaintiffs earlier in the settlement process with Bear Stearns, for example, the agency could have avoided the embarrassment of spending resources to restore losses that never actually existed.³³¹

On the other hand, an agency may need to determine penalties and restitution before commencing a negotiated rulemaking. If an agency involves plaintiffs too early in the settlement process, negotiated rulemaking would compromise its ability to obtain information about related regulatory violations. In such cases, negotiated rulemaking may have to give way to the agency's need to investigate and enforce the law.³³² Finally, negotiated rulemaking could frustrate

(identifying "reverse auctions" as one of "[t]he most ethically disturbing problem[s] with class actions").

³²⁸ See ALI REPORT, *supra* note 13, § 1.05(d)–(e) (describing tools to encourage adequate representation including putting named parties with sizable stakes in control of representative litigation).

³²⁹ In actions proceeding in federal court, that reason alone would seem to permit plaintiffs to intervene as a matter of right. See FED. R. CIV. P. 24(a)(2) (providing for intervention as matter of right for individuals whose interests would be impaired by decision in action in absence of adequate representation).

³³⁰ Cf. David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 745 (1968) ("Interveners with special interests in particular cases can offer evidence and arguments which are of value to the agencies both in insuring that cases which ought to be contested are contested and in reaching a decision.").

³³¹ See *supra* notes 223–32 and accompanying text (describing problems with Bear Stearns settlement).

³³² For example, the SEC has long relied on a "Wells process," whereby prospective defendants or respondents are afforded an opportunity to submit a writing—essentially a brief—to the Commission and its staff after the staff's investigation is completed, but before the staff has made a recommendation to the Commission. See generally 17 C.F.R. § 202.5(c) (2010) (describing Wells process). "Wells submissions" provide a way to ensure the SEC possesses information related to an impending enforcement action and that defendants have an opportunity to respond privately to an investigation. See Paul S. Atkins et al., *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC*

the fairness of a settlement if commenced too soon. If an agency begins such a negotiated rulemaking before testing potential strengths and weaknesses of the case through discovery, the parties may not be able to assess whether the settlement is fair.³³³ This is a common concern when class action settlements are certified and settled at the same time.³³⁴ At a minimum, like class action settlements, a settlement achieved through negotiated rulemaking should receive closer judicial scrutiny when there has been little or no discovery, litigation, or other forms of adversarial process.³³⁵

Negotiated rulemaking is a quasi-public, quasi-private process, well suited to the way that agencies settle on behalf of potential victims. A negotiated rulemaking process does not solve everything, but at the very least, it would permit agencies to gather information about potential claimants, resolve potential disputes between parties, and settle grievances in much the same way a court might steer parties toward a class action settlement. By adopting such a device, agencies would give claimants more authority to control the outcome of a dispute that involves their interests, consistent with principles of corrective justice and the broader distributional goals of any settlement fund.

C. *Hard Look Judicial Review*

Agency-based settlements also require some form of consistent judicial oversight. In theory, courts review agency settlements deferentially; however, in practice, the degree of deference that federal courts afford to agency settlements varies substantially.³³⁶ As

Enforcement Program, 8 FORDHAM J. CORP. & FIN. LAW 368, 377–83 (2008) (describing history and basis for Wells submissions). Negotiated rulemaking should not take place before a Wells process or other similar investigatory process.

³³³ See *supra* notes 256–67 and accompanying text (discussing proposed settlement between SEC and Bank of America).

³³⁴ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004) (“If . . . the case is filed as a settlement class action or certified for settlement with little or no discovery, it may be more difficult to assess the strengths and weaknesses of the parties’ claims and defenses . . .”).

³³⁵ See Macey & Miller, *Judicial Review*, *supra* note 61, at 192–94 (recommending heightened judicial scrutiny for “shotgun” class action settlements that occur very early in litigation); see also *In re Matzo Food Prod. Litig.*, 156 F.R.D. 600, 604 (D.N.J. 1994) (noting that factual record must be “sufficiently developed” before settlement can be approved); *Murillo v. Tex. A&M Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. 1996) (stating whether counsel has engaged in “sufficient discovery” is one element in deciding whether class settlement is presumptively fair).

³³⁶ Compare, e.g., Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 81 (2d Cir. 2006) (limiting judicial review of distribution plans approved by SEC), with *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009) (rejecting settlement reached at “expense . . . of the shareholders [and] . . . the truth”).

demonstrated above, some courts aggressively intervene to overturn agency settlements. Others do not. This section recommends that courts take a hard look at agency settlements to determine whether a distribution plan makes reasonable, fact-based distinctions between differently situated parties.

Agency settlements lack a consistent form of judicial review. This is a problem because an agency's interests may conflict with the victims who theoretically benefit from the agency settlement. Agencies may also lack the information necessary to assess the full extent of damage suffered by victims. Lastly, agencies may settle too early in the litigation process. All of these conditions raise obstacles to the ultimate fairness of any final agency settlement.³³⁷

In other forms of representative litigation, judicial review exists principally to address these problems. In such cases, judges assume more responsibility to review settlements and to ensure both that the lawyers serve their respective clients and that settlements fairly allocate awards among different parties.³³⁸

On the other hand, agency settlements require some deference to an agency's decision to prosecute and enforce the law. Agencies need flexibility to evaluate their capabilities and resources.³³⁹ Additional judicial review of agency settlements should give weight to the traditional deference agencies receive when they make or enforce law.

Hard look review attempts to strike a balance between the needs of representative litigation and the requirement that agencies serve the public interest. Under hard look review, courts evaluate an agency's decisions to ensure that the agency deliberates and explains the basis for its actions.³⁴⁰ The court does not scrutinize regulatory actions *de novo*; instead, the court considers whether the agency explained and justified its decision-making process and whether the process was reasonable.³⁴¹

³³⁷ See *supra* Part II.B (broadly discussing case studies of problematic agency settlements).

³³⁸ See *supra* Part I.B (discussing procedural protections for class action settlements).

³³⁹ See *supra* notes 250–51 and accompanying text (arguing that agencies deserve greater flexibility since their actions serve public interest).

³⁴⁰ See *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980) (discussing roots of hard look review); see also William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction and the Quest for Stewardship and Intergenerational Equity*, 77 *GEO. WASH. L. REV.* 1521, 1557 (2009) (“[N]ormative goals of encouraging agency transparency, accountability, and open process are furthered by hard look review.”); Sharkey, *supra* note 20, at 2181 (describing hard look review as tool “to ensure that agencies disclose relevant data and provide reasoned responses to material objections raised during the rulemaking process”).

³⁴¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Consider, for example, the Supreme Court's reasoning in the seminal case of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*³⁴² There, litigation arose from an agency's decision to rescind a rule that would have mandated the inclusion of passive restraints in new cars.³⁴³ The Court overturned the agency's action as arbitrary, observing that the agency did not state the basis for abandoning the passive-restraint rule.³⁴⁴ Among other things, the agency did not explain how the record supported its conclusions—namely, that passengers would unhinge detachable automatic belts.³⁴⁵ The Court held that while courts should not substitute their own judgment for complex agency policymaking decisions, at a minimum, an “agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.”³⁴⁶

Hard look review thus recognizes that agencies will not always vigorously represent the interests of victims in a settlement. Significantly, however, such review also respects the technical judgments and policy considerations that inform administrative decision making. As Professor Richard Nagareda famously observed, hard look review demands that the agency rely upon reasoned decision making to “guard against precisely the kinds of infidelities that lie at the core of the agency cost problem in administrative law.”³⁴⁷

In the context of an agency settlement, an agency would have to weigh plausible approaches to the settlement supported by the facts at hand. The agency would then explain the reasoning behind its selection of a particular settlement term. Hard look review would permit judges to review agency settlements more closely, as the court did in the Bank of America settlement, where the agency lacked an independent basis to form a reasoned decision.³⁴⁸ If the agency settles with little adversarial process—meaning little formal discovery or other litigation—courts would have more power to probe the justifications for the settlement. Hard look review, at a minimum, would require judges to assess the strengths and weaknesses of the parties' claims and consider how participants would actually benefit from the proposed settlement.

³⁴² *Id.*

³⁴³ *Id.* at 34–40.

³⁴⁴ *Id.* at 51–57.

³⁴⁵ *Id.* at 54.

³⁴⁶ *Id.* at 52 (citation omitted).

³⁴⁷ Nagareda, *Turning from Tort*, *supra* note 48, at 945.

³⁴⁸ See *supra* notes 252–67 and accompanying text.

Such a procedure is not unlike a class action settlement, where courts are encouraged to review the substance of a settlement more carefully when the court is unsure whether “the settlement negotiations were at arm’s length.”³⁴⁹ At bottom, hard look review can be, as some have explained, an “agency-forcing” measure,³⁵⁰ designed to require agencies to develop processes that lead to better settlements. Hard look review would demand more information about the parties’ competing interests in settlement, more participation by potential stakeholders, and more reasoned explanations for the distributional decisions an agency makes between parties.

Hard look review does not aim to add another layer of onerous oversight to the difficult distributional questions raised by agency settlements. Courts can, however, demand that agencies produce arguments supporting and opposing the proposed settlement, explain the complex trade-offs made by the agency in arriving at the settlement, and require a reasoned explanation for the final choice of settlement terms. Courts have already undertaken such an approach, most recently in the Bank of America settlement, without explicitly recognizing it.³⁵¹ Formally accepting the use of hard look review would empower courts to police conflicts of interest without compromising deference to agency expertise.

CONCLUSION

The emergence of agency settlements represents a new trend in the way public actors compensate people for privately felt harm. Increasingly, class action attorneys, regulatory agencies, state attorneys general, and criminal prosecutors commence actions seeking the same funds, against the same defendant, for the same conduct, and on behalf of the same set of victims. Commentators have largely ignored how the convergence of these legal regimes may inform or alter the responsibilities of public actors to provide compensatory justice to private parties. Who acts as a check against indifference or conflicts of interest? How do we assure transparency when disseminating information about such settlements? Who decides on an appropriate way

³⁴⁹ See, e.g., *Isby v. Bayh*, 75 F.3d 1191, 1198–99 (7th Cir. 1996); *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21.612 (2004) (collecting cases); see also Macey & Miller, *Judicial Review*, *supra* note 61, at 192 (observing that early class action settlements “present substantial risks” and justify more judicial scrutiny).

³⁵⁰ Sharkey, *supra* note 20, at 2130 (describing agency-forcing measures as those that “ensure that agencies abide by executive mandates and other reforms, and [] provide a check on overt politicization or inaction on agencies’ part”).

³⁵¹ See *supra* notes 256–65 and accompanying text (describing Judge Rakoff’s probing analysis in Bank of America settlement).

to allocate and distribute settlement proceeds? Only by beginning to examine such questions can we shed light on the state's ability to provide procedural, distributive, and corrective justice to victims of collective harm.

This Article has explored the specific questions and concerns that arise when regulatory agencies mimic class actions by collecting large monetary settlements on behalf of victims. While many have considered the way that private class actions complement public goals of deterrence, few have explored the ways that public settlements complement private goals of compensation. As a result, we have yet to clearly identify the proper balance of procedural safeguards and discretion agencies require when compensating victims. If agencies are to continue to play a role—even a limited one—in compensating victims, they will benefit by adopting procedures from private litigation to assure victims more voice in their own redress.