

LOCAL GOVERNMENT PLAINTIFFS AND THE OPIOID MULTI-DISTRICT LITIGATION

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In late 2017, the U.S. Judicial Panel on Multidistrict Litigation ordered the consolidation of a few hundred cases pending around the country against opioid manufacturers and distributors into a Multi-District Litigation (MDL) in the Northern District of Ohio. Today, the Opioid MDL consists of over 1900 opioid-related cases brought primarily by states, cities, counties, and other local entities, and that number is growing weekly. Strikingly, these lawsuits are not, in their main, seeking damages for injuries to individuals. Rather, they are seeking compensation for the cost of public services needed to address the consequences of addicted communities, ranging from emergency response capabilities to rehabilitation services. The Opioid MDL is the first mass litigation to involve this number of local government plaintiffs, and although this Note predicts that the Opioid MDL, like most MDLs, will resolve in an aggregate settlement, the presence of local governments poses a unique problem for achieving that outcome. Mass litigation can only result in settlement if the settlement provides some guarantees to the defendants of “global peace”—meaning that the settlement forecloses all, or close to all, current and future litigation against the defendants—and any settlement arising out of the Opioid MDL will have to contend with resolving the claims of around 33,000 city, township, and county governments. Even though only a fraction of these local governments are currently part of the Opioid MDL, their presence leaves open the threat that absent localities will sue later, undermining the likelihood or value of any settlement. This Note discusses the various ways that a settlement could be structured with local governments by looking to prior mass tort litigation and applying the settlement tactics used in those cases to the Opioid MDL. In doing so, this Note proposes that even though the players in this MDL are unique, the solutions are not.

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* Copyright © 2019 by Morgan A. McCollum, J.D., 2019, New York University School of Law; B.A., 2014, Colgate University. In Spring 2018, Professors Samuel Issacharoff and Arthur R. Miller brought Judge Polster, Joe Rice, Sheila Birnbaum, Elizabeth Cabraser, and Christopher Seeger to their Complex Litigation class to discuss the Opioid MDL. I am indebted to that class and their teaching for the inspiration for this Note, and in particular to Professor Issacharoff for his continued support and feedback. Thank you to the many *New York University Law Review* editors who provided enormously helpful guidance and edits on this piece—Russell Patterson, Evan Gilbert, Juan Bedoya, Jenny Lotova, Eric Wang, Megan Stater, Jim Brennan, and James Mayer. This Note received the Paul D. Kaufman Memorial Award, which is awarded each year to a graduating student who has written the most outstanding note for *New York University Law Review*, and the Weinfeld Prize for Scholarship in Procedure and Courts.

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[T]he tension that we now have in opioids . . . is the tension between the states, the municipalities, the counties. This is the first case that I’ve ever seen where we have state [Attorneys General] on behalf of the people of the state, and then we have all the cities, counties, municipalities, down to fire departments and emergency rooms, all seeking damages as well. And my concern is [that] this is going to be a model that’s going to happen in lots and lots of cases . . . [I]t’s very disturbing how this gets managed. . . [Y]ou’ve superimposed on this a whole new regime that is . . . double and triple recovery for the same thing unless it gets worked out.

—Sheila L. Birnbaum, counsel for Purdue Pharma¹

INTRODUCTION

When Judge Dan A. Polster met for the first time with counsel for the opioid multi-district litigation (Opioid MDL), he began by remarking that, “Since we’re losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we’re meeting.”² Judge Polster has the unenviable task of managing one of the most complex MDLs since the Multidistrict Litigation Act of 1968 was enacted—a statute that authorizes a judi-

¹ NYU School of Law, *The State Role and State Attorneys-General*, YOUTUBE (Nov. 8, 2018), 1:16:06-1:17:20, https://www.youtube.com/watch?time_continue=4640&v=ybxguacXKec.

² Transcript of Proceedings at 4, *In re National Prescription Opiate Litigation*, MDL No. 2804, No. 1:17-CV-2804 (N.D. Ohio Jan. 9, 2018).

cial panel to consolidate separate lawsuits in one district court for the purpose of pretrial proceedings.³ The Opioid MDL currently involves the consolidation of over 1900 opioid-related cases, a number that is growing weekly.⁴

This “wave of litigation” is a direct response to the opioid epidemic.⁵ The numbers reveal a national crisis almost beyond comprehension. In 2017, sixty-eight percent of drug overdoses were caused by opioids,⁶ making them the leading cause of “accidental deaths in the country, surpassing deaths caused by car accidents.”⁷ In 2016, health care providers wrote so many prescriptions for opioids that every adult in the United States could have had his or her own bottle of pills.⁸ Individuals who are dependent on opioids may also turn to non-prescription drugs such as heroin, which led to a 533% increase from 2002 to 2016 in heroin overdoses resulting in death.⁹ As Judge Polster summarized the combined effect of these statistics: “[W]e’ve managed in the last two years, because of the opioid problem, to do what our country has not done in 50 years, which is to—for two consecutive years, reduce, lower the average life expectancy of Americans.”¹⁰

The Opioid MDL is comprised of individual lawsuits brought primarily by states, cities, counties, and other local entities.¹¹ Strikingly,

³ 28 U.S.C. § 1407 (2012).

⁴ See Jan Hoffman, *Groundwork Is Laid for Opioids Settlement that Would Touch Every Corner of U.S.*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/health/opioids-lawsuit-settlement.html>.

⁵ See generally Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L. MED. & ETHICS 351, 354 (2018) (discussing the effect of the perception of a national opioid crisis on litigation against opioid manufacturers and distributors).

⁶ *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last visited Apr. 24, 2019).

⁷ Complaint at 1, *City of Tacoma v. Purdue Pharma*, No. 3:17-cv-5737 (W.D. Wash. Sept. 13, 2017).

⁸ *Id.*

⁹ *Opioid Crisis Fast Facts*, CNN (Jan. 16, 2019), <https://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html>.

¹⁰ Transcript of Proceedings, *supra* note 2, at 13.

¹¹ Hoffman, *supra* note 4. The Opioid MDL also consists of lawsuits by Native American tribes, union benefit funds, hospitals, and individuals. See Suzette Brewer, *Tribes Lead the Battle to Combat a National Opioid Crisis*, HIGH COUNTRY NEWS (May 9, 2018), <https://www.hcn.org/articles/tribal-affairs-tribes-lead-the-battle-to-combat-a-national-opioid-crisis>; Amanda Bronstad, *Panel Rejects Separate Opioid MDL for Addicted Babies*, LAW.COM (Dec. 7, 2018), <https://www.law.com/2018/12/07/panel-rejects-separate-opioid-mdl-for-addicted-babies>. This Note does not focus on these groups because they will likely be resolved separate from the state and local governments. Cf. *infra* notes 180–92 and accompanying text (describing the BP Oil Spill MDL and the use of different settlements for different groups of plaintiffs). It is also plausible that State AGs may purport to represent the individual plaintiffs in their *parens patriae* capacity. See *infra* note 152 (discussing *parens patriae* lawsuits). This could possibly preclude individuals from

these lawsuits are not, in their main, seeking damages for injuries to individuals. Rather, they seek compensation for the cost of public services—ranging from emergency response capabilities to rehabilitation services—to address the consequences of addicted communities.¹² These plaintiffs pinpoint the blame for these costs on a score of defendants, including the manufacturers and distributors of the drugs and the pharmacies that sell them.¹³ Lawsuits against the manufacturers, for example, allege that these defendants purposely engaged in fraudulent and misleading marketing of the opioids by “downplay[ing] the risk of addiction” and “den[ying] the risks of higher dosages,” among other claims.¹⁴ Plaintiffs raise a host of causes of action emerging from the cost consequences of the epidemic, including “public nuisance, negligence, unjust enrichment; and violations of state consumer protection, racketeering and Medicaid fraud statutes.”¹⁵

This Note does not discuss the validity or likelihood of success of these legal theories,¹⁶ because it is more likely that any hurdles to these claims will be used by defendants as a chip on the settlement bargaining table than resolved through any comprehensive, conclusive trial.¹⁷ This Note instead starts and ends with the presumption that part, or all, of the Opioid MDL will be resolved in some form of an aggregate settlement, whether preceded by “bellwether trials” or not,¹⁸ and addresses the various ways the Opioid MDL—“one of the

bringing their own lawsuits against the defendants. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 500 (2012).

¹² See Edgar Aliferov, *The Role of Direct-Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 FORDHAM L. REV. 1141, 1144–45 (2018) (discussing the immense economic burden created by the opioid epidemic—including criminal justice expenditures, healthcare costs, and lost productivity).

¹³ See Gluck et al., *supra* note 5, at 351 (describing the parties to the MDL).

¹⁴ *Id.* at 355.

¹⁵ *Id.*

¹⁶ One of the primary challenges is the intervening actors that make showing proximate cause between the defendants and the harms suffered by local governments difficult. See *id.* at 357, 358. In addition, blameworthiness might be mitigated by the fact that “opioids are approved as safe and effective by the FDA . . . and then, are prescribed by doctors, often for necessary medical use.” *Id.* at 358.

¹⁷ See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT IX* (2007) (“[T]he endgame for mass tort dispute is not trial but settlement.”); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1769 (2005).

¹⁸ Judge Polster has set up test cases, also known as “bellwether trials,” to try some of plaintiffs’ legal theories in front of a jury. See Nate Raymond, *U.S. Judge Schedules 2019 Trial in Opioid Litigation*, REUTERS (Apr. 11, 2018), <https://www.reuters.com/article/idUSKBN1HI3EI>. To date, these bellwether trials have been postponed twice, and it is unclear whether they will actually happen. See Jan Hoffman, *Opioid Lawsuits Are Headed to Trial. Here’s Why the Stakes Are Getting Uglier*, N.Y. Times (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html>. The use of bellwether trials does not mean that the Opioid MDL will not result in settlement. See Adam S.

most complicated and gargantuan legal battles in American history”¹⁹—could reach settlement.

The key to reaching settlement in mass litigation is to grant the defendants something as close as possible to “global peace,” and the Opioid MDL will be no exception. Global peace means that a settlement legally forecloses all, or close to all, current and future litigation against the defendants through claim preclusion.²⁰ The problem is that MDLs only consist of cases that have *already* been filed in federal courts and have been transferred through the statutory process to one transferee court, leaving a huge number of potential plaintiffs unaffected by claim preclusion and free to bring additional lawsuits in the future. Any settlement arising out of an MDL must therefore use creative measures to get parties that have not already sued, or have sued in state courts, into the settlement, in order to prevent them from litigating in the future. Judges and lawyers in MDLs typically coordinate these mass settlements by looking at prior mass aggregation settlements and employing techniques that have previously worked to achieve finality.²¹ Professor Abbe R. Gluck has commented that over time this process has created “essentially a federal common law of MDL procedure.”²²

The Opioid MDL, however, presents a challenge never before addressed by prior MDL settlements—the sheer number of local government plaintiffs. The plaintiffs in the opioid crisis include “more

Zimmerman, *The Bellwether Settlement*, 85 *FORDHAM L. REV.* 2275, 2277 (2017) (noting that bellwether trials “are intended to offer the parties crucial ‘building blocks’ of information to globally resolve the remaining cases”).

¹⁹ Hoffman, *supra* note 18.

²⁰ See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 *LA. L. REV.* 397, 413 (2014) (“Defendants in mass litigation want peace, and they are often willing to pay for it.”). Claim preclusion is a legal doctrine that, once applied, bars plaintiffs from relitigating their claims in successive suits. See *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (noting that the doctrine is designed to “protect against ‘the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions’” (quoting *Montana v. United States*, 440 U.S. 147, 153–54 (1979))). To make that goal explicit, settlements will often explicitly include a provision stating that the settling parties “shall absolutely and unconditionally release and forever discharge all . . . claims that [they may] directly, indirectly, derivatively or in any capacity ever had, now have, or hereafter can, shall or may have.” Master Settlement Agreement, Settling States’ Release, Discharge and Covenant § XII(a)(1), <https://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>; see also Individual Release of Claims, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 15-2672, No. 3:15-md-02672-CRB (N.D. Cal. July 26, 2016).

²¹ See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 *U. PENN. L. REV.* 1669, 1674 (2017).

²² *Id.*

than 700 states, counties, and cities” from across the nation, and that number is growing weekly.²³ This is the first major MDL to involve this volume of state *and* local governments as plaintiffs, raising new and complicated questions for how to achieve global peace.²⁴ While there are only fifty-one²⁵ State Attorneys General (State AGs), there are around 33,000 municipal, township, and county governments.²⁶ Only a fraction of these local governments are currently part of the Opioid MDL,²⁷ but their presence leaves open the threat that absent local governments will sue later, which undermines the likelihood or value of any settlement.²⁸ This creates a difficult issue for achieving finality: Is there a way to structure a settlement that encompasses all 33,000 local governments, including those that have not already sued?

This Note argues that despite the number of seemingly intractable problems presented in the Opioid MDL—the absolute need for finality, the number of plaintiffs, and the uncertain role that local governments will play in the litigation—the parties can reach a settlement by employing procedural tools that have been used in past MDLs, the so-called “common law of MDL procedure.”²⁹ Because Judge Polster has ordered that settlement discussions remain confidential,³⁰ this Note is the first to detail the various ways that a settlement with the local government plaintiffs could be structured.

Part I lays the foundation for this Note by addressing how aggregate settlements are typically reached in mass tort litigations. Mass tort cases “generally settle[] in clusters rather than one claim at a

²³ Gluck, et al., *supra* note 5, at 355 (“The number of suits brought by localities is increasing weekly and is a particularly noteworthy new development.”).

²⁴ Other MDLs have involved local governments. *See, e.g.*, Issacharoff & Rave, *supra* note 20, at 400 (noting that there were some “lawsuits filed against BP” by “local governmental entities” but not to the degree seen in the opioid crisis). Professor Roger Michalski has suggested that in light of difficulties demonstrated by the Opioid MDL, future “cases by and against government entities” should henceforth be “exempted from generalized MDL treatment.” Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. at 7 (forthcoming 2019) (manuscript at 7) (on file with the *New York University Law Review*).

²⁵ Including the District of Columbia.

²⁶ Transcript of Proceedings at 17, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-MD-02804-DAP (N.D. Ohio Aug. 7, 2019).

²⁷ *See* Michalski, *supra* note 24, at 12 (stating the number of county, municipality, and sub-municipality plaintiffs that were part of the Opioid MDL as of February 14, 2019).

²⁸ *See* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2175 (2017) (“Closure has value in mass litigation. Defendants often insist on it as a condition of settlement, and plaintiffs who can deliver it may be able to command a premium.”).

²⁹ Gluck, *supra* note 21, at 1674.

³⁰ *See* Order, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-MD-2804 (N.D. Ohio Feb. 6, 2018).

time.”³¹ This Part describes three ways by which individual claims are “clustered” together and resolved en masse through contractual aggregation, class actions, and bankruptcy.³²

Part II zooms in on the particular problem in the Opioid MDL—the local governments. Section II.A asks whether the defendants need to reach a settlement agreement with the local governments in order to achieve finality by examining whether local governments have a right to sue separate and apart from their state governments. Section II.B then looks to other mass aggregations that have involved state and local governments and identifies how those litigations were resolved. This Section argues that although prior settlements provide a starting point for how to handle local government claims, they do not resolve the unprecedented issue of how to get *every* local government nationwide into a settlement.

Finally, Part III addresses the problem of providing finality in the Opioid MDL by applying the aggregate settlement techniques discussed in Part I to the Opioid MDL. In doing so, this Note raises the proposition that even though the number of local governments in this MDL is unprecedented, the solutions, including the recently proposed “negotiation class,”³³ are not.

There are important questions about whether a settlement in the Opioid MDL is desirable³⁴ or if the judiciary is the correct branch of government to tackle this epidemic³⁵ that this Note does not address but which merit discussion. However, as Judge Polster has stated, “[C]andidly, the other branches of government, federal and state, have punted. So it’s here.”³⁶ This Note therefore sets out to begin the conversation about the Opioid MDL’s most likely reality—a settlement.

³¹ Erichson, *supra* note 17, at 1769.

³² See *id.* at 1771 (describing why parties often settle in bunches).

³³ See *infra* Section III.C.3 (describing the negotiation class).

³⁴ Cf. Elizabeth Chamblee Burch, Remanding Multidistrict Litigation, 75 LA. L. REV. 399, 401 (2014) (“Retaining cases in hopes of forcing a global settlement can cause a constellation of complications [ranging from] substantive concerns about fidelity to state laws, to undermining democratic participation ideals fulfilled through jury trials in affected communities.”).

³⁵ See Ryan J. Duplechin, *What Is the Role of the Judiciary in Tackling the Opioid Epidemic?*, BILL OF HEALTH (June 15, 2018), <http://blog.petrieflom.law.harvard.edu/2018/06/15/what-is-the-role-of-the-judiciary-in-tackling-the-opioid-epidemic> (“The Opioid MDL, in its current state, gives the impression of policy-making through a litigation process.”).

³⁶ Transcript of Proceedings, *supra* note 2, at 4.

I

HOW MDLS RESULT IN AGGREGATE SETTLEMENTS

The Opioid MDL will most likely result, at least partially, in a settlement.³⁷ That presumption stems from a few general facts about MDLs. First, the statistical odds are in favor of a settlement. Although cases are only consolidated in an MDL for purposes of pretrial proceedings under 28 U.S.C. § 1407, the reality is that “almost 75% are resolved in MDL courts and only a paltry 2.9% are ever remanded for trial to the court of origin.”³⁸ Second, there are strong incentives for both plaintiffs and defendants to settle, regardless of the merits of the legal claims—most notably, to avoid the risk and cost of prolonged and uncertain litigation.³⁹ Finally, Judge Polster has made it very clear that settlement is the ultimate goal of the Opioid MDL, “inform[ing] lawyers that he intended to dispense with legal norms like discovery” and ordering counsel to launch into “settlement discussions immediately.”⁴⁰ This Part therefore, looks at how prior mass tort cases have resulted in settlement, in order to understand the foundation for a possible settlement in the Opioid MDL.

A. *Multi-District Litigation Defined*

The MDL is a consolidation device, meaning that it takes individual cases filed separately in different courts and brings them together in front of one judge to coordinate discovery and other pretrial motions.⁴¹ The MDL was supposed to be a “temporary aggregation” device—once pretrial managerial issues were resolved, cases

³⁷ Admittedly, another alternative to settlement is bankruptcy. See Sara Randazzo & Jared S. Hopkins, *Purdue Pharma Preparing Possible Bankruptcy Filing*, WALL ST. J. (Mar. 4, 2019), <https://www.wsj.com/articles/purdue-pharma-preparing-for-possible-bankruptcy-filing-11551721519> (“In late 2018, information shared with parties in the multidistrict litigation revealed that Purdue’s assets may not be enough to resolve the company’s potential liability . . .”). This may be a likely result for some of the smaller defendants. See Daniel Fisher, *Opioid Lawyers Say Settlement May Hinge on Forcing Plaintiffs into Class Action*, FORBES (Sept. 27, 2018), <https://www.forbes.com/sites/legalnewsline/2018/09/27/opioid-lawyers-say-settlement-may-hinge-on-forcing-plaintiffs-into-class-action> (discussing the likelihood of smaller defendants filing for bankruptcy as a result of the wave of litigation).

³⁸ Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 876 (2017).

³⁹ See Erichson, *supra* note 17, at 1780 (discussing why settlement is often the best solution in mass tort litigation); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 745–49 (1997) (detailing how aggregation of numerous claims align defendants’ and plaintiffs’ bargaining incentives to lead to settlement of mass lawsuits).

⁴⁰ Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html>.

⁴¹ See Burch, *supra* note 34, at 399 (defining an MDL).

were to be sent back to the original courts so that claimants could proceed individually against defendants.⁴² More often than not, however, the MDL is a permanent aggregation device—aggregation for settlement.⁴³ The “vast majority” of MDLs are resolved in settlement.⁴⁴

MDLs do not suddenly transform cases into settlements without the strategic work of many players. The MDL judge, in particular, wields an extraordinary amount of power in steering the MDL to resolution.⁴⁵ In getting the MDL to settlement, “judges develop their own special MDL procedures, often in collaboration with specialist lawyers, that build on previous MDLs or analogous actions.”⁴⁶ One way that judges wield this power is by appointing “Steering Committees”—groups of private lawyers tasked with managing groups of litigants.⁴⁷ The Opioid MDL is no exception, utilizing committees within committees to “conduct discovery, disseminate information, draft motions, negotiate settlements, and try bellwether cases.”⁴⁸ Together, the committees, counsel for defendants, Judge Polster, and his three-appointed Special Masters⁴⁹ will ultimately be the creative minds behind any settlement arrangement, responding in

⁴² See Judith Resnik, *From ‘Cases’ to ‘Litigation,’* 54 L. & CONTEMP. PROBS. 5, 47 (1991) (discussing the history of the MDL statute, and its intention to be used as a tool for management); see also 28 U.S.C. § 1407(a) (2012) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . .”).

⁴³ See *id.* at 49 (explaining the motivation behind using MDLs to dispose of pending and newly-created claims via settlement).

⁴⁴ Daniel Fisher, *Judge Sees Litigation as Only an ‘Aid in Settlement Discussions’ for Opioid Lawsuits*, FORBES (May 10, 2018), <https://www.forbes.com/sites/legalnewsline/2018/05/10/judge-sees-litigation-as-only-an-aid-in-settlement-discussions-for-opioid-lawsuits>.

⁴⁵ See Gluck, *supra* note 21, at 1673 (explaining that judges in an MDL are “more like a modern *administrator* than the judge the FRCP envisions”).

⁴⁶ *Id.* at 1674.

⁴⁷ See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 91 (2015) (“[J]udges typically appoint a plaintiffs’ steering committee within a few weeks of receiving the transferred cases and before most discovery ensues.”).

⁴⁸ *Id.* at 73. Even though Committees typically override the role of any individual claimant’s attorney, many members of the Opioid Steering Committee are also the attorneys for the local and state governments. See John O’Brien, *Pittsburgh’s Hired Guns Move In on Philadelphia’s Turf as Opioid Lawyers Jostle for Power*, FORBES (Aug. 28, 2018), <https://www.forbes.com/sites/legalnewsline/2018/08/28/pittsburghs-hired-guns-move-in-on-philadelphias-turf-as-opioid-lawyers-jostle-for-power> (describing the power struggle between two firms who represent the cities of Pittsburgh and Philadelphia, respectively).

⁴⁹ See Appointment Order at 1, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-MD-2804-DAP (N.D. Ohio Jan. 11, 2018) (listing the three Special Masters: David R. Cohen, Francis McGovern, and Cathy Yanni).

part to the voices of the individual MDL claimants—State AGs and local officials.⁵⁰

B. *Using Aggregation Techniques to Bind Plaintiffs to the Settlement Agreement*

In order to understand how the Opioid MDL might settle, it is first important to understand how mass tort cases typically reach settlement. Without the promise of finality, a settlement will provide no value to the defendants⁵¹ and can reduce the monetary value of settlement for plaintiffs.⁵² The only way to obtain global peace is to ensure that both absent⁵³ and present parties are bound to the terms of the settlement.⁵⁴ There needs to be a broad structural device that gets as many plaintiffs—both current and potential—into the settlement agreement. This Section shows that mass tort litigation can reach settlement by employing three aggregation devices: contractual aggregation, class actions, and bankruptcy.

1. *Contractual Aggregation*

Contractual aggregation occurs when a single attorney or law firm represents multiple individuals with similar claims and resolves their claims collectively.⁵⁵ Every claimant has an individual contract with her attorney, but because the attorney has a block of cases that are similar, she may seek to resolve those claims in one bunch “pursuant to the same contractual terms as everyone else.”⁵⁶ By consoli-

⁵⁰ Committees do not completely invalidate the role that individual claimants can play in an MDL’s resolution. Even after consolidation, individual claimants in past MDLs have organized together as “a monitoring group that has the ability and the incentive to challenge the fruits of the representative action.” Cabraser & Issacharoff, *supra* note 38, at 860.

⁵¹ Cf. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 338 (2001) (noting that what the tobacco “industry was willing to buy, at a very considerable price, was relief from litigation uncertainty”).

⁵² See Silver & Baker, *supra* note 39, at 762 (“[A] defendant will predictably pay considerably less per plaintiff—perhaps nothing at all—to settle with some plaintiffs than to settle with all of them.”).

⁵³ “Absent” parties mean potential litigants who have not yet sued, but who could bring a claim against the defendants in the future if they are not included in the settlement.

⁵⁴ See generally Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (“A person who was not a party to a suit generally has not had a ‘full and fair opportunity to litigate’ the claims and issues settled in that suit.”); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).

⁵⁵ See RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 27 (2d ed. 2013).

⁵⁶ *Id.*

dating multiple plaintiffs' claims together, the attorney may be able to bargain for a better deal with the defendant.⁵⁷ Individual claimants are not automatically included as part of any consolidated settlement—they must “opt-in” to the settlement by giving their attorney approval to include them.⁵⁸

At first glance, contractual aggregation seems like a poor tool for achieving settlement in the MDL context because it relies on consent, meaning that it can only bind parties that agree to the settlement, which risks leaving unsettled claims open for future litigation. However, lawyers figured out a solution to this problem in the Vioxx Products Liability Litigation (Vioxx MDL). The Vioxx MDL involved products liability claims against Merck, a pharmaceutical company, that marketed and distributed the drug Vioxx.⁵⁹ Vioxx was supposed to “relieve pain and inflammation,” but plaintiffs alleged that the drug increased the risk of cardiovascular problems, including heart attacks and strokes.⁶⁰ In 2007, the parties agreed to settle for \$4.85 billion⁶¹ under the pressure of resolving over 27,000 cases,⁶² allowing plaintiffs who had proof of requisite medical harm to claim between \$100,000 and \$200,000.⁶³

The Vioxx settlement took advantage of contracts that individual plaintiffs had with their attorneys. The settlement required attorneys, who had each amassed hundreds of claimants, to recommend enrollment in the settlement to one hundred percent of their eligible clients.⁶⁴ If any client chose not to participate in the settlement, the

⁵⁷ See *id.* at 26 (noting that consolidating claims “gives plaintiffs economies of scale that the defendant already enjoys and thus helps to equalize power”).

⁵⁸ The American Law Institute has proposed a set of requirements that must be met in order for aggregate settlements to be binding on plaintiffs. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2009).

⁵⁹ See Final Order and Judgment Approving Class Settlements with Defendants at 1, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, No. 2:05-md-01657-EEF-DEF (E.D. La. Aug. 27, 2013).

⁶⁰ See *id.* at 1–2.

⁶¹ Press Release, Merck Settles Thousands of Vioxx Claims for \$4.85 Billion (Nov. 9, 2007) (on file with author).

⁶² See Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509, 510 (2008).

⁶³ *Id.* at 509–10.

⁶⁴ Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto § 1.2.8.1 (2007) [hereinafter Merck Settlement Agreement], <https://www.sec.gov/Archives/edgar/data/64978/000095012307015538/y42609exv10w1.htm> (“By submitting an Enrollment Form, the Enrolling Counsel affirms that he has recommended, or . . . will recommend . . . to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the program.”).

attorney would have to “withdraw from representation.”⁶⁵ In other words, a lawyer had only two options: sign *all* of her individual clients on to the settlement or sign *none* of them.⁶⁶ This incentivized lawyers to encourage each client to join the settlement because, without that, the lawyers would not get paid despite their work.⁶⁷ Compounding this feature was a “walk-away” provision—meaning that the entire settlement would fall apart unless a minimum number of claimants agreed to it.⁶⁸

Although the Vioxx settlement could not foreclose the claims of individuals who did not sign onto the settlement, individual claimants realized that they would face significant hurdles in establishing causation under the specific circumstances of Vioxx-induced cardiac injuries.⁶⁹ Once it was clear that this settlement was the only game in town, plaintiffs’ attorneys succeeded in enrolling “99.79% of the eligible claimants.”⁷⁰

2. *Class Actions*

Class actions arising out of MDLs have had a stunning resurgence in the past few years.⁷¹ In fact, some of the largest class action settle-

⁶⁵ Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847, 866 (2017) (citing the Master Settlement Agreement at § 1.2.8.2).

⁶⁶ See Rave, *supra* note 28, at 2191–92 (“The lawyer must be either all in or all out.”). A lawyer could not sign ninety percent of her clients, but then keep the ten percent with the best claims to try to get more money out of defendants later.

⁶⁷ *Id.* at 2198. The settlement also required attorneys to “forgo any financial interest in any Vioxx-related claim, filed or unfilled” that was not included in the settlement, ensuring that lawyers could only get paid if the client opted into the settlement. *Id.* at 2195.

⁶⁸ See, e.g., Merck Settlement Agreement, *supra* note 64, §§ 11.1, 11.1.4.2 (requiring eighty-five percent of “Registered Eligible Claimants alleging . . . death as an injury” to participate in the settlement).

⁶⁹ Plaintiffs’ attorneys warned their clients of the risks of opting-out of the settlement, including the fact that “not even the five plaintiffs with hard fought victories against Merck at trial have received any money from Merck.” See Template Client Letter for Plaintiffs’ Lawyers, Merck Settlement Agreement, at 198–200 (on file with author).

⁷⁰ Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 266 (2011) (citation omitted).

⁷¹ For many years, the class action was considered a poor instrument for resolving mass tort cases due to a series of Supreme Court cases that made it exceptionally difficult for plaintiffs to pass the certification phase. See Cabraser & Issacharoff, *supra* note 38, at 847 (noting Supreme Court decisions that “rejected any easy application of the class action mechanism to the complete resolution of mass harm cases”). For example, the Supreme Court’s decision in *Amchem* made it extremely difficult for claimants to meet the commonality and adequacy of representation requirements of Rule 23(a). See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). The Court held that when class members are lumped together in one proceeding despite having individualized differences, their interests cannot be adequately protected by any one representative. See *id.* at 627–28. In addition, the Supreme Court’s more recent decision in *Wal-Mart v. Dukes* upped the stakes on the certification requirements for a 23(b)(3) class action. See *Wal-Mart Stores, Inc. v.*

ments in recent history “emerged from MDL consolidation of dozens or hundreds or thousands of underlying claims against common defendants,” and involved some of the “highest-profile, most difficult, and most tort-like situations.”⁷²

Class action settlements have the power to bind both present *and* absent parties, making them an ideal vehicle for resolving mass actions.⁷³ Class actions are an “exception to the rule against nonparty preclusion,” meaning that they can bind plaintiffs who are not actively part of the litigation.⁷⁴ To protect the due process rights of absent parties, the Federal Rules of Civil Procedure impose significant procedural hurdles that must be met prior to class certification or any class settlement. Rule 23(a) requires the class to show numerosity, commonality, typicality, and adequacy of representation prior to certification,⁷⁵ and members of a 23(b)(3) class, also known as a “damages class action,” must meet additional procedural requirements, including proving predominance and superiority,⁷⁶ and giving plaintiffs notice and the right to opt out of the class.⁷⁷ Courts must vigorously test that these safeguards are met prior to certifying a class and binding absent parties.⁷⁸

While there are three types of class actions under Rule 23(b), only two of these types of classes are relevant to the Opioid MDL—Rule 23(b)(1) and 23(b)(3).⁷⁹ Rule 23(b)(3) has been used to resolve

Dukes, 564 U.S. 338 (2011); *see also infra* note 83 and accompanying text (describing the consequence of the Court’s decision in *Wal-Mart v. Dukes*).

⁷² Cabraser & Issacharoff, *supra* note 38, at 850–51, 859.

⁷³ *See* Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1757 (2017) (“Class actions represent a break from the ‘day in court’ ideal, because all of the interested individuals do not actually participate in the adjudication themselves – and yet they are bound by the judgment.”) (footnote omitted).

⁷⁴ Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 448–49 (2000).

⁷⁵ *See* FED. R. CIV. P. 23(a); *see also* Resnik, *supra* note 42, at 25 (defining these requirements).

⁷⁶ *See* FED. R. CIV. P. 23(b)(3) (“[T]he court [must find] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”).

⁷⁷ *See id.* 23(c)(2)(B).

⁷⁸ *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (holding that a class cannot be certified unless the judge “conducts an inquiry” to ensure that the requirements of Rule 23 are met).

⁷⁹ Plaintiffs are primarily asking for monetary damages, and therefore a 23(b)(2) class would be inappropriate. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (“Rule 23(b)(2) permits class actions for declaratory or injunctive relief . . .”). There is some dispute over whether 23(b)(1) actions can encompass monetary relief, because the Supreme Court has implied that Due Process requires claimants be given the opportunity to opt out and the right to notice before being bound to a money damages judgment. *See* Shutts, 472 U.S. at 811–12; *see also* Robert H. Klonoff, *Class Actions for Monetary Relief*

some of the recent, major class actions arising out of MDLs.⁸⁰ A 23(b)(3) class action is used when common issues *predominate* over any individual issues and the class action is a *superior* mechanism for resolving the dispute.⁸¹ This typically occurs when many plaintiffs have suffered injuries that stem from the same conduct by the defendant.⁸²

Even though 23(b)(3) classes have recently been used to resolve MDLs, they do present significant procedural obstacles. First, the Supreme Court's decision in *Wal-Mart v. Dukes* emphasized that plaintiffs bear a heavy burden in 23(b)(3) classes to prove, oftentimes through statistical evidence, that common issues predominate over individual ones.⁸³ Second, plaintiffs are allowed to opt out of the 23(b)(3) class,⁸⁴ which can make achieving finality more difficult.

In comparison, a 23(b)(1) class does not have a predominance requirement or an opt-out right.⁸⁵ Particularly relevant to the Opioid

Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?, 82 GEO. WASH. L. REV. 798, 801 (2014). However, some courts find that while “not all damages suits should be certified under (b)(1)(A) . . . certain damages actions—those that truly create incompatible standards of conduct for the defendant—should be permitted as (b)(1)(A) class actions.” *Id.* at 813.

⁸⁰ See, e.g., *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 434–35 (3d Cir. 2016) (upholding certification of a 23(b)(3) settlement class); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 921 (E.D. La. 2012) (certifying a 23(b)(3) settlement class).

⁸¹ See FED. R. CIV. P. 23(b)(3) (requiring predominance and superiority).

⁸² In the National Football League (NFL) Concussion MDL, for example, retired pro-football players sued the NFL alleging that the organization “suppressed information concerning the link between [repetitive head] trauma and cognitive damage.” *In re Nat'l Football League Players*, 821 F.3d at 422. In that case, there were many individualized differences among the many players, including how many years they played football prior to retirement and how they were injured. See *id.* at 427. However, the court nonetheless found that common issues predominated, namely that all players' injuries allegedly stemmed from the same conduct by the NFL—the knowing concealment from players of the risks associated with concussions. See *id.* (“Even if players' particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the NFL's conduct.”).

⁸³ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) (upping the stakes on the certification requirements for a 23(b)(3) class action). After *Wal-Mart v. Dukes*, plaintiffs are tasked at the pleading stage with providing evidence that would otherwise not be required until adjudication on the merits, upping the stakes and cost of class certification. See Chip Hunter, *Statistical Analysis and Wal-Mart v. Dukes*, 22 CLASS ACTIONS & DERIVATIVE SUITS 9, 9–10 (2011) (detailing the additional burdens plaintiffs must overcome after *Wal-Mart v. Dukes* to get a class certified).

⁸⁴ See FED. R. CIV. P. 23(c)(2)(B).

⁸⁵ Some courts still require that class members be given notice prior to certification as a matter of due process. See, e.g., *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317–18 (11th Cir. 2012) (“[W]e have held that due process will additionally require at least *some* notice to potential absent members prior to class certification under Rule 23(b)(1)(B).” (citing *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988))).

MDL will be Rule 23(b)(1)(A), which states that a class action can be certified when there is a risk that individual adjudications by plaintiffs could create “incompatible standards of conduct” for the defendants.⁸⁶ “Incompatible standards of conduct” means that in two cases with similarly situated plaintiffs, one court might hold that the defendant is “obliged by law” to act in one way, while another court says that it is *not*.⁸⁷ This would leave the defendant in a pickle—do they or don’t they have a duty under the law to act in a particular manner?

Rule 23(b)(1)(A) actions are most useful when sub-parts of a whole can sue alleging that the defendant violated a legal duty owed to the entire entity. One common example of this arises in the context of the Employee Retirement Income Security Act of 1971 (ERISA).⁸⁸ ERISA imposes a fiduciary duty on those who manage a company’s retirement plan.⁸⁹ If the defendant breaches its fiduciary duties, retirement plan members are allowed to bring two different claims: They can allege that the defendant’s behavior injured their own *individual* retirement account or they can allege that the defendant’s behavior injured the *entire retirement plan* (“which necessarily includes discrete accounts within the plan”).⁹⁰ If two lawsuits are brought regarding the same fund, and one court finds that the defendant did *not* breach a duty to someone’s *individual* account, and another court finds that the defendant *did* breach a duty to the *entire* account (which includes the individual’s account), then this would create irreconcilable “standards of conduct for the defendants.”⁹¹ In these cases, a 23(b)(1)(A) class

⁸⁶ FED. R. CIV. P. 23(b)(1)(A).

⁸⁷ See 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1773 (3d ed. 2005); see also 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:7 (5th ed. 2012) (“[I]nconsistent verdicts on liability or damages do not alone give rise to incompatible standards of conduct.”).

⁸⁸ See, e.g., *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) (certifying a 23(b)(1)(A) ERISA class); *Harris v. Koenig*, 271 F.R.D. 383, 394–95 (D.D.C. 2010) (same); see also *Klonoff*, *supra* note 79, at 814 (“The most common type of (b)(1)(A) action for money is a suit under ERISA.”). For examples of 23(b)(1)(A) class certifications outside of the ERISA context, see *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 562 (S.D. Fla. 1973), which certifies a 23(b)(1)(A) class to determine whether defendants were negligent in preparing contaminated water and/or food to ship’s passengers, and *Technograph Printed Circuits Ltd. v. Methode Elecs. Inc.*, 285 F. Supp. 714, 716, 722 (N.D. Ill. 1968), which found 23(b)(1)(A) requirements were met where the plaintiff sued approximately eighty defendants for patent infringement.

⁸⁹ See *Health Plans & Benefits: ERISA*, DEP’T OF LABOR, <https://www.dol.gov/general/topic/health-plans/erisa> (last visited Apr. 20, 2019) (providing a high-level overview of ERISA).

⁹⁰ See *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 173 (E.D. Pa. 2009).

⁹¹ *Id.*

can ensure that only a single, consistent determination is made as to the same defendant and the same conduct.⁹²

Finally, recent MDLs have combined class actions and contractual measures, as an extra-precautionary measure to bind absent parties to the settlement.⁹³ The Volkswagen MDL, for example, arose out of claims that the car manufacturer had installed software to turn off emissions controls except when the car was being tested.⁹⁴ Structured as a 23(b)(3) class action,⁹⁵ the case resulted in a settlement agreement that gave owners and lessees of these vehicles the option to sell back their car, terminate their lease early, have their car modified, or keep the car and receive cash.⁹⁶ When users went to the car dealer to engage in one of these transactions, they had to sign a waiver that released any future claims against Volkswagen related to those resolved in the MDL.⁹⁷ This contractual waiver not only gave defendants an additional assurance of finality, but it also allowed the parties to argue on appeal that the settlement agreement should be upheld because it had already proven to be a sweeping success.⁹⁸

Together, class actions and contractual aggregation are two structural devices that can help defendants obtain global peace. However, these two devices share a similar problem: In order for contractual aggregation to be effective, enough plaintiffs must *opt in* to the settlement; in order for a 23(b)(3) class to be effective, enough plaintiffs must decide not to *opt out* of the settlement. To address this problem, successful settlement agreements also tend to employ a range of additional tactics that provide extra incentive (or pressure) for plaintiffs to either remain in (if in a 23(b)(3) class) or join (if using contractual

⁹² See WRIGHT & MILLER, *supra* note 87, § 1773.

⁹³ See, e.g., *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on April 20, 2010, 910 F. Supp. 2d 891, 903 (E.D. La. 2012) (“An unusual feature of the Settlement Agreement . . . is that class members have been able to submit claims and receive payments prior to the Court’s grant of final approval, provided that they sign an individual release.”).

⁹⁴ *About the Settlement*, NASEO & NACAA: VW SETTLEMENT CLEARINGHOUSE, <https://vwclearinghouse.org/about-the-settlement> (last visited Apr. 20, 2019).

⁹⁵ See *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2016 WL 4010049, at *10, *12 (N.D. Cal. July 26, 2016) (granting preliminary approval of a 23(b)(3) settlement).

⁹⁶ See *About*, VOLKSWAGEN/AUDI 2.0L DIESEL EMISSIONS SETTLEMENT PROGRAM, <https://www.vwcourtsettlement.com/en/2-0-models> (last visited Apr. 26, 2019).

⁹⁷ Individual Release of Claims, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 15-2672, No. 3:15-md-02672-CRB (N.D. Cal. July 26, 2016).

⁹⁸ Even though the settlement had only received preliminary approval, “over 63% of class members had registered for benefits under the settlement.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 605 (9th Cir. 2018).

aggregation) the proposed settlement.⁹⁹ Although this Note does not discuss those tactics in detail, some examples include the “walk-away provisions” utilized in the Vioxx settlement,¹⁰⁰ “most-favored-nation-clauses,”¹⁰¹ or “trust and lien” structures,¹⁰² and any final opioid settlement could employ some or all of these tactics to encourage potential claimants to either join or remain in the settlement.

3. *Bankruptcy and Section 3.17 of the ALI Principles*

For decades, asbestos manufacturers faced an overwhelming number of lawsuits as a result of a growing awareness of the health risks associated with exposure to asbestos.¹⁰³ Attempts to resolve these claims in bulk through class actions had failed,¹⁰⁴ and bankruptcy law became the main tool to resolve and achieve closure of the vast quantities of asbestos claims against manufacturers.¹⁰⁵ In particular, asbestos manufacturers were able to use Chapter 11 of the Bankruptcy Code to create reorganization plans that provided for the resolution of all claims of present and future asbestos plaintiffs. This

⁹⁹ For a detailed discussion on what are commonly known as “closure provisions,” see Rave, *supra* note 28.

¹⁰⁰ The Vioxx settlement provided that if a certain percentage of eligible plaintiffs did not sign onto the settlement agreement, the entire deal would fall apart. See *supra* note 68 and accompanying text (discussing the “walk-away provision” in the Vioxx Settlement). Walk-away provisions can vary—the Vioxx Settlement contains just one example of such a provision. For further discussion, see Rave, *supra* note 28, at 2179–81.

¹⁰¹ This settlement provision states that if any individual claimant does not join the settlement, and later sues and wins more money than they would have been entitled to from the settlement, then the defendant will give everyone who did join the settlement additional money to match the amount received by the individual. Rave, *supra* note 28, at 2185. This means that no single individual can earn more from the defendant than the claimants who have signed the settlement. It also means that the individual will have to go to trial with the defendant to get any more money; the defendant will not voluntarily settle with them for more than they would have received under the settlement agreement, because to do so would require paying *everyone* more. See *id.* at 2185–86.

¹⁰² In *In re Inter-Op Hip Prosthesis*, defendants created a “Settlement Trust” and placed hundreds of millions of dollars in it. The money in the trust was to be given to the individual claimants in the settlement. The defendants then planned to “place liens on virtually all of their assets” in order “to secure all of their obligations” under the Trust. The liens would remain on their assets until all parties to the settlement had been paid. See *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 351–52 (N.D. Ohio 2001). This meant that if any claimant chose to opt-out of the class action, and then later sued and won against the defendant, the defendant would not have any assets with which to pay her “until all participating claimants had been paid through the settlement program—a process expected to take six years, with no guarantee that anything would be left over.” Rave, *supra* note 28, at 2186.

¹⁰³ See, e.g., *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988).

¹⁰⁴ See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 5 SUP. CT. REV. 183, 208 (2008) (discussing Supreme Court cases that effectively eliminated class actions as a method to resolve asbestos claims).

¹⁰⁵ See *id.* at 209–10.

Section highlights not only how bankruptcy law has helped to resolve mass asbestos tort claims, but also how recent trends in aggregate litigation have capitalized on bankruptcy reorganization techniques to resolve mass litigations *without* the requirement that the defendant declare bankruptcy.

In the early 1980s, an asbestos manufacturer, Johns-Manville, had become the target of over 425 asbestos-related lawsuits a month. Johns-Manville estimated that it would eventually face greater liability than it had assets to meet those liabilities.¹⁰⁶ In 1982, the manufacturer filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code, which permits a debtor corporation to reorganize, as opposed to liquidate.¹⁰⁷

The novelty of the Johns-Manville reorganization plan was that it required the company to create a trust fund solely to pay out the claims of current and future asbestos claimants.¹⁰⁸ The trust would include the company's "insurance proceeds . . . stock in the reorganized corporation and a right to receive up to 20 percent of its profits for as long as needed to compensate asbestos claimants."¹⁰⁹ To claim money from the trust, claimants needed to submit proof of claim forms that detailed their exposure to asbestos as well as their resulting harm, which in turn determined the set amount of compensation they could receive.¹¹⁰ These set amounts were born from years of negotiation between plaintiffs committees and Johns-Manville.¹¹¹ In order to enforce the trust, the Bankruptcy Court issued a "channeling injunction" which provided that any current or future asbestos claimants could "proceed only against the Trust to satisfy their claims and [could] not sue Manville, its other operating entities, and certain other specified parties, including Manville's insurers."¹¹²

¹⁰⁶ Kane, 843 F.2d at 639.

¹⁰⁷ See 11 U.S.C. §§ 1101–74.

¹⁰⁸ NAGAREDA ET AL., *supra* note 55, at 613.

¹⁰⁹ *Id.*

¹¹⁰ See MANVILLE PERSONAL INJURY SETTLEMENT TRUST, PROOF OF CLAIM FORM, <http://www.claimsres.com/wp-content/uploads/2016/11/POC-02-Version-6.pdf>.

¹¹¹ See generally Francis E. McGovern, *Asbestos Litigation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 238 (2003) ("Each committee's goal is to establish sufficient bargaining power to assure that its claims receive as great a share as possible of the available assets as possible."); Marc C. Scarcella & Peter R. Kelson, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, LEXISNEXIS LEGAL NEWSROOM (Dec. 11, 2013), <https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/posts/asbestos-bankruptcy-trusts-a-2013-overview-of-trust-assets-compensation-amp-governance> ("[I]t is often the representatives of asbestos claimants who assume the leadership roles in advising the management of trust assets and distribution of claim payments over time. These representatives make up the Trust Advisory Committee.").

¹¹² Kane v. Johns-Manville Corp., 843 F.2d 636, 640 (2d Cir. 1988).

Chapter 11 requires that a certain majority of creditors approve the reorganization plan,¹¹³ and in this case the creditors were the asbestos claimants. To abide by this provision of Chapter 11, the Bankruptcy Court assigned each pending asbestos claimant one vote,¹¹⁴ and held that if two-thirds of all pending claimants approved of the reorganization, then the plan was affirmed.¹¹⁵ In the end, the reorganization plan, including the channeling injunction, received a supermajority vote, and any claimants against Johns-Manville could now only seek compensation from the company by submitting a claim to the trust.¹¹⁶ The trust and channeling injunction afforded Johns-Manville global peace.¹¹⁷

Congress ultimately blessed the Johns-Manville reorganization plan by adding § 524(g) to the Bankruptcy Code,¹¹⁸ which “authorize[s] the use of a trust, separate from the reorganized debtor, to pay both present claims and future ‘demands’” of asbestos claimants, and approves the use of channeling injunctions *if* the reorganization plan receives “a favorable vote by at least 75 percent of ‘the claimants whose claims are to be addressed.’”¹¹⁹ In practice, a reorganization under § 524(g) consists mainly of four steps: (1) Claimants are provided at the outset with a *distributional metric* that informs the claimant of the comparative value of her claim to the rest of the group; (2) Claimants are given the opportunity to *vote* on the reorganization plan; (3) Claimants are bound to accept the terms of the reorganization plan if it is approved by *supermajority vote*; and (4) When the reorganization plan is ultimately approved, the *channeling* injunction kicks in and funnels all current and future claims against the asbestos manufacturer to the trust set up by the reorganization plan.¹²⁰ These steps work together to finally provide asbestos manufacturers with global peace, and claimants with relief.

In the aftermath of the creation of § 524(g), Chief Judge Scirica on the Third Circuit added an additional layer of protection to asbestos claimants by requiring that the reorganization plan ensure “equality of distribution among creditors.”¹²¹ In *Combustion*

¹¹³ *Id.* at 646 (citing 11 U.S.C. § 1126(c) (1982)).

¹¹⁴ Technically, the Bankruptcy Court “simply fixed at one dollar the value of each pending asbestos claim against Manville” NAGAREDA, *supra* note 17, at 165.

¹¹⁵ *Id.*

¹¹⁶ *Kane*, 843 F.2d at 641.

¹¹⁷ NAGAREDA ET AL., *supra* note 55, at 613.

¹¹⁸ *Id.* at 614.

¹¹⁹ *Id.* at 614–15 (citing 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb)).

¹²⁰ For greater discussion on § 524(g), see McGovern, *supra* note 111.

¹²¹ *In re Combustion Eng'g Inc.*, 391 F.3d 190, 239 (3d Cir. 2004) (citing *Begier v. IRS*, 496 U.S. 53, 58 (1990)).

Engineering, a reorganization plan under § 524(g) called for a “multi-tiered payment scheme” that provided for the “bulk of the payout to present claimants” and a “diminished corpus” for future claimants.¹²² In effect, the reorganization plan “gave preferential treatment to a group of voting claimants at the expense of those neither present nor voting.”¹²³ To resolve this unfairness, Chief Judge Scirica turned to the guidance of FRCP Rule 23—which requires assurances that *all* claimants are “adequately represented.”¹²⁴ Any reorganization plan to be approved by the court would need to demonstrate fairness and equity to future claimants in addition to present ones.

Section 524(g) of the Bankruptcy Code technically applies only to asbestos litigation and is therefore not obviously relevant to the Opioid MDL. However, in 2010, the American Law Institute (ALI) proposed a solution that “expanded” the core requirements of § 524(g) “into other kinds of aggregate litigation.”¹²⁵ Section 3.17 of the ALI Principles takes the elements of § 524(g)—the use of distributional metrics and ex ante agreement to be bound to a settlement through supermajority vote—and imposes them on any mass litigation where multiple claimants with shared counsel raise similar claims against the same defendant. Understanding § 3.17 of the ALI Principles is important, because it will likely be one of the cornerstones of Judge Polster’s decision to certify a negotiation class.¹²⁶

Section 3.17 provides that at the outset of any mass litigation, a group of claimants represented by the same lawyer against the same defendant can give their informed consent in writing to have their claims resolved collectively, rather than individually.¹²⁷ As part of that

¹²² Issacharoff, *supra* note 104, at 211.

¹²³ *Id.*

¹²⁴ *In re Combustion Eng’g Inc.*, 391 F.3d at 245; see FED. R. CIV. P. 23(a)(4).

¹²⁵ Transcript of Proceedings, *supra* note 26, at 11.

¹²⁶ See *infra* Section III.C.3 (describing the negotiation class).

¹²⁷ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2010). Section 3.17 has faced some criticism, largely because some argue that it violates the Model Rules of Professional Conduct. See Nancy J. Moore, *The American Law Institute’s Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 397 & n.16 (2008) (citing “numerous cases and ethics opinions [that] have addressed the effectiveness of advance waivers and [that] have uniformly rejected an interpretation of [ABA Model Rule 1.8(g)] that would permit them.”). In particular, Model Rule 1.8(g) states that when a lawyer represents multiple clients, she cannot enter into a settlement that collectively resolves their claims together “unless each client gives informed consent, in a writing signed by the client.” MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (AM. BAR ASS’N 2018). Some courts have interpreted this as requiring a lawyer to get her client’s consent only after her client has knowledge of the final settlement offer. See, e.g., *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975) (rejecting the use of ex ante agreements); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006) (referring the issue of whether

informed consent waiver, claimants agree to “vote on any proposed deal, with a supermajority [vote] binding everyone in the group.”¹²⁸ Claimants also decide on a distributional metric for resolving their claims.¹²⁹ This means that, even without a final settlement figure, every claimant understands the comparative value of their claim, which gives them a sense of the percentage of any settlement they stand to receive. Once the attorney has her clients’ consent to resolve their claims collectively, she then can negotiate with the defendant on behalf of the entire group.¹³⁰ When the settlement figure is derived, the claimants then *vote* on the proposed settlement, and if the settlement offer is approved by a *supermajority vote*, then *all* claimants in that negotiation block are bound to the terms of the settlement.¹³¹ The ALI Principles also provide an opportunity for judicial review of any settlements reached through this method¹³² and require the approving court to assess whether the settlement is “substantively fair and reasonable,” mirroring Chief Judge Scirica’s inquiry in *Combustion Engineering*.¹³³

In effect, Section 3.17 employs a parallel procedure to § 524(g), and as a result combines the comparative benefits of contractual aggregation and class actions. Contractual aggregation gives claimants more private control over their claims, but at the cost of efficiency because attorneys need to gain their clients’ individual consent to settle their claims after the settlement is offered, as demonstrated by the Vioxx settlement.¹³⁴ Class actions, on the other hand, provide an avenue to bind present and absent claims to a settlement even without

supermajority agreements violate Rule 1.8(g) to the Commission on Ethics Reform). However, “several authorities” in addition to the ALI Principles, have increasingly supported the use of informed consent waivers provided for in Section 3.17. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders* 25 (Duke Law Sch. Pub. Law & Legal Theory Research Paper Series, No. 2019-41, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834 (forthcoming).

¹²⁸ McGovern & Rubenstein, *supra* note 127, at 6.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2010). To illustrate, a lawyer has one hundred clients. Eighty agree to have their claim collectively resolved together, by signing an *ex ante* agreement that states that they consent to any settlement plan that ultimately receives a seventy-five percent vote or higher. A settlement figure is reached, and at least sixty of these claimants vote in favor of the settlement. This vote, in turn, binds all eighty claimants who signed the *ex ante* agreement. The remaining twenty are not automatically bound by this supermajority vote because they never consented to the *ex ante* agreement.

¹³² See *id.* § 3.18 (providing for judicial review of aggregate settlements reached through *ex ante* agreements).

¹³³ *Id.* § 3.17(e); see *supra* notes 121–24 (discussing *Combustion Engineering*).

¹³⁴ See *supra* Section I.B.1.

every class member's affirmative consent, but are saddled with difficult procedural hurdles to ensure fairness.¹³⁵ Section 3.17 melds these two worlds and gives claimants a private mechanism to organize and bind themselves together as a group, without the procedural hurdles of a class action.¹³⁶ This in turn makes it "more likely [for claimants] to obtain remedies" by providing defendants with a greater upfront promise of finality more akin to a class action,¹³⁷ while still giving individual claimants some individual power to control the fate of their claim through a voting procedure.

Decades of evolution in resolving mass litigation have now created multiple avenues for achieving mass resolution in aggregate litigation that provide defendants with global peace. Although these mechanisms have previously been used to resolve the claims of *individuals*, they also may be applicable to the *government plaintiffs* in the Opioid MDL.

II

LOCAL GOVERNMENTS AS PLAINTIFF

The Opioid MDL began in late 2017 when the U.S. Judicial Panel on Multidistrict Litigation ordered the consolidation of over two hundred cases then pending against opioid manufacturers and distributors.¹³⁸ Some of those cases were brought by local governments that considered themselves on the frontlines of the opioid crisis—claiming that their "[l]aw enforcement, first responders, hospitals, jails, and other community services have all been stretched thin by the opioid crisis."¹³⁹ What has followed is something of a domino effect—once one municipality in a state sues, dozens of surrounding municipalities

¹³⁵ See *supra* Section I.B.2 (describing class actions).

¹³⁶ See *supra* notes 83–84 and accompanying text.

¹³⁷ Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Power*, 79 G.W. L. REV. 628, 674 (2011).

¹³⁸ See *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1380 (J.P.M.L. 2017).

¹³⁹ Melissa D. Berry, *Opioid Litigation—Hundreds of Cases Consolidated: Here's What You Should Know*, THOMSON REUTERS: LEGAL EXEC. INST. (Sept. 28, 2018), <http://www.legalexecutiveinstitute.com/opioid-litigation-consolidated>; see, e.g., Jessica Bartlett, *City of Boston Sues Drugmakers over Opioid Epidemic*, BOS. BUS. J. (Sept. 13, 2018), <https://www.bizjournals.com/boston/news/2018/09/13/city-of-boston-to-sue-drugmakers-over-opioid.html> (noting that Boston has alleged that the opioid epidemic has cost them "at least \$64 million in damages").

follow.¹⁴⁰ Today, the number of local governments in the MDL rises weekly and shows no sign of stopping.¹⁴¹

In light of the relationship between state and local governments, it is intuitively strange that local governments can sue separate and apart from their state governments. Local governments are “creatures of the state’s making,”¹⁴² created “to perform the tasks of the state at the local level.”¹⁴³ To the extent that State AGs are already suing on behalf of the state and its citizens,¹⁴⁴ to allow local governments to sue as well would seem to permit double recovery for the exact same population. And, where State AGs have made the active decision *not* to sue, permitting local governments to sue would seem to subvert the state’s judgment.¹⁴⁵ These policy considerations raise the question of whether local governments even have standing to sue separate from their state governments, or if instead the defendants can settle with only the State AGs and leave local governments out entirely. This Part seeks to answer that question by discussing whether local governments have a right to sue separate from their state, and by looking at how previous mass lawsuits that have involved government entities have settled.

¹⁴⁰ See, e.g., Karen Bouffard, *Michigan Law Shielding Drug Makers Draws Scrutiny amid Opioid Crisis*, DETROIT NEWS (June 14, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/06/15/michigan-law-shields-opioid-lawsuits/649577002> (noting that in Michigan fifty cities and municipalities have already sued despite a state statute which shields pharmaceutical companies from consumer lawsuits).

¹⁴¹ See Gluck et al., *supra* note 5, at 355. Additionally, contingency fee arrangements with counsel make it relatively costless, at least upfront, for local governments to enter the Opioid MDL in droves. Cf. Richard A. Nagareda, *Gun Litigation in the Mass Tort Context*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 180 (Timothy D. Lytton, ed., 2005) (“Such litigation frequently takes place not through the use of budgetary resources for law enforcement but, instead, through the retention of law firms within the plaintiffs’ bar on a contingency fee basis.”).

¹⁴² Samuel Marll, *Do Municipalities Have Article III Standing to Sue Mortgage Lenders Under the Fair Housing Act?*, 15 U. PA. J. BUS. L. 253, 268 (2012).

¹⁴³ HON. JON D. RUSSELL & AARON BOSTROM, AM. CITY CTY. EXCHANGE, FEDERALISM, DILLON RULE AND HOME RULE 2 (2016), <https://www.alec.org/app/uploads/2016/01/2016/ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

¹⁴⁴ And many are suing on behalf of their citizens and local entities. See Sara Randazzo & Lillian Rizzo, *Purdue Pharma Hires Davis Polk for Restructuring Help*, WALL ST. J. (Aug. 17, 2018), <https://www.wsj.com/articles/purdue-pharma-hires-davis-polk-for-restructuring-help-1534536369> (“New York this week became the 27th state to sue Purdue, following others including Ohio, Florida, and Texas.”).

¹⁴⁵ Some may believe that this is a good thing because it allows local governments—who have a closer relationship with their residents—to pursue their own, often more progressive agendas. Cf. Kriston Capps, *Texas Cities Haul the State to Court over Immigration*, CITYLAB (June 26, 2017), <https://www.citylab.com/equity/2017/06/texas-cities-take-the-state-to-court-over-anti-sanctuary-law-sb4/531684> (writing that five cities in Texas sued seeking a preliminary injunction against a Texas law that would impose penalties on sanctuary cities).

A. *The Right of Local Governments to Sue*

As a baseline rule, local governments are creatures of the state, meaning that the state must grant them the authority to sue. Municipalities in the United States are governed by what is known as “Dillon’s Rule,”¹⁴⁶ which holds that local governments only have powers that are granted to them by their respective states.¹⁴⁷ This means that local governments must get the state’s permission before taking any action, including initiating litigation. Most states, however, have adopted what are known as “Home Rule” provisions, which grant authority to local governments to govern themselves.¹⁴⁸ Some states merge the two systems—Dillon’s Rule and Home Rule—giving local governments unfettered control in some places and retaining state control in others.¹⁴⁹ Together, this means that in the Opioid MDL, some local governments may be completely barred from suing by their state governments while others have full authority to sue. To complicate matters further, states may permit local governments to litigate on *some* issues but not all.¹⁵⁰

There are two basic types of claims that local governments might bring against the opioid manufacturers and distributors, as highlighted by a lawsuit brought by the City of Chicago.¹⁵¹ The first claim is commonly referred to as a *parens patriae* claim, meaning that the local government sues on behalf of its citizens.¹⁵² Chicago alleges in this

¹⁴⁶ Dillon’s Rule is a judicial doctrine that was “derived from the two court decisions issued by Judge John F. Dillon of Iowa in 1868.” *Cities 101—Delegation of Power*, NAT’L LEAGUE OF CITIES (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-delegation-of-power>.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* (“The inflexibility of [Dillon’s Rule] is the reason that many states began to adopt ‘home rule’ provisions in the early 1990s that conferred greater authority to their local governments.”).

¹⁴⁹ JESSE J. RICHARDSON, JR., ET AL., BROOKINGS INST., *IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON’S RULE ON GROWTH MANAGEMENT* 17 (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf>.

¹⁵⁰ *See infra* notes 157–65 and accompanying text.

¹⁵¹ *See* Second Amended Complaint at 247–86, *City of Chicago v. Purdue Pharma L.P.*, 211 F. Supp. 3d 1058 (N.D. Ill. 2016) (No. 14-cv-04361).

¹⁵² *See* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863 (2000) (defining *parens patriae* actions). Typically, there are two main types of *parens patriae* actions—sovereign and quasi-sovereign. A government litigates in its “sovereign” capacity when it brings an action against an actor who violated its “criminal laws, civil laws, or other regulatory provision.” *Id.* A government litigates on behalf of its “quasi-sovereign interest” when it seeks to protect the “health and well-being—both physical and economic—of its residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). For criticisms on the use of *parens patriae* actions, see Lemos, *supra* note 11, at 503, suggesting that *parens patriae* actions could wrongfully preclude private citizens from suing to vindicate their own personal interests.

regard that the “[d]efendants’ fraudulent and deceptive marketing of opioids directly caused harm to Chicago consumers” by causing “[w]idespread opioid use and abuse.”¹⁵³ The second claim is known as a proprietary claim, meaning that the local government sues on behalf of itself.¹⁵⁴ Chicago here alleges that due to the “[d]efendants’ heavy promotion of opioids . . . the City of Chicago has seen *its own* spending on opioids—through claims paid by its health care plans and workers’ compensation program—increase dramatically.”¹⁵⁵ In sum, Chicago argues that the defendants have harmed both the city’s own budget and the city’s citizens. Illinois does not govern its municipalities entirely by Dillon’s Rule,¹⁵⁶ meaning that, subject to exceptions discussed below, Chicago may be able to bring these claims in federal court.

First, federal courts have consistently held that only state AGs, not local governments, can bring *parens patriae* claims in federal court.¹⁵⁷ However, some states permit local governments to bring *parens patriae* claims in state court.¹⁵⁸ Thus, defendants will need to get these plaintiffs into the federal MDL, conditioning their participa-

¹⁵³ Second Amended Complaint, *supra* note 151, at 279–80 (emphasis added).

¹⁵⁴ See Marll, *supra* note 142, at 270 (defining a proprietary action). Examples of proprietary actions include “seek[ing] to get back loans paid to citizens who have defaulted . . . [or] to remedy fraud wrought against the treasury, or for instance, to recover the costs of paying too much for computers equipped with Microsoft software.” William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2141 (2004).

¹⁵⁵ Second Amended Complaint, *supra* note 151, at 256 (emphasis added).

¹⁵⁶ See RICHARDSON, *supra* note 149, at 42 (“About 10 percent of municipalities [in Illinois] and only one county have home rule. The remainder are subject to Dillon’s Rule . . .”).

¹⁵⁷ Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 365 (2006). An added layer of complexity is that it can be difficult to differentiate between a *parens patriae* claim and a proprietary action. For example, if a local government alleges that the defendants’ actions caused them to spend more money on medical care for their citizens, this could be framed as either a proprietary or a *parens patriae* action. On one hand, this looks like a proprietary action because the local government is seeking restitution for money that it alleges the defendants wrongfully caused it to lose. On the other hand, this could be considered a *parens patriae* action because having a functioning and cost-effective health care system affects the health and welfare of the citizenry. The lack of case law in this area and the ability to carefully frame pleadings means that local government plaintiffs can assert that all of their claims are actually proprietary actions, while defendants may argue that their claims are entirely *parens patriae* actions that should be dismissed. See, e.g., *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (debating whether plaintiffs have raised a proprietary or a quasi-sovereign *parens patriae* claim); see also Lemos, *supra* note 11, at 492 (“The line between the two forms of litigation authority is fuzzy at best . . .”).

¹⁵⁸ New York, for example, grants its municipalities the power to bring *parens patriae* lawsuits in state court. Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 765 (2007). New York is the only state that has granted municipalities this power explicitly, and it is unclear how many other

tion on the waiver of all other litigation in both state and federal court, to preclude local governments from raising similar claims in state court.¹⁵⁹

Second, municipalities can bring proprietary actions in federal court if authorized by state statute. For example, in *White v. Smith & Wesson*, the City of Cleveland sued firearms manufacturers, bringing proprietary claims under the Ohio Product Liability Act.¹⁶⁰ The federal district court held that Cleveland was permitted to bring this proprietary action because the Ohio Product Liability Act explicitly gave “governmental entities” a private right of action.¹⁶¹ In comparison, in *City of Cleveland v. Ameriquest Mortgage Securities*, the district court held that Cleveland could not bring suit in a proprietary capacity¹⁶² when the city sued a number of investment banks, arguing that “sub-prime lending” caused an “epidemic of foreclosures” in Cleveland.¹⁶³ In that case, an Ohio statute “prohibited municipalities from regulating mortgages,”¹⁶⁴ and the court held that if Cleveland could not *legislate* on an issue, it also could not *litigate* on that issue.¹⁶⁵ Cleveland therefore could only sue when Ohio had authorized it to do so by statute.

The broad takeaway is this: Whether a local government can bring a lawsuit depends on the type of claim that it brings and the court in which the government brings it. If a state statute permits a

municipalities may have this authority implicitly. *Id.* at 764–65 (“[T]he *parens patriae* jurisprudence involving municipalities is sparse.”).

¹⁵⁹ Some local governments have already brought suit in state court instead of suing in federal court, including Harris County, Texas. See Andrew Joseph, *Why Houston and Other Cities Want Nothing to Do with the Massive National Opioid Lawsuit*, STAT (Mar. 27, 2018), <https://www.statnews.com/2018/03/27/houston-national-opioid-lawsuit>. If defendants can bring local governments into the federal MDL, they can condition the settlement on the waiver of all other litigation, in state or federal court. See *supra* note 20 (describing settlement provisions that waive plaintiffs’ rights to bring additional claims).

¹⁶⁰ 97 F. Supp. 2d 816, 825 (N.D. Ohio 2000). Cleveland alleged that because of the defendants’ “unreasonably dangerous and negligently designed handguns,” the city “lost substantial tax revenue due to lower productivity; and has been obligated to pay millions of dollars in enhanced police protection, emergency services, police pension benefits, court and jail costs and medical care.” *Id.* at 824 (internal quotation marks omitted).

¹⁶¹ *Id.* at 825.

¹⁶² *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 519 (N.D. Ohio 2009).

¹⁶³ *Id.* at 516. The City argued that these foreclosures, in turn, increased the City’s “costs of responding to crime and other emergencies” and led to a “concomitant drop in the tax base.” Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7, 23 (2010).

¹⁶⁴ Brescia, *supra* note 163, at 23.

¹⁶⁵ *Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d at 519 (holding that “the City ‘may not do indirectly’ through litigation ‘that which it cannot directly’ through legislation” (quoting *Sturm, Ruger, & Co. v. City of Atlanta*, 560 S.E.2d 525, 530 (Ga. Ct. App. 2002))).

local government to sue in a proprietary capacity, then it is allowed to bring that action. Additionally, even absent statutory authorization, some courts have found that local governments have broad authority to bring *common law* public nuisance actions in a proprietary capacity.¹⁶⁶ Finally, a local government might be able to bring a *parens patriae* claim in its state court. With fifty states, innumerable statutes, and common law claims, there are windows of opportunity for at least *some* local governments to bring their own actions, separate and apart from state governments. And, unless a state explicitly prohibits its local governments from ever suing, it is difficult to decipher which local governments do and do not have this authority until parties litigate.¹⁶⁷

Ultimately, this lack of clarity will drive parties to reach a resolution that includes both state and local governments. If settlements are only achieved in the face of global peace, a settlement will not be reached if there is a *possibility* of leaving thousands of potential claims open. The next Section will therefore discuss how previous mass aggregation settlements have tried to deal with government plaintiffs in order to see if those devices provide a solution for the Opioid MDL.

B. *The Rise of the Local Government Plaintiff*

The Opioid MDL is unprecedented in the scope and volume of government plaintiffs that are suing. However, it is not the first mass litigation to involve government entities, and these previous cases could provide guidance for structuring a settlement in the Opioid MDL.

The most commonly cited example of a successful multistate lawsuit is the tobacco litigation. In the early 1990s, states sued the four largest cigarette manufacturers to recoup their Medicaid expenses after finding that smoking-related healthcare costs accounted for “a quarter of state Medicaid expenditures.”¹⁶⁸ By 1998, the manufacturers entered into a multi-billion dollar Master Settlement

¹⁶⁶ See Brescia, *supra* note 163, at 8.

¹⁶⁷ See, e.g., RICHARDSON, *supra* note 149, Executive Summary (“Virtually every local government possesses some degree of local autonomy and every state legislature retains some degree of control over local government.”).

¹⁶⁸ PUB. HEALTH LAW CTR., THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW (2019), <https://publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf> (noting that several states sued “the country’s largest cigarette manufacturers,” including Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard Tobacco Co.).

Agreement with forty-six states, four U.S. territories, the Commonwealth of Puerto Rico, and the District of Columbia.¹⁶⁹

Since the tobacco litigation, State AGs have coordinated together on numerous nationwide lawsuits.¹⁷⁰ The ability of State AGs to coordinate and target their efforts against a common defendant to achieve a common good is largely made possible by a system of formal and informal networks that bring attorneys general across the country together. The National Association of Attorneys General (NAAG) was founded to “facilitate[] interaction among attorneys general as peers” through “trainings, conferences, summits, emerging issue forums, and special events yearly,”¹⁷¹ and the organization has helped to ease and advance the use of multistate litigation.¹⁷² Joining a multistate action is also politically expedient for many State AGs, who can then be seen as taking proactive steps against wrongdoers, while minimizing the litigation costs that any AG might bear if they sued alone.¹⁷³ These institutional structures and incentives may similarly

¹⁶⁹ See *The ABCs of the Tobacco Master Settlement Agreement*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/publications/naagazette/volume_1_number_2/the_abcs_of_the_tobacco_master_settlement_agreement.php (last visited Apr. 18, 2019). The four states not included in the settlement had already settled with the defendants earlier in 1997. See Rabin, *supra* note 51, at 340.

¹⁷⁰ See Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001) (“In groups ranging from two states to all fifty, the attorneys general now routinely prosecute cases jointly, closely coordinating with each other and sharing legal theories, discovery materials, court filings, litigation expenses, and even staff.”). The Volkswagen MDL Settlement, for example, “establish[ed] an Environmental Mitigation Trust . . . which will provide funds to all fifty states, the District of Columbia, Puerto Rico, and federally recognized tribes, to implement actions to counter the air quality impacts of the excess NOx emissions resulting from the use of the defeat devices.” Volkswagen Settlement, ST. N.J. DEP'T ENVTL. PROT., <https://www.state.nj.us/dep/vw> (last updated Dec. 13, 2018).

¹⁷¹ *What Is the National Association of Attorneys General (NAAG)?*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/about_naag/faq/what_is_the_national_association_of_attorneys_general_naag.php (last visited Apr. 18, 2019).

¹⁷² See, e.g., Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 749, 790 (2016) (noting that in the area of privacy law, “[t]he Privacy Working Group, coordinated by NAAG, has enabled offices to share expertise and resources” and that “[m]embers of the [Working Group] also take turns leading multistate investigations”); Lynch, *supra* note 170, at 2004 (noting that after the NAAG promulgated “a series of antitrust and consumer protection enforcement guidelines,” attorneys general brought more multistate actions because “[t]he guidelines informally coordinated state enforcement actions by encouraging attorneys general to follow uniform standards in the exercise of their prosecutorial discretion”).

¹⁷³ See Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 STATE POL. & POL'Y Q. 1, 6, 19–20 (2010) (noting that a state AG “may incur a political cost by not pursuing fairly easy money” in a multistate litigation).

help State AGs in the Opioid MDL to coordinate themselves, without the need for additional binding mechanisms such as a class action.¹⁷⁴

Local governments, on the other hand, lack the same nationwide coordination as the states, in part because there are multitudes more of them. The past two decades have shown a rise in litigation brought by local governments, largely in response to the tobacco settlement.¹⁷⁵ For example, in the late 1990s, local governments across the country filed numerous lawsuits against gun manufacturers.¹⁷⁶ Local governments, however, did not band together in any coordinated fashion, and these cases were not statutorily consolidated into an MDL.¹⁷⁷ Many of these lawsuits were subsequently dismissed,¹⁷⁸ and states across the country immediately passed laws to preempt local governments from suing gun manufacturers in the future.¹⁷⁹

Local governments have found greater success when their claims are consolidated into an MDL, because the MDL provides them with a structure to coordinate, giving them joint-leverage over a common defendant. One such example is *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* an MDL that consisted of claims arising out of

¹⁷⁴ See Jef Feeley, *Drugmakers Balk Now at Multibillion Dollar Opioid Accord*, BLOOMBERG (May 3, 2018), <https://www.bloomberg.com/news/articles/2018-05-03/drugmakers-said-to-balk-now-at-multibillion-dollar-opioid-accord> (“Settlement talks sponsored by state attorneys general have been going on since last year.”).

¹⁷⁵ William H. Pryor, Jr., *Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1902 (2000). The tobacco settlement did not require states to funnel any settlement money to their localities, and local governments learned that they could not trust the states to reimburse them for their own monetary damages. The states have broadly been accused of squandering their settlement money. See Jim Estes, *How the Big Tobacco Deal Went Bad*, N.Y. TIMES (Oct. 6, 2014), <https://www.nytimes.com/2014/10/07/opinion/how-the-big-tobacco-deal-went-bad.html> (noting many instances of states using the tobacco settlement money for unrelated expenditures). Some local governments did not get any money from states; others received some money temporarily only to see it revoked later. In Massachusetts, for example, once states revoked local funding to some communities, these communities saw a seventy-four percent increase in cigarette sales to minors. ROBERT WOOD JOHNSON FOUND. ET AL., A BROKEN PROMISE TO OUR CHILDREN: THE 1998 STATE TOBACCO SETTLEMENT 12 YEARS LATER 116–17 (Nov. 17, 2010), <https://www.issueab.org/resources/8443/8443.pdf>.

¹⁷⁶ Within two years of the first suit—brought by New Orleans—thirty-one municipalities filed similar lawsuits. Brian J. Siebel, *The Case Against the Gun Industry*, 115 PUB. HEALTH REP. 410, 410 (2000).

¹⁷⁷ See, e.g., Nagareda, *supra* note 141, at 176 (noting that those litigations against the gun industry were not “a monolithic force, united in all respects about objectives and strategy”).

¹⁷⁸ See *id.* at 180.

¹⁷⁹ Michael Siegel & Molly Pahn, *Mapping America’s Gun Laws, State by State*, CITYLAB (May 23, 2017), <https://www.citylab.com/equity/2017/05/mapping-americas-gun-laws-state-by-state/527823> (noting that thirty-three states passed these preemption measures such that “[n]o other consumer product manufacturer enjoys such broad immunity”).

the British Petroleum (BP) oil spill in 2010 (BP Oil Spill MDL).¹⁸⁰ After one of the biggest oil spills in history, thousands of individual claimants,¹⁸¹ seven Gulf Coast states,¹⁸² the federal government,¹⁸³ and local governments sued BP.¹⁸⁴ As a result, parties had to reach a settlement not only with five Gulf States,¹⁸⁵ but also with over four hundred local governments.¹⁸⁶

To manage the local governments, Judge Carl Barbier of the Eastern District of Louisiana did something unique: He created “pleading bundles” for different categories of plaintiffs.¹⁸⁷ One of those pleading bundles was for “public damage claims,” which included all claims brought by government entities.¹⁸⁸ Local governments that wanted to participate in the MDL could either file their own individual complaint or sign onto a “Master Complaint” called the Local Government Entity Master Complaint.¹⁸⁹ When BP ultimately offered to settle all claims, putting aside one billion dollars specifically for local governments,¹⁹⁰ Judge Barbier gave the local governments, including those that had not already sued, until a specific

¹⁸⁰ *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010, 731 F. Supp. 2d 1352, 1353 (J.P.M.L. 2010).

¹⁸¹ *See In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010, 910 F. Supp. 2d 891, 900 (E.D. La. 2012) (“[H]undreds of cases with thousands of individual claimants [were] consolidated with this Multidistrict Litigation.”).

¹⁸² *See* Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the BP Oil Spill as Parens Patriae Products Liability*, 49 HOUS. L. REV. 291, 301 (2012) (noting that Alabama and Louisiana were the first two states to join the MDL); *see also* U.S. Dep’t of Justice, *U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit over Deepwater Horizon Oil Spill* (Oct. 5, 2015), <https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater> (stating that BP reached settlement with Alabama, Florida, Louisiana, Mississippi, and Texas).

¹⁸³ *See* U.S. Dep’t of Justice, *supra* note 182.

¹⁸⁴ *See* Koenig & Rustad, *supra* note 182, at 301.

¹⁸⁵ *See* U.S. Dep’t of Justice, *supra* note 182.

¹⁸⁶ *See* LA. STATE SENATE COMM. ON FIN. AND NAT. RES., DEEPWATER HORIZON SETTLEMENT UPDATE: AGREEMENT IN PRINCIPLE WITH BP EXPLORATION AND PRODUCTION ON STATE AND FEDERAL CLAIMS 3 (2015), <http://senate.la.gov/FiscalServices/Presentations/2015/DH%20Settlement%20Update.pdf>.

¹⁸⁷ *See* Pre-Trial Order No. 25 at 1–2, *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010, MDL No. 2179, No. 2:10-md-02179-CJB-SS (E.D. La. Jan. 12, 2011) (describing the scopes of various pleading bundles).

¹⁸⁸ *See* Pre-Trial Order No. 33 at 1, *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010, MDL No. 2179, No. 2:10-md-02179-CJB-SS (E.D. La. Mar. 9, 2011).

¹⁸⁹ *Id.* at 2. In order to join the Master Complaint, a local government would first fill out a form that included the type of claim that they had against BP, for example, loss of tax revenue, property damages, or restoration costs, plus the type of evidence they had to support that claim. *See id.* app. 1–2 (Local Government Entity Short Form (Voluntary)).

¹⁹⁰ *See* Sean Rossman, *BP Payouts to Local Governments to Start Soon*, TALLAHASSEE DEMOCRAT (July 23, 2015), <https://www.tallahassee.com/story/news/2015/07/27/leon-jefferson-wakulla-get-six-figure-bp-payments/30596259>.

date to sign onto the settlement agreement.¹⁹¹ Although BP could “walk away” from the settlement if not enough local entities accepted the offer, most local entities joined in the end.¹⁹²

The BP Oil Spill settlement demonstrates that the MDL judge has extraordinary power to shape a settlement to include local governments. By coordinating a master complaint for local governments and then refusing to dismiss many of their claims, Judge Barbier helped to forge a path where local governments needed to be included in any settlement arrangement. Judge Polster has also done the same for the local governments in the Opioid MDL.¹⁹³

The BP Oil Spill settlement also provides a starting point for handling the local government claims in the Opioid MDL. Similar to Judge Barbier’s tactics, Judge Polster has streamlined the process for local government plaintiffs to file claims in the Opioid MDL by allowing local governments plaintiffs to use the same standardized short form complaint.¹⁹⁴ However, the similarities likely end there, because the Opioid MDL involves tens of thousands more local entities. Judge Barbier’s “if you build it, they will come” approach—putting forth a settlement agreement, setting a deadline for joining, and hoping that local governments will sign on to it—will not be enough to provide the defendants with assurance that enough local governments have joined to provide global peace.

The Opioid MDL thus presents a new problem, which is that consolidation into an MDL is not enough alone to achieve coordination, and additional mechanisms will be necessary to “coerce” or “convince” enough local governments to join to achieve finality. The next Part argues that the mechanisms used primarily to resolve MDLs involving *individuals*, as described in Part I, can also be used to incentivize the *local governments* in the Opioid MDL to settle.

¹⁹¹ See Order, *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010, MDL No. 2179, No. 2:10-md-02179-CJB-SS (E.D. La. July 10, 2015) (giving governmental entities until July 2, 2015 to accept the settlement offer).

¹⁹² See Order, *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010, MDL No. 2179, No. 2:10-md-02179-CJB-SS (E.D. La. Aug. 28, 2015) (“[T]he vast majority of [local government entities (LGE)] who preserved their claims subsequently elected to participate in the LGE settlement with the BP Parties.”).

¹⁹³ See Order Appointing Interim Class Counsel, *In re* Nat’l Prescription Opiate Litig. MDL No. 2804, No. 1:17-md-02804-DAP (N.D. Ohio Aug. 19, 2019) [hereinafter Order Appointing Interim Class Counsel] (appointing Co-Lead Negotiation Class Counsel for “a Rule 23(b)(3) Cities/Counties Negotiation Class”).

¹⁹⁴ See Transcript of Proceedings, *supra* note 26, at 4 (discussing the short form complaint). The version of the short form complaint that local governments can use to file their own complaint is the Summit County, Ohio complaint. See generally Opinion and Order, *In re* Nat’l Prescription Opiate Litig., MDL No. 2804, No. 1:17-md-2804-DAP (N.D. Ohio Jan. 18, 2019), <https://www.ohnd.uscourts.gov/sites/ohnd/files/1282.pdf> (discussing and providing a copy of the short form complaint).

III REACHING AN AGGREGATE SETTLEMENT IN THE OPIOID MDL

Any settlement needs to address three problems: defining the scope of the local government plaintiffs, creating a distributional metric that defines each plaintiffs' proportionate share of any settlement award, and getting absent and present parties into the settlement. This Part proposes that the Opioid MDL could use the settlement structures described in Part I to achieve finality. This Part does not take a position on which particular method should be used, and does not seek to resolve all the granular details of a settlement.¹⁹⁵ Rather, the goal of this Part is to further a dialogue on how settlement might be possible in the Opioid MDL.

A. *Defining the Local Government Plaintiffs*

One initial hurdle for reaching a settlement with local governments is that there are layers to the local government plaintiffs, including counties, cities, towns, and public organizations like fire departments and local hospitals.¹⁹⁶ These sub-governmental entities pose a difficult problem for just how granular a settlement arrangement with local governments must get.

Plaintiffs' counsel has proposed the certification of a "negotiation class" that is limited to "cities, towns, villages, townships, and municipalities, as defined by the United States Census Bureau"¹⁹⁷ This, of course, leaves organizations like local fire departments free to sue.¹⁹⁸ However, the parties can employ the solution used in the

¹⁹⁵ It does not, for example, address how to divide and apportion liability among the plethora of defendants.

¹⁹⁶ See, e.g., *Ill. Fire Dept. Joins Lawsuit Against Opioid Manufacturers*, EMS1.COM (July 23, 2018), <https://www.ems1.com/fire-ems/articles/387545048-Ill-fire-dept-joins-lawsuit-against-opioid-manufacturers> (noting that the Orland Park Fire Department joined multiple other entities within the municipality to sue "opioid manufacturers, distributors, and three doctors in state court").

¹⁹⁷ Order Appointing Interim Class Counsel, *supra* note 193, at 1.

¹⁹⁸ However, it is possible that local governments would be precluded from suing. When states bring an action in a *parens patriae* capacity, that action might preclude private individuals from suing in the future. See Gabrielle J. Hanna, Note, *The Helicopter State: Misuse of Parens Patriae Unconstitutionally Precludes Individual and Class Claims*, 92 WASH. L. REV. 1955, 1966 (2017) ("This preclusion problem happens when a state has a quasi-sovereign interest in a particular claim that overlaps with a private individual's or classes' interest in the same claim."). The same preclusive effect might be true when a municipality purports to represent, for example, the local fire departments interests. See, e.g., Opinion and Order at 16, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018) (stating that the County of Summit, Ohio, brings damage claims related to "[c]osts associated with emergency responses by police officers, firefighters, and emergency and/or first responders to opioid overdoses").

Volkswagen MDL, where Volkswagen had individuals sign litigation waivers when they went to turn in or trade in their car.¹⁹⁹ When defendants agree to settle with local governments, the settlement can require that a portion of the funding be set aside for local fire departments, police, and hospitals. Local governments can figure out how to apportion funding among these organizations and leave it open for them to come and claim it. If and when these organizations accept money from the settlement fund, they would be required to sign a waiver foreclosing all future litigation against the defendants.

As for the counties and cities, there are a few possibilities for how they can each be included in a settlement. For example, there could be a single class action that creates subclasses for each entity—counties, cities. These sub-entities could be treated separately, instituting two separate class certifications or settlement agreements. This Section does not put forth a preference, but merely notes that due process concerns might mandate more granular divisions.²⁰⁰

B. *Creating a Distributional Metric*

In any mass settlement one of the major hurdles is figuring out how much of the settlement each plaintiff should receive. The way that most aggregate litigation has resolved this complication is by using “grids” to determine different payouts²⁰¹ and tasking special masters and claims administrators, who are neutral third parties, with “handl[ing] intraclass allocations.”²⁰² The key to arriving at a settlement figure is to agree to a particular loss, or set of losses, that can be easily quantified. Currently, plaintiffs’ lawyers have proposed a distributional metric based on federal data on the “distribution of prescriptions as well as opioid overdoses and deaths nationwide.”²⁰³ Another alternative is to select from any of the variety of losses that local governments claim—including increased health care costs related to treating opioid addictions, taxpayer dollars spent on community services such as homeless shelters and addiction centers, costs to fire or police departments in responding to opioid overdoses and drug-

¹⁹⁹ See *supra* notes 94–98 and accompanying text (discussing the Volkswagen settlement).

²⁰⁰ See *supra* note 79 (discussing *Amchem*).

²⁰¹ See David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 571 (2017) (discussing the use of “grids” to determine different payments).

²⁰² Cabraser & Issacharoff, *supra* note 38, at 862 (generally discussing the use of “grids” to resolve this problem).

²⁰³ Hoffman, *supra* note 4. To view the distributional metric and interactive map, see *Allocation Map*, IN RE: NATIONAL PRESCRIPTION OPIATES LITIGATION (June 18, 2019), <https://allocationmap.iclaimsonline.com>.

related arrests, and others²⁰⁴—because there should be a record of how local governments spend taxpayer dollars.²⁰⁵

After a settlement figure is derived, defendants can create a trust to hold settlement money—a tactic discussed in Part I that was employed in the asbestos bankruptcy reorganizations.²⁰⁶ Claimants can file as “beneficiaries” to receive money from the trust, and to avoid the problem of the Tobacco Settlement,²⁰⁷ the trust administrator can require them to set forth a plan for exactly how they intend to spend the settlement money.²⁰⁸ In addition, beneficiaries should be required to submit proof of damages prior to receiving money from the trust²⁰⁹ and the agreement should include an appeals process, whereby claimants can argue that they did not receive appropriate compensation from the claims distribution process.²¹⁰ Finally, because the opioid crisis is ongoing, it will likely be important to leave the settlement figure open-ended so that localities that do not currently have losses can claim them in the future.²¹¹

C. *Getting Present and Absent Parties into the Settlement Agreement*

Contractual aggregation and class actions—two techniques described in Part I that have been particularly effective in achieving an aggregated settlement—are plausible solutions to the Opioid MDL. The following Section examines how those techniques could be

²⁰⁴ See Complaint at 58–63, *City of Tacoma v. Purdue Pharma*, No. 3:17-cv-5737 (W.D. Wash. Sept. 13, 2017) (describing a variety of damages faced by the city of Tacoma, Washington).

²⁰⁵ Local governments must “produce a Comprehensive Annual Financial Report . . . reporting on its financial status” that are reviewed by an independent auditor who “makes a public report on the accuracy of the local government’s financial records and report.” Ron Carlee, *Budgeting for Local Governments in the United States: Deciding Who Gets What, How Much, and Who Pays?*, 3 J. WASH. INST. CHINA STUDIES 106, 109 (2008), <https://www.bpastudies.org/bpastudies/article/view/73/151>. Claims that are not compensated will likely be waived by the terms of the settlement agreement. See *supra* note 20 and accompanying text (describing standard settlement terms to achieve claim preclusion).

²⁰⁶ See *supra* Section I.B.3.

²⁰⁷ See *supra* note 175.

²⁰⁸ See, e.g., VOLKSWAGEN DIESEL EMISSIONS ENVTL. MITIGATION TRUST, <https://www.vwenvironmentalmitigationtrust.com> (last visited Apr. 21, 2019) (setting out how states can use funding, and mandating that they submit a plan prior to reimbursement and also publish semi-annual reports on how they have spent the money).

²⁰⁹ See, e.g., *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 423–24 (3d Cir. 2016).

²¹⁰ See, e.g., *id.* at 424 (“The class member, class counsel, and the NFL have the right to appeal an award determination.”).

²¹¹ See *id.* at 433 (leaving the settlement fund “uncapped and inflation-adjusted, protecting the interests of those who worry about developing injuries in the future”).

used to incentivize absent parties to join a settlement agreement. This Section also analyzes a third solution, proposed to resolve the local government claims, the negotiation class, and details how despite its novelty the class is just the evolution of techniques previously used in the asbestos bankruptcy reorganizations.²¹²

1. *Contractual Aggregation*

The Vioxx settlement took advantage of the contracts that individual plaintiffs had with their attorneys to induce those plaintiffs to join the settlement agreement. The ultimate agreement required plaintiffs' attorneys to recommend enrollment in the program to one hundred percent of their eligible clients, and if an individual client chose not to participate, the lawyer would then have to attempt to disengage from the representation. The lawyer had to either put *all* of her clients into the settlement or leave *all* of her clients out—there was no middle ground, and the settlement contained a “walk-away” provision that allowed Merck to back out of the settlement if less than eighty-five percent of eligible claimants joined.²¹³

The opioid defendants can use a similar technique, but instead of leveraging the *attorneys* to get their local government clients into the settlement, they can use the *states*.²¹⁴ Under this plan, each state must get at least a certain percentage of their local governments to sign onto the settlement, or else any proposed settlement falls apart for both of them, similar to the walk-away provision in Vioxx.²¹⁵ States have a variety of carrots and sticks to incentivize their sub-governments to join settlement agreements. For example, states provide funding to local governments for various programs, such as

²¹² At the time of writing, the negotiation class has not yet been certified, but interim class counsel has been appointed. See Order Appointing Interim Class Counsel, *supra* note 193. By the time of publication, the negotiation class may be certified in some fashion. This Note does not reflect changes to the Opioid MDL made after September 10, 2019, and as a result does not reflect the final terms of any negotiation class certification.

²¹³ See *supra* notes 59–70 and accompanying text (discussing the *Vioxx* settlement in more detail).

²¹⁴ This Note presumes that by the point of settlement, all, or close to all, states will be part of the Opioid MDL (or at least willing to engage in settlement negotiations even if they have not yet filed a complaint). See Esmé E. Deprez & Paul Barrett, *The Lawyer Who Beat Big Tobacco Takes on the Opioid Industry*, BLOOMBERG BUSINESSWEEK (Oct. 5, 2017), <https://www.bloomberg.com/news/features/2017-10-05/the-lawyer-who-beat-big-tobacco-takes-on-the-opioid-industry> (noting that as of 2017, “[f]orty state AGs have launched preliminary investigations as a way to gauge the viability of litigation” and that plaintiff attorneys “hope to corral at least 25 states to exert enough pressure, collect enough evidence, and drive potential damages so high that it will be cheaper for opioid manufacturers to back down”).

²¹⁵ See *supra* note 68 and accompanying text.

improving infrastructure or helping combat homelessness,²¹⁶ that an individual state could threaten to withhold, or offer to increase, depending on whether the local government signs onto the settlement agreement. States could also designate a certain percentage of their settlement money to the creation of specific programs in local communities if they agree to settle.²¹⁷

Local governments have an incentive to cooperate with their state, because if they choose to forgo participation in the settlement and pursue their claims individually, they will face enormous hurdles, not only in demonstrating that their state permits them to sue in their own capacity,²¹⁸ but also in meeting the Article III injury, causation, and redressability requirements²¹⁹ that are largely contested in this case.²²⁰

However, the states will need to be incentivized to work so extensively with local governments in structuring the settlement. One possible incentive is for the settlement to offer bonuses to states depending on the percentage of local governments that they bring into it. The greater percentage of local governments the state convinces to join the settlement, the more money they receive from defendants. In order to ensure that the settlement does not only consist of local governments with the weakest claims, leaving out the local governments

²¹⁶ There is a myriad of programs that involve state funding of local governments. For example, in New Jersey, the state provides over \$400 million in “assistance to local governments for the funding of road, bridge and other transportation projects.” See *Local Aid and Economic Development: Funding Programs*, ST. N.J. DEP’T TRANSP., <https://www.state.nj.us/transportation/business/localaid/funding.shtm> (last updated July 27, 2018). California “provides more than \$700 million dollars to help local governments and entities combat homelessness.” *New 2018 Homelessness Funding*, CAL. ST. ASS’N COUNTIES, <http://www.counties.org/post/new-2018-homelessness-funding> (last visited Mar. 21, 2019).

²¹⁷ For example, states could help create local “syringe exchange programs” which can help “protect[] communities from the outbreak of infectious diseases like HIV and hepatitis,” as well as “connect individuals struggling with drug addiction to treatment services.” NAT’L LEAGUE OF CITIES & NAT’L ASS’N OF CTYS., *A PRESCRIPTION FOR ACTION: LOCAL LEADERSHIP IN ENDING THE OPIOID CRISIS*, <http://opioidaction.org/report> (last visited Mar. 21, 2019). States could also help local governments create “medication-assisted treatment programs, expand drug abuse prevention and education efforts, purchase sufficient quantities of naloxone and implement useful drug take-back programs.” *Id.*

²¹⁸ See *supra* notes 157–65 and accompanying text; see also Engel, *supra* note 157, at 373 (explaining that when bringing statutory claims, “cities must demonstrate that they fall within the zone of interests the statutes were intended to benefit”).

²¹⁹ Engel, *supra* note 157, at 369.

²²⁰ See *supra* note 16. Even though local governments face these hurdles, defendants will still want to keep them in the settlement to avoid the risks of litigation. Cf. Master Settlement Agreement, *supra* note 20, § I (noting that the parties “wish to avoid the further expense, delay, inconvenience, burden and uncertainty of continued litigation (including appeals from any verdicts), and therefore, have agreed to settle their respective lawsuits”).

with the biggest populations and likely the strongest claims,²²¹ the settlement can also condition a state's bonus payment on the participation of enough local governments to account for a certain percentage of the state's total population.

The difficulty with using a Vioxx settlement model is that it requires a lot of work on the front end to encourage local governments to opt-in to the settlement. In addition, a settlement of this nature would still only bind parties that *join* the settlement, and could not reach absent localities.²²² Defendants can employ a range of tools, such as the trust-and-lien structure and most-favored nation clauses described in Part I,²²³ to make staying out of the settlement less appealing. However, if the defendants want the greater assurance of finality that comes from binding absent parties, then a class action would be a preferable tool for settlement.

2. *Class Action*

There are two possible types of class actions that could be employed in the Opioid MDL, a 23(b)(1) or a 23(b)(3) class, each with its own set of strengths and weaknesses.

The biggest difficulty in certifying a 23(b)(3) class action is meeting its “predominance” requirement.²²⁴ Defendants have ardently argued that the harms flowing from the opioid crisis do not stem from a single genesis, but rather are the result of disparate actors and influences beyond the conduct of the defendants. Even though the defendants manufacture and distribute the drugs, physicians still need to prescribe them, individuals need to take them in excess and become addicted to them, and those individuals' addiction in turn must cause “[the local governments] to expend additional resources on emergency services”²²⁵ Additionally, the “opioid epidemic” is not just the fault of the defendants—it also “include[s] black markets for diverted opioids.”²²⁶ This can make it difficult to prove commonality among the various plaintiffs.

Despite these arguments, the Opioid MDL is well-situated to be resolved as a class action. Although it is true that there are many con-

²²¹ See Corky Siemaszko, *Large U.S. Cities See Big Jump in Deadly Opioid Overdoses, CDC Data Shows*, NBC NEWS (Mar. 6, 2018, 1:51 PM), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/large-u-s-cities-see-big-jump-deadly-opioid-overdoses-n854041> (“The opioid epidemic is fast becoming a big city problem.”).

²²² See *supra* note 69 and accompanying text.

²²³ See *supra* notes 99–102 and accompanying text.

²²⁴ See *supra* notes 83–84 (discussing *Wal-Mart v. Dukes*).

²²⁵ Opinion and Order at 9, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Dec. 19, 2018) (citation omitted).

²²⁶ *Id.*

tributors to the “opioid crisis,” this does not mean that there are not common issues that predominate over these individualized ones. Complaints that have been filed by local governments show that almost all of these plaintiffs raise the same set of claims: defendants violated the federal civil Racketeer-Influenced and Corrupt Organizations Act (RICO) and various state-specific statutes and committed a number of common law torts, including public nuisance, negligence, fraud, unjust enrichment, and civil conspiracy.²²⁷

Judge Polster has decided to limit class certification to “a small number of federal claims,” and has excluded all state claims.²²⁸ One of the federal claims, a Civil RICO claim, has met the predominance requirements required for class certification in other courts.²²⁹ If it is true that defendants engaged in a conspiracy to “unlawfully increase their profits and sales . . . through repeated and systematic misrepresentations about the safety and efficacy of opioids for treating long-term chronic pain,”²³⁰ then it is likely that *all* local governments were the targets of this behavior. The defendants’ alleged scheme would not have worked if in one locality they told the truth about opioids but in another they lied about the safety and efficacy of them. An answer as to one plaintiff must be true for all plaintiffs, making this case ripe for a class certification.

An additional difficulty with achieving finality in a 23(b)(3) class is that it must provide plaintiffs with the opportunity to opt-out. As with contractual aggregation, there are mechanisms that the parties can use to make opting-out less enticing, including walk-away provisions, most-favored nation clauses, and trust-and-lien structures.²³¹ A

²²⁷ In fact, some of the complaints appear to be literal templates of one another. *See, e.g.*, Corrected Second Amended Complaint & Jury Demand, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:18-md-45090-DAP (N.D. Ohio May 18, 2018); Second Amended Complaint (Redacted) Demand for Jury Trial, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:18-op-45332-DAP (N.D. Ohio May 30, 2018); Second Amended Complaint (Redacted) Demand for Jury Trial, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:18-op-45158-DAP (N.D. Ohio May 30, 2018).

²²⁸ Transcript of Proceedings, *supra* note 26, at 4.

²²⁹ In *Klay*, the court found that certification of a class was appropriate where plaintiffs raised RICO claims. 382 F.3d at 1256 (“[A]ll of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs.”). In the NFL Concussion MDL, the court found that commonality was met because “[e]ven if players’ particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the NFL’s conduct.” *In re Nat’l Football League Players*, 821 F.3d 410, 427 (3d Cir. 2016).

²³⁰ Complaint at 223, *Muskegon Cty. v. Purdue Pharma*, No. 1:18-cv-01155 (W.D. Mich. Oct. 9, 2018).

²³¹ *See supra* notes 99–102 and accompanying text.

23(b)(1) class action, on the other hand, automatically binds all absent parties to the settlement and provides no opportunity to opt-out.²³²

As discussed in Part I, 23(b)(1) class actions have commonly been used in ERISA lawsuits where defendants would face inconsistent obligations if multiple courts reached different conclusions over whether the defendant violated their statutory fiduciary duty.²³³ A 23(b)(1)(A) class action could similarly be used to resolve parts of the Opioid MDL. One of the many claims raised by local governments is that the manufacturers and the distributors of the drugs violated the Controlled Substances Act (CSA)²³⁴ and the accompanying regulations that have been issued by the U.S. Drug Enforcement Administration (DEA).²³⁵ Local government plaintiffs allege that the manufacturers and the distributors have a legal duty to ensure that opioids “are only distributed and dispensed to appropriate patients,”²³⁶ and that the defendants breached this duty by failing to “detect and warn of diversion of dangerous drugs for non-medical use”²³⁷ and “take steps to halt suspicious orders.”²³⁸

If the defendants in the Opioid MDL owed a legal duty under the CSA to one local government, then they owed that same legal duty to *all* local governments. The Controlled Substances Act cannot be interpreted differently on a locality-by-locality basis—there can only be “one standard of conduct” under the statute, and damages to all plaintiffs would flow directly from a determination that the standard was violated.²³⁹ Further, if a state sues alleging that defendants breached a legal duty under the CSA and a local government in that state raises the same allegations, then the outcome *must* be the same. If defendants owed a duty to the state, then inherently they owed a duty to the sub-parts of the state—the counties, towns, and cities—and vice versa. Two different outcomes would create inconsistent obligations to the same plaintiffs.

²³² See FED. R. CIV. P. 23(b)(1).

²³³ See *supra* notes 88–92 and accompanying text (describing 23(b)(1)(A) ERISA lawsuits).

²³⁴ 21 U.S.C. § 801 *et seq.* (2012).

²³⁵ See, e.g., 21 C.F.R. § 1301.74 (2018) (requiring manufacturers and distributors to “design and operate a system to disclose . . . suspicious orders of controlled substances”).

²³⁶ See Corrected Second Amended Complaint & Jury Demand at 46, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-md-2804 (N.D. Ohio May 18, 2018); see also Complaint at 9, *Cabell Cty. Comm’n v. AmerisourceBergen Drug Corp.*, No. 3:17-cv-01665 (S.D. W. Va. Mar. 9, 2017); Complaint at 183–86, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 18-OP-45158 (N.D. Ohio May 30, 2018).

²³⁷ Corrected Second Amended Complaint & Jury Demand at 46, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-md-2804 (N.D. Ohio May 18, 2018).

²³⁸ *Id.* at 150.

²³⁹ See WRIGHT & MILLER, *supra* note 87, § 1773.

The problem with using a 23(b)(1)(A) class is that this would be the first time that it would be used to resolve such a massive MDL.²⁴⁰ The best way to avoid overturn on appeal would be for the parties to mirror the methods that have previously been (at least implicitly) approved by the Supreme Court, which have primarily been 23(b)(3) class actions.²⁴¹ There is also some debate over whether 23(b)(1)(A) classes can appropriately be used to adjudicate monetary claims.²⁴² And, even when courts have found that 23(b)(1)(A) classes can grant monetary judgments, “courts are in disarray over what due process requires”—namely, should plaintiffs be given notice and the opportunity to opt-out similar to a 23(b)(3) class?²⁴³ Further, if plaintiffs do not have opt-out rights,²⁴⁴ courts may dislike the idea of forcing and binding *local governments* into action in *federal court*.²⁴⁵ Parties will therefore have to decide whether to take the more unprecedented approach of using a 23(b)(1) class in order to achieve greater finality, or to use the more common 23(b)(3) class that would give local governments the option to leave the settlement.

3. *The Negotiation Class: A Hybrid Aggregation*

The solutions discussed above operate on the presumption that a final settlement figure has already been reached, and the goal is to get as many plaintiffs to sign on to the settlement as possible. In this model, the settlement offer is take it, or leave it. The plaintiffs can either agree to the total settlement calculation, or they can opt-out and bring their own claims individually.

The final method, and the one currently being put forth in the Opioid MDL,²⁴⁶ however, attempts to give the local government

²⁴⁰ See Fisher, *supra* note 37 (noting that parties in the Opioid MDL have discussed using a Rule 23(b)(1) class but quoting Francis McGovern, “one of three special masters overseeing settlement negotiations” in saying that “the problem is there’s not a whole lot of law that supports it”).

²⁴¹ See, e.g., *Armstrong v. Nat’l Football League*, 137 S. Ct. 607 (Dec. 12, 2016) (*denying cert. to In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016)).

²⁴² Cf. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (“[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3).”); see also *supra* note 79.

²⁴³ See Klonoff, *supra* note 79, at 801.

²⁴⁴ See *id.* at 833 (“[R]equiring opt outs would defeat the very purpose of a (b)(1)(B) class . . .”).

²⁴⁵ Judge Polster has expressed hesitancy at forcing the state governments to take part in the federal opioid MDL even though he has expressed that “their participation . . . is essential if there is to be any resolution.” See Order, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-md-02804-DAP (N.D. Ohio Jan. 24, 2018); see also Fisher, *supra* note 37 (“[A] mandatory class would tread far too heavily on the autonomy of individual states and counties to decide what’s best for them.” (quoting Elizabeth Chamblee Burch)).

²⁴⁶ See *supra* note 212.

plaintiffs both more agency and flexibility by certifying a class *before* the point at which an absolute and final settlement offer is on the table. The plaintiffs have aptly named this the “negotiation class.”²⁴⁷

Under this approach, local governments and plaintiffs’ committees will create a “distributional metric for allocating [the] lump sum settlement among the class members” and a “supermajority voting scheme.”²⁴⁸ At this time, local governments will be able to know a) what percentage of any total settlement offer they are slated to receive; and b) by what vote will they be bound to accept a total settlement figure if they choose to participate in the 23(b)(3) class. The current supermajority vote proposed creates six different voting groups and requires that each voting group approve the settlement plan by at least a seventy-five percent majority,²⁴⁹ and a proposed distributional metric has already been posted online.²⁵⁰ The parties will then move to certify a 23(b)(3) opt-out class.²⁵¹ The local governments at this point will have two choices. The first choice is to opt-out of the class and proceed individually against the defendants. However, local governments that choose this option risk delayed recovery, or no recovery at all.²⁵² The second choice is to remain in the class. By remaining in the class, plaintiffs will have an option to *vote* on the proposed settlement and “allocation metric.”²⁵³ If the proposed settlement receives “supermajority support” by the local government plaintiffs in the class then the settlement is approved, “the entire class would be bound by that vote,” and “class counsel and the defendant would then move for final judicial approval of the settlement.”²⁵⁴ If the proposed settlement does not receive the necessary supermajority votes, then the plaintiffs and defendants must go back to the drawing table. This plan gives plaintiffs a greater stake in the outcome by giving them more than a decision to just opt-in or opt-out of a final settlement offer—it gives them the option to vote on what that settlement offer should be. Professor Samuel Issacharoff has described the

²⁴⁷ See Plaintiffs’ Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, No. 1:17-md-02804-DAP (N.D. Ohio June 25, 2019).

²⁴⁸ McGovern & Rubenstein, *supra* note 127, at 5.

²⁴⁹ Transcript of Proceedings, *supra* note 26, at 9.

²⁵⁰ See *supra* note 203 and accompanying text (describing the current distributional metric proposal).

²⁵¹ *Id.*

²⁵² Hoffman, *supra* note 4 (“There is no certainty [that municipal plaintiffs] could recover anything on their own. [By opting into the negotiation class], the funds to abate the deadly crisis would be guaranteed and delivered more swiftly than if the municipalities pursued their own cases.”).

²⁵³ McGovern & Rubenstein, *supra* note 127, at 6.

²⁵⁴ *Id.* at 6.

negotiation class as “the most elaborate and direct form of class member participation that has ever been tried.”²⁵⁵ The plan also ensures that any final settlement plan does not fall apart at the last minute because too many plaintiffs choose to opt-out; plaintiffs that do not opt-out prior to voting agree to be bound by whatever settlement ultimately receives supermajority class votes.²⁵⁶

Although legal experts have described the negotiation class as “novel and unorthodox,”²⁵⁷ the negotiation class is really just a combination of the class action, contractual aggregation, and bankruptcy reorganizations used to resolve asbestos claims. The negotiation class mirrors the contractual aggregation techniques supported by ALI Principles § 3.17 and the reorganization plans supported by 11 U.S.C. § 524(g).²⁵⁸ The ALI Principles § 3.17 anticipate an attorney getting their client’s informed consent through a written agreement to be bound to whatever settlement obtains a supermajority vote.²⁵⁹ Here, rather than a written agreement, the parties instead are simply utilizing the opt-out class action as a means of effecting consent. Local government plaintiffs give their consent to be bound by the supermajority approved settlement if they do not opt-out of the negotiation class action of which they received notice and a period to affirmatively withdraw from the class. By using a class action, the parties are also able to ensure that any settlement proposal is fair and equitable to all parties. In *Combustion Engineering*, Chief Judge Scirica took guidance from Rule 23 in assessing whether a bankruptcy organization plan under § 524(g) was fair and equitable.²⁶⁰ Judge Polster, however, will actually be bound procedurally by the provisions of Rule 23 to render a fairness determination.²⁶¹

The negotiation class is a novel use of Rule 23, but that does not mean that it is an invalid use of the Rule. As Plaintiffs’ counsel points out, “Rule 23 does not speak of a ‘litigation class’ or a ‘settlement class.’ The Rule addresses only the use of the class action when certain

²⁵⁵ Hoffman, *supra* note 4 (quoting Samuel Issacharoff).

²⁵⁶ For more detailed overview and discussion of the negotiation class, see McGovern & Rubenstein, *supra* note 127.

²⁵⁷ Hoffman, *supra* note 4 (internal quotation marks omitted).

²⁵⁸ See *supra* notes 118–33 and accompanying text.

²⁵⁹ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2010).

²⁶⁰ See *supra* notes 121–24 and accompanying text.

²⁶¹ FED. R. CIV. P. 23(e)(2) provides that any proposal that would bind class members can only be approved after there has been a hearing and finding that a settlement is “fair, reasonable, and adequate” in light of various considerations including whether “class representatives and class counsel have adequately represented the class;” “the proposal was negotiated at arm’s length;” and “the proposal treats class members equitably relative to each other.”

conditions are met under Rule 23(a), and then specifies the reasons for common class treatment under Rule 23(b)(3).”²⁶² Additionally, by cloaking the *ex ante* agreement in the protections of a class action settlement, the negotiation class actually provides even greater procedural protection to “absent parties” than traditional class actions. Class actions always bind some or all absent parties, including some who did not even know that there was ongoing litigation that might affect them. Class members are also only given the opportunity to opt-out at the very end once a settlement figure has been decided in their absence. The negotiation class, on the other hand, alerts all absent parties to the presence of negotiations prior to any final settlement decision, giving them a chance to participate in crafting that settlement figure and saddling any ultimate settlement with the protection of multiple supermajority vote requirements and the court’s fairness and equity oversight. In turn, the negotiation class may ultimately provide the most efficient and fairest way to resolve the claims of local government plaintiffs while providing the defendants with global peace.

CONCLUSION

This Note hopes to start the conversation about the Opioid MDL’s most predictable outcome—settlement—by highlighting various ideas for how a settlement might be structured. While the Opioid MDL presents a number of seemingly new and intractable issues, including the number of local government plaintiffs and the kinds of claims those governments are litigating, this Note argues that the “federal common law of MDL procedure”²⁶³ can provide a guiding light for achieving a final resolution. The aggregation techniques described in this Note are the product of over a decade of experimentation in resolving MDLs by judges and attorneys, and any solution to resolve the claims of local governments will not be created on a blank canvas. Even the innovative “negotiation class” is the natural evolution of previously used mechanisms to achieve finality. If the Opioid MDL settles in one of the manners described in this Note, it will be a remarkable ode to the so-called “federal common law of MDL procedure,” and will become its own precedent for future litigation involving sub-government entities. As the cases discussed in this

²⁶² Plaintiffs’ Memorandum in Support of Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 4, *In re Nat’l Prescription Opiate Litig.*, MDL 2804, No. 1:17-md-2804-DAP (N.D. Ohio June 24, 2019).

²⁶³ Gluck, *supra* note 21, at 1674 (emphasis omitted).

Note testify, when it comes to resolving MDLs, everything is unprecedented until it is not.