

The Democratization of Mass Actions in the Internet Age

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I. INTRODUCTION

The need for aggregate litigation is increasing as our society becomes more interconnected. Even as courts and legislatures contract the availability of efficacious class actions,¹ demand for mass actions is rising. New procedures are developing to fill the gap.² These changes will present new practical and logistical challenges.

For over sixty years, I have been intrigued by the issue of how much claimants in mass litigations should participate in their cases. A number of current conditions are putting pressure on our traditional notions of who controls litigation and how they do it. These conditions suggest revisiting the relationship of courts, attorneys, and plaintiffs to the mass actions brought on their behalf, as well as carefully examining how these actions are financed.

It is trite to say that the Internet and its various applications are profoundly affecting our lives. Examples from the Middle East “people’s revolts” to domestic, sexual, and other social changes abound. In the law, a huge expansion of do-it-yourself

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1. See, e.g., David Segal, *A Rising Tide Against Class-Action Suits*, N.Y. TIMES, May 6, 2012, at BU4 (discussing recent curtailment of class action suits).

2. See, e.g., AM. L. INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 1.05 cmt. i (2010) [hereinafter AGGREGATE LITIGATION].

online legal guidance,³ discovery burdens,⁴ and new research and notice capabilities are well known.⁵ These and other new technologies increase the potential for plaintiffs to directly participate in mass actions.

At the same time, alternative litigation financing — whether in such forms as loans to individual plaintiffs or plaintiffs' law firms or investment in lawsuits — is increasingly a reality of the legal world.⁶ As the availability of this kind of financing increases, it may become easier for plaintiffs to sue, equalizing the power to conduct suits between defendants — often large, well-funded corporations — and small, individual claimants.

The question remains: Is more active participation in litigations by those with claims necessary in theory?⁷ Is it possible? Is

3. For example, Professor Richard Susskind describes how online technologies have changed the way clients obtain legal guidance:

One of the most obviously disruptive legal technologies is online legal guidance. Some context is needed here. Traditionally, when most non-lawyers needed legal help, the principal way in which this was secured was through direct consultation with lawyers — face-to-face, consultative service, usually delivered on an hourly billing basis. Lawyers, on this model, were the interface between clients and the law. With the emergence of the Web, however, it has been possible for clients to gain access to increasingly advanced online facilities. A wave of websites is now in play, from which legal guidance and legal advice can be obtained. . . . Whether one calls them online legal services, "virtual lawyers," legal advice systems, or online legal guidance systems, these are Web-based resources that contain knowledge of lawyers that is no longer accessed exclusively by consultation with human advisers.

RICHARD E. SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 121 (2008).

4. See, e.g., Douglas J. Good, *A Modest Proposal to Resolve the E-Discovery Crisis*, N.Y. L.J., May 16, 2011, at S8; N.Y.C. Bar Ctr. for Continuing Legal Educ., *Social Media Data: Practical Guidance on Handling Discovery Issues* (June 1, 2011).

5. See, e.g., Dickran M. Tevrizian & Jeanne C. Finegan, *Expert Opinion: It's More than Just a Report . . . Why Qualified Legal Experts Are Needed to Navigate the Changing Media Landscape*, 12 CLASS ACTION LITIG. REP. 464 (BNA) (2011) (describing social media, text messaging, and email as "standard").

6. See, e.g., Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, RAND INST. FOR CIV. JUST., 1 (2010) http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf.

Throughout this Article, I use the term "alternative litigation financing," coined by Steven Garber, to mean "litigation financing in the United States by entities other than plaintiffs, defendants, their lawyers, and defendants' insurers." *Id.*

7. See, e.g., MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 143 (2009) ("It might be argued that the concern with the need to preserve litigant autonomy is greatly overdone, because as a practical matter a litigant will influence day-to-day strategic litigation choices, at most, only rarely. Instead, it is the litigant's chosen representative, far more than the litigant herself, who makes such decisions. Thus, the argument might proceed, to take those

it warranted? Is it desirable? What should courts do to monitor cases involving third-party financing, when those that pull some of the strings are not formally before the court?⁸

The judiciary, through its case management practices, as well as the legislature and the bar, have an important role to play in answering these questions.

II. TRADITIONAL REPRESENTATIVE MODEL

Our classic litigation model is republican-representative. The lawyer consults with, represents, and does the speaking for the client. Representation is paid for either by the client out-of-pocket, by an insurer, or as part of a contingency-fee arrangement.⁹

choices away from the litigant would actually undermine litigant autonomy very little. While of course there is much practical truth in the insight, it would be a serious mistake, from the perspective of liberal democratic thought, to glean from the absence of such direct litigant involvement in strategic decision making a finding that the values of individual autonomy embodied in the due process clause are therefore irrelevant in the context of litigation control.”) *But cf.* JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 46–47 (1995) (“Because of the political, sociological, economic, and technological implications of many mass tort cases, we must consider not only the individual litigant and lawyer, but entire communities. We assume, properly I believe, that dignity is enhanced by individual control of litigation for each person’s own benefit. Our legal system highly values individual interests and prerogatives. But just as individualism run riot can be damaging in social matters, so too may it need checking in mass litigation. Each of us lives in many communities if we define this term as a group of people having common rights and privileges or common interests. Sometimes the community is defined by status, as in a community of prisoners or of schoolchildren. Often it consists of a diffuse group having little continuing physical connection, as is the case with women from all parts of the country suffering reproductive organ impairment because their mothers took a drug during pregnancy. At other times it is defined by geography, as when a group of homes in a valley is swept away by a flood.” (citation omitted)). *See also* Alexander D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939, 1939 (2011) (“There are two dominant views of the class action’s structure and two dominant views of the class action lawyer. Some see the class action as an aggregation of individuals, a complex joinder device and nothing more. Others view the class action as transforming the class members into an entity. . . . Many see the class action lawyer as an entrepreneur Others view the class action lawyer as a public servant or a ‘private attorney general,’ privately vindicating rights through lawsuits that public officials do not have the resources to pursue. The procedural law does not definitively adopt one of these views. . . . Every lawyer to some extent frames — or forms — the interests of the client. On a spectrum of lawyer control and client consciousness, the class action seems to be on one extreme end.”) (citations omitted).

8. *See infra* Part IV.

9. *See* Garber, *supra* note 6, at 1.

The representative nature of the traditional model is heightened in the context of aggregate litigation. Typically, in mass actions, most clients' input is minimal. They may have little contact with the attorneys in charge of the litigation, particularly if they are not named plaintiffs. They may have little knowledge of the strategy or status of the litigation other than through the receipt of the mailing of a class notice and an offer of recovery. As a result, those injured may feel left out, disaffected, and resentful.

Lack of involvement in the litigation may have other deleterious effects. Litigators are sometimes not candid with clients who have not retained them and may take advantage of those they will never meet. Concepts of fair fees, settlement negotiations, and other aspects of representation are not clear to most lay-people.

The fully democratic model of litigation is that of the pro se plaintiff. It does not work well. Pro se plaintiffs have substantial knowledge of and control over the litigation. But they often have difficulty understanding legal standards and marshaling the evidence necessary to meet those standards. This problem is compounded when their legal claims require proof involving expertise, such as when plaintiffs must establish causation of a medical harm by a particular drug. I have used a plaintiff steering committee to advise pro se litigants in mass actions,¹⁰ but I am not sure this is an adequate solution for lack of individual legal aid.

We may want more participation and understanding by those individuals who are represented en masse, either in class actions or by aggregations of individual actions.¹¹ The intensity of such

10. See Case Management Order No. 38, *In re Zyprexa Prod. Liab. Litig.*, No. 04-MD-1596, (E.D.N.Y. Feb. 15, 2011) (Peter H. Woodin, Special Master) (addressing pro se plaintiff steering committee). My contact with individual plaintiffs in *Zyprexa* was, in my opinion, inadequate, even though each of the tens of thousands of cases were properly adjudicated by current constitutional and legal standards.

11. See, e.g., Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009); Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1 (2009); Elizabeth Chamblee Burch, *A New Way Forward: A Response to Judge Weinstein*, 2009 CARDOZO L. REV. DE NOVO 168 (2009); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 919 n.350 (2005). *But cf.* Sergio J. Campos, *Mass Torts and Due Process* 1116 (Univ. of Miami Legal Studies Research Paper No. 2011-16), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1838368 (“[I]ncreasing autonomy as a

direct connection between the lawyers and the parties will often depend upon the kind of case and subtle individual litigation circumstances.

III. PARTICIPATION OF AGGRIEVED PERSONS IN LITIGATION

A. INCREASING OPPORTUNITIES AND NEED FOR PARTICIPATION

A number of factors warrant revisiting the degree to which the plaintiffs in mass actions should participate in the litigation.

First, we now have the necessary hardware and software to allow substantial involvement by plaintiffs in mass actions. Court papers are filed electronically. We can arrange for every member of a class or aggregate litigation to obtain free access to our full docket in his or her case through a home computer. (Documents such as those showing individual medical treatment can be sealed.) Videos of hearings and civil trials can be made available through court or private facilities now in being. And social interaction through electronic chat rooms or social networking can provide for local group and national conversations among claimants and discussions with counsel.¹²

Second, we are seeing a shift from class actions to aggregate forms of independent actions, sometimes consolidated by the Multidistrict Litigation Panel or state equivalents.¹³ Statutes and

'check' on class action settlements misstates the problem."). This is particularly true because individual litigants use litigation to satisfy a variety of goals. *See, e.g.*, Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund* (USC Center in Law, Economics and Organization, Paper No. C08-8), available at <http://ssrn.com/abstract=1105155>.

12. *See* AGGREGATE LITIGATION, *supra* note 2, § 1.05 cmt. i ("Technological advances have made it easier and less expensive for lawyers to communicate with clients and class members. Many lawyers now regard communicating by e-mail and via websites as standard practice techniques. They post important documents online, provide periodic updates on the progress of litigation, comment on press coverage, and disseminate other information broadly. It is often far more cost-effective to communicate by clients electronically than to do so by mail. In large cases, lawyers also establish phone banks, enabling clients or class members to talk with operators trained to answer their questions.").

13. There is also growing compensation for harmed individuals and general deterrence through criminal restitution and administrative penalties. *See, e.g.*, United States v. Peterson, Nos. 12-CR-224, 12-CV-2033, 2012 WL 1656309 (E.D.N.Y. May 10, 2012) (discussing intersection of criminal and civil penalties); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947 (2001) (addressing civil, criminal, and administrative proceedings); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV.

rule changes achieved largely by the defense bar and potential defendants are modifying the process of mass litigation through amendments to Rule 23, the Class Action Fairness Act, and the Private Securities Litigation Reform Act.¹⁴ Court decisions are also inhibiting class actions through interpretations of procedural and substantive law.¹⁵ For example, we permit contracts of adhesion requiring consumers to arbitrate with large suppliers, such as telephone companies — and then, as in the recent decision of *AT&T Mobility LLC v. Concepcion*, we enforce waivers of class arbitration (and perhaps other types of consolidations) in such contracts.¹⁶ The Supreme Court and lower courts have cut wide swaths through mass litigations designed to protect those who might be entitled to relatively small amounts in damages.

1385 (2011) (addressing criminal restitution); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011) (concerning role of regulatory agencies).

14. See, e.g., DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 31.3 (4th ed. 2010), (discussing the Private Securities Litigation Reform Act); John C. Coffee, Jr. & Max Heuer, *Class Certification: Developments over the Last Five Years 2005–2010*, 11 CLASS ACTION LITIG. REP. 879 (BNA) (2010). Angela J. Rafoth, Note, *Congress and the Multiparty, Multiforum Trial Jurisdiction Act of 2002: Meaningful Reform or a Comedy of Errors?*, 54 DUKE L.J. 255, 284–92 (2004). Cf. Melanie Hirsch, *Is Access to Justice for Everyone, or Only the Wealthy? Browning v. Angelfish and the Danger of a “Financial Resources” Test for Class Representatives*, 12 CLASS ACTION LITIG. REP. 456 (BNA) (2011).

15. See, e.g., Editorial, *Gutting Class Action: The Five Conservatives of the Supreme Court Chose Corporations over Everyone Else*, N.Y. TIMES, May 13, 2011, at A26 (discussing the Supreme Court decision of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)). But cf. Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448 (2011) (discussing the saving of federal class actions in Supreme Court).

16. 131 S. Ct. 1740 (2011). See also Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 104–33 (2011) (discussing class arbitrations). Similarly, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court made the commonality requirement more stringent, requiring the certifying court to inquire into the merits of the class claims and ultimately making it more difficult to certify a class. 131 S. Ct. 2541, 2550–52 (2011) (holding that it is not sufficient for a class to share “common ‘questions’ — even in droves”; rather, a class proceeding must be able “to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” (internal citations omitted)); see also John C. Coffee, Jr., “You Just Can’t Get There from Here”: A Primer on *Wal-Mart v. Dukes*, 12 CLASS ACTION LITIG. REP. 610 (BNA) (2011) (arguing (1) that *Wal-Mart* indicates that certification under Fed. R. Civ. P. Rule 23(b)(2) would not be available where monetary relief is “individualized,” even if it is “incidental”; (2) that the availability of individual defenses may preclude class certification; (3) that using sampling methodology in individual mass tort cases may be disfavored; and (4) that satisfying the commonality requirement will be difficult to satisfy in many discrimination cases and may require a mini-trial).

The shift away from class actions is reducing, to some degree, control by courts and by lead attorneys on the plaintiffs' side. Treating aggregations as "quasi-class actions"¹⁷ is a palliative.

Third, there appears to be a trend toward reducing the role of government in our lives. The recent economic crisis has led to reductions in spending at every level of government.¹⁸ Politicians have called for reducing regulation or eliminating certain regulatory agencies altogether.¹⁹ This may reduce protective orders against dangers and compelled restitution or fines in criminal and administrative proceedings. As a reaction, more pressure for private initiatives to protect individual rights and provide compensation in mass civil litigation may be expected.²⁰

B. DEMOCRATIZATION STRATEGIES AND TECHNIQUES

A number of strategies and techniques have been used to keep individual plaintiffs informed about and involved in their case. In some instances, lawyers have set up telephone answering services, community-based meetings, and group emails to inform large numbers of those they represent. They also have relied upon the news media to advise their clients. Plaintiffs' steering committees²¹ have provided legal resources to pro se litigants. Special masters,²² mediators, and advisers have dealt personally

17. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006) (suggesting use of the term "quasi-class action" to support court control over fees, communication with clients, appointment of special masters, and the like in cases that are theoretically independent actions).

18. See, e.g., Jackie Calmes, *Obama's Budget Seeks Deep Cuts in Domestic Spending*, N.Y. TIMES, Feb. 13, 2011, at A1; Monica Davey, *Families Feel Sharp Edge of State Budget Cuts*, N.Y. TIMES, Sept. 7, 2011, at A22.

19. See, e.g., Kate Zernike, *Tea Party Group Presents Its Own Debt Commission Report*, N.Y. TIMES CAUCUS BLOG (Nov. 16, 2011 8:44 p.m.), <http://thecaucus.blogs.nytimes.com/2011/11/16/tea-party-group-presents-its-own-debt-commission-report/>.

20. For example, reductions in clean air regulation might lead to increased rates of asthma and other upper respiratory diseases. Because the government has not prevented these harms ex ante, injured parties may seek to recover from the polluters ex post.

21. A plaintiffs' steering committee is a subset of the plaintiffs' attorneys with cases before the court who coordinate the litigation and work together to represent all plaintiffs. A committee's tasks can include conducting pretrial discovery; calling meetings of counsel for plaintiffs; examining witnesses and introducing evidence at hearings; acting as a spokesperson for all plaintiffs; and negotiating with defendants on settlement.

22. A special master is an official appointed under Rule 53 of the Federal Rules of Civil Procedure, with the consent of the parties, to conduct proceedings and report to the

with large numbers of the aggrieved to explain such matters as settlement matrices. A few instances illustrate the techniques used.²³

I have approved live broadcast of hearings, mainly for the lawyers. In one case, the clerk of our court arranged for all of those who were prospective class members to obtain access to the filed documents.

Curtis Berger, a beloved professor at Columbia Law School, acted as special master in the post-*Brown v. Board of Education*²⁴ litigation involving the desegregation of the Mark Twain school in Brooklyn.²⁵ He went out into the streets and conferred with many groups, some of whom expressed opposition to any change.²⁶ They rejected my initial theory that would have required housing integration in order to have classroom integration. A magnet school, which is still operating effectively, provided a viable compromise.²⁷

In the Agent Orange products liability litigation,²⁸ special master Kenneth R. Feinberg and I toured the nation to get input from veterans, and I met with representatives of a national network of social agencies organized to help veterans and their families.²⁹ After the case was settled, the insurance company that issued checks from the fund to class members had a battery of telephone operators to answer questions.

court. This special master may perform a number of tasks depending on the nature of the litigation.

23. Professor Elizabeth Burch of the University of Georgia has written extensively on the methods and sociology of having mass clients participate actively in litigations fought on their behalf. *See supra* note 11. Unions and other advocacy groups sometimes do this work well.

24. 347 U.S. 483.

25. *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974) (liability decision and order appointing special master), *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974) (remedial order), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

26. *See generally* Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978).

27. JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 149–51 (2011); *see generally* Berger, *supra* note 26.

28. *In re* Agent Orange Prod. Liab. Litig., MDL No. 381, 79–C–747, CV–85–2022 (E.D.N.Y.); *see generally* KENNETH FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 23–40 (2012) [hereinafter FEINBERG, WHO GETS WHAT]; PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987).

29. FEINBERG, WHO GETS WHAT, *supra* note 28, at 30–32; MORRIS, *supra* note 27, at 331–32; SCHUCK, *supra* note 28, at 173–78.

In the California *Stringfellow* case,³⁰ which consolidated individual hazardous waste claims, the lead plaintiffs' counsel, Melvyn Weiss, retained Professor Arthur Miller to meet with groups of clients to fill them in on the background.³¹

Kenneth Feinberg made himself available to each of the 9/11 claimants.³² He has also been accessible to the many more numerous Gulf oil spill claimants.³³ Judge Alvin Hellerstein has consulted closely with groups of those affected by the post-9/11 cleanup litigation.³⁴

In the diethylstilbestrol (DES) cases,³⁵ where the plaintiffs were women whose mothers had taken the drug during their pregnancy, there was a great deal of participation through groups of affected women who assisted each other. They had a particularly talented and sympathetic lawyer, Sybil Shainwald. She would explain the relevant issues to her many clients over the telephone and in small meetings. At her request, I met with groups of those women after their cases were settled to try to explain what went on. It helped all of us feel that the law thought of them as important individuals.³⁶

Such techniques provide plaintiffs with a limited degree of transparency that is not generally available in mass cases. They

30. *Newman v. Stringfellow*, No. 165994MF (Cal. Super. Ct. May 9, 1995) (on file with author).

31. See E-mail from Arthur R. Miller, Univ. Professor, N.Y.U. Sch. of Law, to author (Apr. 28, 2011) (on file with author) ("Mel [Weiss] had me conduct seminars for the significant number of people who represented the group (it was not a class action), which was designed to give them something of a wide angle view of the litigation and what to expect. I think those in attendance came away with a better sense of what was going on in the case, and perhaps a heightened sense of the system's attempt at rationality. But, of course, that was a rather large-stake litigation for each of the plaintiffs, making generalization difficult.").

32. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* 50–60 (2005); FEINBERG, *WHO GETS WHAT*, *supra* note 28, at 34–37.

33. See, e.g., Philip Rucker, *Earning Trust Is Biggest Obstacle for Spill Payout*, *Feinberg Says*, WASH. POST, June 19, 2010, at A5 ("[Feinberg and his firm] began arranging town hall meetings across the region, where frustrated people can vent their concerns and find out how to file claims. They set up 800-numbers and readied a Web site.").

34. See Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 475 (2012). Sheila L. Birnbaum, Special Master of the 9/11 Victim Compensation Fund, also met with groups of first responders who have fallen ill since 9/11.

35. See *In re N.Y. Cnty. DES Litigation*, No. 43003 (N.Y. Sup. Ct.).

36. MORRIS, *supra* note 27, at 352–54.

have the advantage of avoiding overreaching by some attorneys, as in the fen-phen case.³⁷

C. SPECIAL PROBLEMS OF DEMOCRATIC LITIGATION

These democratization techniques do not solve the fundamental problems of mass litigation. In fact, greater contact with large numbers of clients adds complexity to the litigation. When the litigator has to deal with many people who become enmeshed in the details of their attorneys' decisions, and who may misunderstand or disagree, it is much harder to execute an effective plaintiffs' strategy. This may constitute a serious problem since there is generally a cohesive individual defendant's stance.

The first brush I had with this issue was in private practice in the late 1940s, in a number of securities litigations — shareholder derivative suits. There, the participation of those allegedly harmed was negligible. Plaintiffs' counsel contacted named shareholders, and there was little or no individual plaintiff participation.

In the 1960s, under the leadership of Columbia Law School alumnus, Professor Benjamin Kaplan of Harvard Law School, Rule 23, controlling federal class actions, became a much more powerful plaintiffs' instrument. While I taught at Columbia, I was concerned about input from the theoretically represented mass. Most members of most class actions were just dragged in and along. In the 1970s, Professor Abram Chayes began pointing out the growth of sprawling aggregate public law litigations and the need to pay attention to this major method of judicial control of many areas of public and private life.³⁸

In the Agent Orange case, we were dealing with hundreds of thousands of members of the armed forces who thought that they

37. See, e.g., Elizabeth Chamblee Burch, *Financiers as Monitors* (UGA Legal Studies Research Paper No. 1968961), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968961 (describing issues with the fen-phen settlement); Beth Musgrave, *Fen-Phen Attorneys Sentenced to Decades in Prison*, LEXINGTON HERALD-LEADER (Aug. 18, 2009), <http://www.kentucky.com/2009/08/18/898627/fen-phen-attorneys-sentenced-to.html> (stating that plaintiffs' attorneys were sentenced to prison for withholding settlement funds and information from mass clients).

38. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

had been injured by chemicals.³⁹ There, we had a degree of plaintiff cohesiveness in informed (and sometimes misinformed) veterans groups. Ultimately, the government took over compensation.⁴⁰

The Shoreham atomic energy plant litigation, asbestos, breast implants, tobacco, guns, and other cases followed on my docket.⁴¹ Special masters and plaintiffs' steering committees helped inform the large groups of injured individuals in those cases. Local cases like pollution and the Shoreham litigation were covered extensively by local news media and politicians; that helped keep interested people aware of what was happening. But the people who were affected had little access to relevant legal materials and no real participation in strategy or settlement negotiations.⁴² Even the judge was sometimes out of the loop; so were most of the litigants.

In the asbestos litigation — which ultimately involved hundreds of thousands of claims — I tried some seventy of the cases. The verdicts provided a sense of the situation and the basis for large numbers of settlements. In other cases, I knew only the lawyers and special masters. How much those plaintiffs with settled cases were aware of the issues is unclear.

How do we deal with the 9/11 cases that Judge Hellerstein and Kenneth Feinberg have managed, and the oil spill litigation that Kenneth Feinberg was involved in at the request of the Attorney General and the President of the United States? How should we administer local environmental cases, such as Love Canal, or the Buffalo Creek dam disaster, which destroyed an entire town?⁴³ Should we pay people cash, provide for monitoring, or try to rebuild communities with available funds? Should we provide non-court compensation schedules, as is apparently happening in Japan's atomic disaster? What about cases where indi-

39. See generally FEINBERG, WHO GETS WHAT, *supra* note 28, at 29–40; SCHUCK, *supra* note 28.

40. See, e.g., *Benefits Overview for Agent Orange Exposure*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/benefits.asp> (last visited June 5, 2012).

41. See, e.g., FEINBERG, WHO GETS WHAT, *supra* note 28, at 11.

42. For a brief history of the Shoreham litigation, see MORRIS, *supra* note 27, at 230–39.

43. See, e.g., WEINSTEIN, *supra* note 7, at 47–48, 179 n.5 (discussing Love Canal and Buffalo Creek).

viduals' claims are minuscule? What is to be done with what are sometimes characterized as nuisance suits, with negligible projected recoveries by many individuals?

Who decides? Who speaks for those outside the courtroom?

While a Web-based town hall meeting on a national scale is not beyond our capacity, is this the best way to conduct litigation? There may be unacceptable costs in burdening the attorneys and courts and increasing delays in litigation.⁴⁴ Whether the value added is worth the difficulties is not clear.⁴⁵

As part of the routine control of all mass litigations, should the courts require a plan for keeping clients — and the public,⁴⁶ when it comes to such matters as pharmaceutical dangers and the prac-

44. See Hellerstein, *supra* note 34, at 478 (arguing that providing full and fair information to individual plaintiffs is important, but that participation and control by the plaintiffs themselves are likely to complicate, rather than improve, the fair and efficient progress for mass tort litigation; strong checks and controls by the judge are required, with legal experts to monitor communications with clients); Letter from Charles M. Silver, Roy W. & Eugenia C. MacDonald Endowed Chair in Civil Procedure, Univ. of Tex. Sch. of Law, to author (May 10, 2011) (on file with author) (“[C]ommunication focused on and limited to certain individuals [as in PSLRA] may be better . . . than general communication open to all claimants. From a functional perspective, one wants communication with claimants who have important information and views.”).

45. There are clear cost savings to using technology to facilitate communication between attorneys and the court. In many multi-district litigations, the members of the plaintiffs' steering committee are asked to attend frequent meetings with the court. The costs of hotel rooms and plane tickets to attend these meetings can quickly increase the cost of litigation. These expenses, in turn, come out of the fees of attorneys litigating individual cases. Such costs could be reduced or eliminated by using telephone or video conferencing to virtually bring the parties together. Permitting virtual participation could also permit more participation from individual attorneys, which may require a rethinking of how to supervise these cases. I used this technique with success in the Zyprexa litigation to resolve disputes over how to set aside funds over which the state, local, or federal government may have a claim.

46. See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 83–89 (2000). One possibility would be to create a website that kept the public informed on the progress of the litigation. Chief Judge Michael J. Davis has created such a site for the Baycol litigation. The site allows the public to access audio recordings and transcripts of hearings and conferences, view the court's orders, and download litigation documents. *Baycol Product Liability Litigation*, U.S. DIST. COURT: DIST. OF MINN., <http://www.mnd.uscourts.gov/MDL-Baycol/index.shtml> (last visited Nov. 7, 2011). Another option would be to work with the Clerk of the Court to waive the fee normally charged for electronic access to the court docket. Both options present challenges in cases involving sensitive documents, such as medical or mental health records. More documents may need to be sealed in order to prevent accidental disclosure or intentional abuse of this information.

tices of their manufacturers⁴⁷ — informed, and for responding to their inquiries, and then see that the plan is properly executed?⁴⁸

Should the court control and monitor the use of social media to encourage class members to participate in mass litigations, to claim their awards, or to opt out of a settlement?⁴⁹

Does the court have an obligation to use technology and procedure to reduce litigation administration costs for the litigants — for example, by requiring plaintiffs' steering committees to use video conferencing rather than rely on face-to-face meetings requiring frequent and costly travel?⁵⁰

47. See, e.g., Natasha Singer, *A Fight over How Drugs Are Pitched*, N.Y. TIMES, Apr. 25, 2011, at B1.

48. Among the routines utilized in my court are the following:

- 1) Frequent conferences, with notices and agendas are published on the court's website. The conferences are held on the record in large and open courtrooms, with the public invited. Pains are taken to assure that all points are explained so that all those attending are able to understand. Anyone in attendance can ask questions or suggest items for discussion.
- 2) Summaries and case management orders are published on the court's website promptly after each conference. Each conference is intended to order events and progress to the next scheduled meeting, and no meeting is adjourned without setting a following meeting.
- 3) The press is encouraged to attend and report on the conferences and on every aspect of the litigation. If the press' articles report problems noted by the parties, they are brought up for discussion at the conferences. Documents and exhibits submitted to the court, or prepared by the court, are promptly posted on the court website, where they are available to the press.
- 4) Lawyers and the court are encouraged to express arguments and issues in language that lay people can understand and appreciate. The court, in its rulings, strives to make them easily readable to laypersons.

49. Professor Adam Zimmerman argues in a perceptive blog piece that social media can make class actions work more effectively, but may require careful monitoring:

An effectively coordinated effort to opt for small claims litigation, over a class action settlement, could at least provide a modest signal to a court that the class action settlement insufficiently compensates class members. . . . Social media could also combat the phenomenon of "under-claiming" in large settlements — where parties neglect to opt out of a settlement, but never claim an award. . . . But even these approaches should be adopted with caution. Social media could be manipulated by rival attorneys, or defendants, to undermine notice. Judges generally have to ensure that claimants are not swayed by entrepreneurial lawyers that seek to sabotage the settlement and may police what can be said to potential claimants to ensure that they make unbiased decisions.

Adam Zimmerman, *Flash Mob Litigation*, PRAWFSBLAWG (Jan. 3, 2012, 9:33 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/01/class-actions-v-flash-mob-litigation.html>.

50. I have long been concerned about the expense of some of the work of plaintiffs' steering committees. In large cases, even though they are complex, the costs of centralized control and supervision should be kept as close to a few percentage points of the total settlement or damages as possible. Even in exceptional cases, anything above three or

The digital age is producing an information and communication renaissance. How it will impact our system of justice is uncertain.

Judges have a special role to play in shaping the future. We have the responsibility for limiting fees and regulating communications with clients and others in all mass cases.

We should reconsider excessive use of “sealing.” The media can assist in providing transparency if the necessary documents and testimony are available.

IV. ALTERNATIVE FINANCING OF MASS CASES

A. INCREASING AVAILABILITY OF ALTERNATIVE LITIGATION FINANCING

The availability of alternative litigation financing (ALF) has grown considerably in the last few years⁵¹ and may have significant impact on the balance of power in future litigation. It comes in three major forms:

(1) consumer legal funding, which involves provision of non-recourse loans directly to consumer (i.e., individual) plaintiffs with pending lawsuits; (2) subprime lending to plaintiffs’ law firms (i.e., firms whose litigation work is largely concentrated in representing individuals with personal-injury claims; and (3) investments in commercial (i.e., business-against-business) lawsuits or their proceeds.⁵²

While these forms of financing are “still in . . . infancy,” they are “steadily growing” and may be “one of the most significant developments in civil litigation today.”⁵³ The appeal of non-traditional

four percent of total fees for the work of plaintiffs’ committees should be suspect and subjected to the most serious scrutiny and justification.

51. Garber, *supra* note 6, at 1.

52. *Id.*

53. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1270–71 (2011); *see also* Geoffrey McGovern et al., *Third-Party Litigation Funding and Claim Transfer*, RAND INST. FOR CIV. JUST., 11 (2010), http://www.rand.org/pubs/conf_proceedings/RAND_CF272.pdf (identifying third-party litigation funding as one of the “biggest and most influential trends in civil justice”); William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, N.Y. TIMES DEALBOOK (Apr. 30, 2012, 6:07 PM), <http://dealbook.nytimes.com/2012/04/30/looking-to->

forms of financing may grow as substitutes for class actions become even more common.⁵⁴

The increasing availability of ALF may lead to a more democratic litigation system. Some plaintiffs with meritorious claims may neither be able to afford counsel nor find an attorney willing to take the case on a contingency fee basis. If consumer litigation funding permits such plaintiffs to bring cases, it could permit greater access to the courts.⁵⁵ In doing so, it could also offset, to some extent, the current trend toward shutting plaintiffs out of the courthouse exemplified by recent decisions discouraging class actions, strengthening pleading rules to permit dismissal before discovery, and increasing the power of defendants to dispose of cases at summary judgment.

In some cases, ALF could equalize the power between individual plaintiffs and their (usually well-funded) opponents.⁵⁶ Across all types of ALF, “a defendant who knows that the plaintiff has ALF might perceive a consequent decrease in the defendant’s bargaining power (e.g., by reducing the credibility of some threats in negotiations), and as a result be more prone to addressing legitimate needs of plaintiffs in settling.”⁵⁷ In giving plaintiffs needing

make-a-profit-on-lawsuits-firms-invest-in-them/ (noting that “the practice of litigation finance is enticing more corporate lawyers to become investors, bankrolling lawsuits in exchange for a piece of the potential winnings”).

54. Burch, *supra* note 37, at 25–26.

55. This would require some development in the current market for ALF. Currently, “almost all consumers receiving [alternative] litigation funding are being represented on a contingency-fee basis.” Garber, *supra* note 6, at 9. There are “no hints that [consumer legal funding] is used by consumers to pay their lawyers” directly. *Id.* at 30 (arguing that it is unlikely that consumer legal funding will significantly affect the quantity or quality of litigation). This development may be particularly unlikely in mass actions outside the context of mass torts, where the potential recovery is quite large. Where the potential recovery is small, it may not be enough to support an application for a non-recourse loan. *Id.* at 36–37.

56. *Id.* at 34 (“[W]hen a litigant is at a bargaining disadvantage relative to the litigant on the other side — because of greater risks, less tolerance for risk, fewer resources available for disputing and negotiating, or some combination — then providing ALF to the disadvantaged party could avert settlements that reflect primarily bargaining power rather than legal merit. . . . [I]f ALF levels the playing field between plaintiffs and defendants, this will tend to improve the accuracy or fairness of settlements.”); Steinitz, *supra* note 53, at 1271–72 (“By aligning structurally weak social players who make infrequent use of the courts (one-shotters) with powerful funders who make repeated use of the court system (repeat players), litigation funding may alter the bargaining dynamics between the litigating parties in favor of disempowered parties. It may thereby enable the litigation process to serve as a redistributive tool by society’s have-nots as opposed to an (unwitting, perhaps) guardian of the status quo in favor of society’s haves.”).

57. Garber, *supra* note 6, at 32.

cash to pay “their rent, mortgage, or medical bills,”⁵⁸ consumer legal funding may help avoid settlement of meritorious cases for amounts well below their value at trial by economically disadvantaged plaintiffs.⁵⁹ Investments in corporate plaintiff’s claims in particular may signal to the defendant that the claim has a high quality, “strengthening [the] bargaining positions [of such plaintiffs] in settlement negotiations.”⁶⁰

B. SPECIAL PROBLEMS OF DEMOCRATIC FINANCING

The rise of ALF raises special issues for attorneys and judges alike. Professor Huang and Professor Coffee of Columbia Law School have suggested that the person who finances a mass litigation should be recognized as having substantial input into how the action is conducted. It is a concept contrary to traditional thinking in American law on such issues as champerty and control of litigation by nonparties who are not retained as attorneys,⁶¹ although some of the ethical restrictions that would in-

58. *Id.* at 12.

59. *But see id.* at 33 (arguing that “mass tort cases are rarely settled one or a few claims at a time, and when settlement negotiations involve large numbers of claims, the preferences of individual claimants have almost no scope for influencing settlements.”) (citation omitted).

60. *Id.* at 15.

61. *See, e.g.*, MODEL R. PROF’L CONDUCT 1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.”); *id.* R. 1.7 cmt. 13, (“A lawyer may be paid from a source other than the client . . . if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.”); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987) (holding that a fee-sharing agreement under which certain members of plaintiffs’ committee would advance funds for litigation expenses and receive a threefold return on that investment out of the fee settlement was unenforceable because it violated established principles regarding attorney’s fees in an equitable fund class action and had the potential to create a conflict between counsel and the class); STEPHEN GILLERS, REGULATION OF LAWYERS 837–38 (8th ed. 2009) (discussing the prohibition on champerty). Some states specifically prohibit third parties

hibit ALF may be lifting.⁶² Others argue that ALF could solve some of the ethical issues raised by non-class aggregation by shifting the financial risk of the litigation to a third party, permitting attorneys to avoid the Hobson's choice of potential financial ruin following unsuccessful litigation and unethical coercion of their clients into an unfavorable settlement that covers the costs of the attorneys.⁶³

Traditional litigation financing arrangements are not without conflicts of interest. Attorneys litigating on a contingency-fee basis must invest time and money in the case while carrying the risk that they will get no return on that investment. They may be inclined to settle quickly, even if they believe they could potentially recover more after a trial, to avoid this risk. Attorneys representing parties with insurance must zealously represent their client even as their bills are paid by the insurers. The question is whether ALF increases the likelihood of such conflicts of interest.

Although it has recently garnered more intense attention in the literature,⁶⁴ the idea of ALF is not a new one. The Agent Or-

from exercising substantial control over litigation. See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 109–112 (2011) (discussing cases in various states).

62. Rules against champerty and maintenance may be falling out of disfavor. Currently, “[t]wenty-eight of fifty-one United States jurisdictions (including the District of Columbia) explicitly permit champerty, albeit with varying limitations.” Sebok, *supra* note 61, at 98–99; see also Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT’L & COMP. L. 343 (2010) (arguing that third-party funding of lawsuits makes economic sense and that courts in the United States are relaxing the doctrine of champerty to permit such lawsuits). Other ethical barriers to alternative litigation financing, such as Model Rule 5.4, which forbids splitting fees with non-lawyers, are likely to remain in place for the near future. See Mark Hamblett, *Judge Rebuffs Challenge to Ban on Non-Lawyer Firm Ownership*, N.Y. L.J., Mar. 9, 2012, at 1 (describing recent dismissal of challenge to New York State’s ban on law firms accepting equity investments from non-lawyers); Sara Randazzo, *ABA Panel Says No to Outside Law Firm Ownership*, N.Y. L.J., Dec. 7, 2011, at 2; Jamie S. Gorelick & Michael Traynor, *For Comment: Discussion Paper on Alternative Law Practice Structures*, ABA COMM’N. ON ETHICS 20/20, 17–20 (2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf (outlining proposed rule that would permit non-lawyer ownership of firms in some cases but would forbid law firms from becoming either publicly traded entities or multidisciplinary practices).

63. See generally Burch, *supra* note 37.

64. See, e.g., Symposium, *Third-Party Financing of Litigation: Civil Justice Friend or Foe?*, 8 J.L. ECON. & POL’Y (forthcoming 2012); see also Binyamin Appelbaum, *Lobby Battle over Loans for Lawsuits*, N.Y. TIMES, Mar. 10, 2011, at B1; Binyamin Appelbaum, *Betting on Justice: Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 17, 2011, at A1; Binyamin Appelbaum, *Betting on Justice: Taking Sides in a Divorce, Chasing Profit*, N.Y. TIMES, Dec. 5, 2010, at A1; Binyamin Appelbaum, *Betting on Justice; Putting*

ange litigation was partially financed through funds advanced by plaintiffs' attorneys who did not perform any legal work.⁶⁵ These attorneys' sole interest in the litigation was their financial stake in the fees should the plaintiffs succeed.⁶⁶ The court was not informed of this agreement until after the case had been settled.⁶⁷

The fee arrangement was later challenged by the lead trial counsel for the plaintiff class and a non-investing member of the Plaintiffs' Management Committee.⁶⁸ He contended that the agreement violated the ABA Code of Professional Responsibility, which forbade attorneys from acquiring a proprietary interest in an action in which he or she is involved and from dividing a fee with an attorney who is not a member of the law firm.⁶⁹ He also argued that such a fee arrangement inevitably creates a conflict between the interests of class counsel and the interests of the class itself.⁷⁰

At the time, I found that the fee agreement did not violate ethical rules.⁷¹ I was troubled, however, by the fact that the court

Money on Lawsuits, Investors Share in the Payouts, N.Y. TIMES, Nov. 15, 2010, at A1; Robert S. Kelner & Gail S. Kelner, *Alternative Litigation Financing: Ethics and Logistics*, N.Y. L.J., Sept. 27, 2011, at 3; Ashby Jones, *The Next National Investment Craze: Lawsuits!*, WALL ST. J. L. BLOG (June 4, 2010, 12:36 PM), <http://blogs.wsj.com/law/2010/06/04/the-next-national-investment-craze-lawsuits/>.

65. *In re Agent Orange Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145, 156 (2d Cir. 1987). Similarly, plaintiffs' attorneys representing Ecuadoreans in their suit against Chevron Corporation relied, at various times, on financial support from other law firms and from a private investment fund to finance the ongoing litigation. Patrick Radden Keefe, *A Reversal of Fortune*, THE NEW YORKER, Jan. 9, 2012, at 38, 43.

66. *See Agent Orange*, 818 F.2d at 217–18.

67. *See Agent Orange*, 818 F.2d at 145.

68. *Agent Orange*, 818 F.2d 216.

69. *Id.* at 217.

70. *Id.* at 217–18.

71. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1452, 1458–62 (E.D.N.Y. 1985), *rev'd*, 818 F.2d 216 (2d Cir. 1987). In so holding, I explained that:

[T]he fundamental concern in the instant case is protection of the rights of the class, in part through minimization of potentially detrimental conflicts of interest. But it is also important to avoid creation of disincentives that in individual instances may unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class. An ironclad requirement that class representatives remain ultimately liable for expenses incurred, for example, would prevent many meritorious cases from reaching the courts. . . . [A] simple prohibition on advances of cash for expenses does not adequately balance these competing considerations. Moreover, because of the court's responsibility for approval of a class action settlement, it is not the only feasible alternative. A case-by-case examination is not only practical, but advances the important policies favoring class litigation in many instances.

had not been informed of the agreement earlier in the litigation. I urged that “[i]n future cases, *as soon as a fee-sharing arrangement is made its existence must be made known to the court*, and through the court to the class. Subsequent modifications if any also must be reported promptly to the court.”⁷²

The Court of Appeals for the Second Circuit found the potential for conflict between the financing attorney and the class was too great:

Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged. . . . The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation.⁷³

Even if no actual conflict influenced settlement negotiations, there was a risk that public perception of such a conflict could taint the outcome of the case.⁷⁴ The Court of Appeals agreed that early knowledge of such an agreement might avoid some of its negative effects.⁷⁵

The situation in *Agent Orange*, in which another attorney has a financial stake in the litigation, is simpler than the modern trend of ALF by non-lawyers.

Whether the financing is provided by an attorney or a non-lawyer, there is the potential for conflict over who controls the litigation. The basic problem is that the person who puts up the

Id. at 1460.

72. *Id.* at 1463.

73. *Agent Orange*, 818 F.2d at 224.

74. *Id.* at 225.

75. *Id.* at 226 (“[I]n all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed to the rights of the class. Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising, either by disapproving improper agreements or by reshaping them with the assistance of counsel . . .”).

money does not have a direct obligation to the client — at least as far as precedent suggests.

An attorney who is not representing a client, but who has assumed a financial stake in the litigation, may want to settle quickly to recoup the investment.⁷⁶ Similarly, if the named attorney, who has a fiduciary obligation to the client, is financing the litigation through a bank or other form of loan, the lender may apply pressure to pay off the loan. This may affect the lawyer's decision about what to do for the client — including settling early before adequate discovery is completed. The requirement that the court approve any proposed settlement “may not completely eliminate the more subtle effects of undue pressures on attorneys toward settlement.”⁷⁷

If an attorney is financing the litigation, either as non-counsel or as named counsel, the court can exercise substantial control. It can discipline the lawyer through internal court procedures. These tools may not be available in the case of alternative financing by non-lawyers.

In any case, the court should be made aware of any third-entity financing arrangements as soon as possible. This will allow the court to better supervise the litigation on an ongoing basis to ensure that client interests are not compromised.⁷⁸

In the case of loans to plaintiffs' law firms, making these financial arrangements public may give an additional edge to defense counsel, who will then know that the plaintiffs' attorney is under a financial strain. In camera disclosure to the court might protect against such unfairness.

76. *Agent Orange*, 611 F. Supp. at 1460–61 (“[A]n agreement of this kind may create an incentive toward early settlement that may not be in the interests of the class. An attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now. An early settlement will maximize the investor's profit, because he or she then can reinvest the funds elsewhere immediately. A lawyer in this situation might not negotiate as hard or might decide to settle early, when holding out for a higher settlement or going to trial would be in the best interests of the class.”).

77. *Id.* at 1461.

78. Burch, *supra* note 37, at 6–7.

V. CONCLUSION

Even as courts continue to restrict class actions, recent developments in technology and litigation financing increase the possibility for the democratization of mass actions. The extent to which this potential is fulfilled appropriately depends on proper judicial involvement at all stages of these cases, to assure both fairness and efficiency.