

Democratization of Mass Litigation: Empowering the Beneficiaries

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When it comes to mass complex litigation, all eyes are focused on the pending trials: observers want to know who the adversaries are, whether liability be found by judge and jury, what the scope of damages will be, and what the battlefield will look like after the litigation dust settles. But public interest quickly wanes after the battle is over and the trial is completed. Litigation warfare is news; peace is an afterthought.

All of this is changing thanks, in large measure, to the work of Federal District Judge Jack B. Weinstein over the past twenty-five years.¹ There is growing interest in the post-litigation phase of complex disputes, when the issue is not whether the defendant is liable for the alleged harm but, rather, what should be done with the settlement proceeds once peace is achieved.² To Judge Weinstein, achieving a proposed settlement of mass litigation triggers the next legal challenge — concentrating on the beneficiaries of the settlement, making sure they are aware of the pro-

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1. See, e.g., *In re Zyprexa*, 433 F. Supp. 2d 268 (E.D.N.Y. 2006) (involving settlement of thousands of claims consolidated through the federal multidistrict litigation statute); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (approving class action settlement agreement).

2. See, e.g., AM. L. INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION (2010); see also Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) (discussing the importance of due process and the right to be heard).

posed settlement and how the deal reached by the lawyers will impact each and every one of them. In a proposed settlement involving hundreds or even thousands of plaintiffs, Judge Weinstein sees this as a formidable legal challenge — but one that must be overcome in order to assure justice for each and every litigant.

Judge Weinstein focused on this issue for the first time in the Agent Orange products liability litigation.³ Prior to *Agent Orange*, the federal courts had demonstrated little interest in the subject of how settlement proceeds should be distributed, particularly in the context of mass tort litigation. The federal class action device had not been used effectively to aggregate individual tort claims; Rule 23 requirements of commonality, typicality, and predominance posed formidable barriers to class certification.⁴

3. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *rev'd in part*, 818 F.2d 179 (2d Cir. 1987); *Agent Orange*, 597 F. Supp. 740.

4. The pertinent language of Rule 23 reads:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:

- (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

- (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

- (3) the court finds 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. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

Judge Weinstein's *Agent Orange* opinions changed all of this. He concluded that individual mass tort lawsuits could be consolidated in one judicial forum for purposes of securing a comprehensive settlement of all related mass tort claims.⁵ There were predominant issues in the litigation, common and typical to all class members, that permitted effective use of Rule 23.⁶ And, once a global settlement was achieved involving all Vietnam veterans alleging injury due to Agent Orange exposure while serving in Vietnam, he turned his attention to the next legal challenge — making sure that thousands of Vietnam veterans comprising the class had a fair opportunity to comment on the terms and conditions of the proposed settlement and how it would impact each of them.⁷ Judge Weinstein was a trail blazer, therefore, in two respects: first, he recognized the value of Rule 23 in aggregating and resolving mass tort litigation and, second, he devised and implemented procedures to make sure that thousands of class members had a voice in commenting on the merits of the proposed settlement.

Now, over twenty-five years later, his work in *Agent Orange* remains provocative. His efforts to breathe new life into Rule 23 mass tort litigation have been challenged by appellate courts, including the Supreme Court.⁸ At the same time, however, Judge Weinstein continues to stress the importance of giving individual plaintiffs in mass litigation the opportunity to be heard and to make their views known regarding the merits of a comprehensive

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23.

5. *Agent Orange*, 597 F. Supp. 740.

6. The predominant issue in *Agent Orange* was the “government contractor defense,” a common defense available to all of the defendants and a formidable obstacle to all plaintiff class member claims. It was this predominant “government contractor defense” that the Second Circuit found to be the key prerequisite to affirming class resolution. *In re Agent Orange Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145, 173 (2d Cir. 1987).

7. *Agent Orange*, 611 F. Supp. at 1403 (commenting on the hearings and how Vietnam veterans testified about the settlement terms and conditions).

8. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reversing class certification in employment discrimination litigation); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (rejecting class certifications in asbestos litigations); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (same); *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010) (reversing Judge Weinstein's class certification in Zyprexa drug litigation); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (reversing Judge Weinstein's class certification in tobacco litigation).

settlement and the distribution of settlement proceeds.⁹ Whether it be federal class actions,¹⁰ consolidation of claims in federal multidistrict litigation (what he refers to as a “quasi-class action”),¹¹ regional consolidation of individual claims,¹² or through extrajudicial devices accomplishing the same objective which build upon Judge Weinstein’s earlier opinions,¹³ Judge Weinstein’s efforts at “democratization” — making sure individual plaintiffs have an informed role to play in judicial proceedings — are both striking and innovative. Law school curriculums are now paying increased attention to Judge Weinstein’s concerns.¹⁴

Judge Weinstein acknowledges aggregation as a fundamental reality of modern mass complex litigation. Without such aggregation, carefully monitored by the trial court, litigation inefficiencies and delays prevent effective resolution of disputes. Judge Weinstein’s judicial opinions and writings all point to this view: justice delayed is justice denied.¹⁵ Aggregation, initially tied to the class action device, but more recently the subject of other consolidation techniques, is a vital tool in achieving an efficient and timely comprehensive resolution of disputes. And, once such

9. See, e.g., *In re Zyprexa*, 433 F. Supp. 2d 268, 272 (E.D.N.Y. 2006). Judge Weinstein has also written on the subject. See, e.g., Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 443 (2011); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 174 (2008) [hereinafter Weinstein, *Role of Judges*] (focusing on making sure individual plaintiffs in aggregate litigation are kept informed through modern electronic means, e.g., Internet and video conferencing).

10. See, e.g., *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989); *Agent Orange*, 597 F. Supp. 740.

11. See, e.g., *Zyprexa*, 433 F. Supp. 2d at 271.

12. See, e.g., *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992).

13. The September 11th Victim Compensation Fund of 2001 was created by the Air Transportation Safety and System Stabilization Act. 49 U.S.C. §§ 40101, 44302–44306 (2006).

14. For example, Harvard Law School offers a course on “Dispute Systems Design.” *Dispute Systems Design*, HARV. LAW SCH., COURSE CATALOG, available at <http://www.law.harvard.edu/academics/curriculum/catalog/index.html?o=64799> (last visited Apr. 18, 2012). Similar courses are taught at Ohio State University’s Moritz College of Law and Pepperdine Law School. *Program on Alternative Dispute Resolution*, OHIO STATE UNIV., MORITZ COLL. OF LAW, <http://moritzlaw.osu.edu/programs/adr/> (last visited Apr. 18, 2012); *Straus Institute for Dispute Resolution*, PEPPERDINE UNIV. SCH. OF LAW, <http://law.pepperdine.edu/straus/about/> (last visited Apr. 18, 2012).

15. See, e.g., *City of N.Y. v. Adventure Outdoors, Inc.*, 644 F. Supp. 2d 201 (E.D.N.Y. 2009), *aff’d in part, vacated in part sub nom.* *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011); *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), *rev’d sub nom.* *McLaughlin v. Am. Tobacco Co.*, 552 F.3d 215 (2d Cir. 2008); *Cnty. of Suffolk*, 710 F. Supp. 1407; *Agent Orange*, 597 F. Supp. 740; *Zyprexa*, 433 F. Supp. 2d 268.

resolution is secured, Judge Weinstein wants to make sure that all individual parties to the settlement have a full and complete understanding of their rights and obligations. This example, from *Agent Orange*, illustrates the concept of “democratization”:

Particular emphasis should be placed on efforts to communicate with class members who are outside the mainstream of society. Special efforts of this kind were made in distributing notices of settlement with claim forms to the class. The cooperation of the governors of the states and the Federal Bureau of Prisons was solicited in reaching incarcerated veterans. Claim forms were forwarded to veterans groups and Hispanic and black organizations for copying and distribution. Information was provided to members of Congress for dissemination. These and similar endeavors must continue to ensure an effective distribution of the settlement fund.¹⁶

In this sense, Judge Weinstein’s more recent concerns with democratization are almost preordained; they follow in the wake of his leadership role in approving the aggregation of mass claims.¹⁷ If you approve of aggregation, you must then consider the impact of mass claim resolution on individual claimants who may or may not benefit from the terms and conditions of a comprehensive settlement. It is one thing to approve a mass settlement involving thousands of claimants; that itself remains a rather innovative result in a litigation system that is adversarial in structure, with each individual plaintiff being represented by his or her lawyer advocating on behalf of the client.

But creativity and innovation assume additional importance when the issue is not aggregation, but, rather, how to treat individual plaintiffs who are swept up in such a huge settlement. To Judge Weinstein, once aggregation is achieved, and hundreds or even thousands of individuals are part of a single judicial proceeding, steps must be taken to make sure that those individuals have an opportunity to participate in the outcome.¹⁸ He realizes

16. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1445–46 (E.D.N.Y. 1985), *rev’d in part*, 818 F.2d 179 (2d Cir. 1987).

17. *See Zyprexa*, 433 F. Supp. 2d 268.

18. *See, e.g., id.* at 269–70; *Agent Orange*, 597 F. Supp. at 746–47.

that traditional legal representation is not possible; in an aggregative settlement involving thousands of individuals, the conventional lawyer/client relationship is unrealistic. Instead, the lawyers involved in the litigation and subsequent settlement represent thousands of individual clients. The challenge is to make meaningful the legal relationship between lawyer and client, to provide each individual a stake in the outcome with the opportunity to be heard. How this is accomplished, how individuals who are part and parcel of the litigation and settlement are provided a voice, is the focus of Judge Weinstein's attention.¹⁹

It is often stated that, once a comprehensive settlement of mass litigation is reached, the defendant — having agreed to a certain sum and other settlement terms — departs from the scene and no longer has a vested interest in how settlement funds are allocated and distributed to individual plaintiff beneficiaries.²⁰ This is usually the case — but it is not a given. After all, the defendant expects adequate consideration for tendering a settlement sum; it wants to minimize the number of plaintiffs who reject the settlement and decide, instead, to continue to litigate. Thus, it seeks individual releases from all of those plaintiffs who are expected to be part of the settlement. The defendant wants global participation by the plaintiffs; a defendant company usually demands a provision in the settlement permitting it to walk away from the deal if a minimum number of eligible individual plaintiffs fail to sign on the dotted line.²¹ Ironically, once a settlement is achieved, both the plaintiffs' lawyers and the defendants now have the same common interest: to assure that the settlement is truly comprehensive, that all eligible plaintiffs participate in the deal that is offered. Otherwise, if too many individual plaintiffs object to the settlement, and exercise their option to reject the deal, the defendant may decide unilaterally to terminate the settlement and continue to litigate. So it is in the interest of all parties negotiating a comprehensive settlement to maximize the likelihood that there will be full individual plaintiff participation. These plaintiffs must be educated as to the merits

19. See, e.g., *Zyprexa*, 433 F. Supp. 2d at 269–70; *Agent Orange*, 597 F. Supp. at 746–47.

20. See, e.g., *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 365–66 (S.D.N.Y. 1996); AM. L. INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION (2010).

21. See, e.g., *Prudential*, 164 F.R.D. at 365–66.

of the settlement. They must be convinced to participate by accepting the settlement's terms and conditions. This is why democratization of mass litigation is as important to defendants as it is to the individual plaintiffs themselves.

What do we mean by "democratization" in this context? To Judge Weinstein, it is making sure that the inevitable anonymity that goes with the aggregation of claims — the inability of plaintiff counsel to know the name and unique circumstances of each and every individual plaintiff — does not result in approval of a settlement in which the individual plaintiff has no knowledge or input.²² This is the heart and soul of the matter. It is what happens *after* aggregation is secured — when individual plaintiffs are consolidated in one forum and, because of the sheer volume of individual claims, lack a basic understanding of their legal rights and obligations under the settlement — that troubles Judge Weinstein.²³

How does one make sure that, through judicial oversight and other means, individual plaintiffs are made aware of proposed settlement terms and conditions, have an opportunity to participate in the settlement process, and can then make an informed decision as to whether or not they wish to accept what is offered? Judge Weinstein views democratization as integral to aggregation — how one can combine the mass resolution of claims with time-honored principles that recognize a plaintiff lawyer's obligation to represent the unique interests of each individual client.

Judge Weinstein recognizes that the courts are the most common vehicle for promoting these interests, since aggregation occurs most often in a mass litigation setting. But, on rare occasions, other institutions may be created by statute or private agreement to allocate financial resources to a large number of similarly situated victims.²⁴ According to Judge Weinstein, the

22. See *supra* note 9 and accompanying text; see also *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *rev'd in part*, 818 F.2d 179 (2d Cir. 1987).

23. Weinstein, *Role of Judges*, *supra* note 9, at 172–77.

24. The September 11th Victim Compensation Fund, created by the Air Transportation Safety and System Stabilization Act, 49 U.S.C. §§ 40101, 44302–44306 (2006), is one example of a statutorily created method of disbursing financial resources to a large number of plaintiffs. See also Jesse Lee, *A New Process and a New Escrow Account for Gulf Coast Claims from BP*, THE WHITE HOUSE BLOG, (June 17, 2010, 2:35 PM), <http://www.whitehouse.gov/blog/2010/06/17/a-new-process-and-a-new-escrow-account-gulf-oil-spill-claims-bp> (describing the private claims facility established to deal with claims

same rules should apply — rules that will maximize individual involvement in making a considered choice.²⁵

Democratization, if done efficiently and effectively under court supervision, or pursuant to administrative regulation in non-judicial forums, advances the credibility and acceptability of the resulting settlement — not only to the individual plaintiffs, but to the public at large. This is an important point. In many complex mass litigations, public awareness and approval are important factors in evaluating the overall success of the process. Many, if not most, such litigations have a public interest and/or public law component. Individual plaintiffs represented in the courtroom are surrogates, or representatives, of the public at large. If the litigation itself, and the accompanying settlement reached behind closed doors, are not viewed as credible or “just,” we citizens lose faith in the ability of the courts to dispense and deliver “justice.” So democratization carries with it an obligation that goes well beyond respect for the individual plaintiff; it also seeks to validate the public’s confidence in our court system.

In order to advance these objectives, democratization should be defined as having two separate but related components: (1) providing outreach to individual plaintiffs who are affected by the settlement and the proposed allocation of funds (what I label the “external” awareness campaign designed to provide settlement information to individual plaintiffs); and (2) providing these plaintiffs with the right to a hearing, or at least the right to be heard even in the absence of a formal court hearing (the “internal” aspect of democratization). Judge Weinstein focuses on both of these components.²⁶ Not only is he determined to reach out to those individuals impacted by a settlement to make sure they exercise a knowledgeable choice in deciding whether to participate, he also deems it important to give individual plaintiffs a

arising out of the April 20, 2010, explosion of the *Deepwater Horizon* oil rig and subsequent oil spill in the Gulf of Mexico); GULF COAST CLAIMS FACILITY, www.gulfcoastclaimsfacility.com (last visited Apr. 18, 2012) (established to process such claims).

25. See Jack B. Weinstein, *A Survey of Changes in United States Litigation*, 76 ST. JOHNS L. REV. 379, 393–95 (2002).

26. See *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 748–49 (E.D.N.Y. 1984) (discussing Judge Weinstein’s outreach effort in publicizing the settlement and his determination to hold hearings in different cities to afford individual class members the opportunity to be heard).

personal opportunity to be heard, either during a formal transcribed hearing under oath, or during a more informal personal meeting that affords the individual plaintiff an opportunity to speak with the court.²⁷ These external and internal objectives complement each other. Individuals impacted by a settlement must know enough to exercise a voluntary choice about the settlement. At the same time, they may desire to be heard — in public or in private — to express their personal views about the settlement and its impact on their individual circumstances.

Judge Weinstein first implemented these dual democratization objectives in the 1980s following the comprehensive settlement of *Agent Orange*. The court made it an official priority to promote outreach to class members, while affording them an opportunity to testify not only about the settlement terms, but about the impact of the Agent Orange defoliant on their lives and the lives of their loved ones.²⁸

Considering the high-tech world we live in today, the decade of the 1980s was the horse and buggy age when it came to notice and outreach. Judge Weinstein took his show on the road. He traveled to Houston, Chicago, Atlanta, and San Francisco, and held public hearings in his own courtroom in Brooklyn, publicizing the settlement and inviting Vietnam veterans throughout the nation to choose the most convenient forum to testify and offer evidence, pro and con, about the settlement.²⁹ Judge Weinstein's goal was not only to make sure that the veterans understood the fairness and reasonableness of the proposed settlement; he also observed first-hand the emotional trauma, frustration, and anger which characterized the return of so many Vietnam veterans from their military service in Southeast Asia.³⁰ He provided them an opportunity to vent, to testify under oath about the obstacles they confronted in returning to civilian life. The court approved

27. For the best example of a "formal" hearing, see *Agent Orange*, 597 F. Supp. at 758–75; for a discussion of a more "informal" opportunity for an individual plaintiff to be heard, see *Bilello v. Abbott Labs*, 825 F. Supp. 475, 476–77 (E.D.N.Y. 1993). See also Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 11–12 (2009) [hereinafter Weinstein, *Preliminary Reflections*]; Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 547 (1994) [hereinafter Weinstein, *Ethical Dilemmas*].

28. See *supra* note 7 and accompanying text.

29. See *supra* note 7 and accompanying text.

30. See *Agent Orange*, 597 F. Supp. at 746–48.

the *Agent Orange* settlement in a lengthy opinion commenting on the trials and tribulations of veteran class members as reflected in the formal hearing record.³¹

In the DES litigation — a regional consolidation of hundreds of related claims brought by women alleging injury to themselves and their children due to ingestion of the DES pregnancy drug — Judge Weinstein once again took the lead in promoting democratization.³² This time, instead of conducting formal hearings under oath, he invited individual women who had settled their cases to visit him in his chambers, off the record, affording them an opportunity to explain how use of the drug had adversely impacted their lives.³³ Meeting with the individual women and their counsel in intimate, informal surroundings, he listened to story after story, expressing empathy and compassion for their plight.³⁴ The court wanted to make sure that each individual plaintiff seeking an audience was afforded that opportunity.³⁵ There may have been hundreds of women filing individual claims in his court, but Judge Weinstein wanted to make sure that each woman did not view her own settlement as merely part of “assembly-line justice.”³⁶ He put a face on the process.

Judge Weinstein has written extensively on the importance of the courts’ use of the latest technology to promote external democratization while continuing to make himself available to meet with individual plaintiffs.³⁷ He views the Internet and video conferencing as just two examples of important electronic means to help educate individual plaintiffs and keep them apprised of developments in the litigation and proposed settlement.³⁸ In recent years, in coordinating the resolution of mass litigation involving the drug Zyprexa, he has focused on the tension between aggre-

31. *Id.* at 857–58.

32. *Bilello*, 825 F. Supp. at 476–77. *See also* Weinstein, *Preliminary Reflections*, supra note 27, at 11–12; Weinstein, *Ethical Dilemmas*, supra note 27, at 547.

33. *Bilello*, 825 F. Supp. at 476–77. *See also* Weinstein, *Preliminary Reflections*, supra note 27, at 11–12; Weinstein, *Ethical Dilemmas*, supra note 27, at 547.

34. *Bilello*, 825 F. Supp. at 476–77. *See also* Weinstein, *Preliminary Reflections*, supra note 27, at 11–12; Weinstein, *Ethical Dilemmas*, supra note 27, at 547.

35. *Bilello*, 825 F. Supp. at 476–77. *See also* Weinstein, *Preliminary Reflections*, supra note 27, at 11–12; Weinstein, *Ethical Dilemmas*, supra note 27, at 547.

36. *Bilello*, 825 F. Supp. at 476–77. *See also* Weinstein, *Preliminary Reflections*, supra note 27, at 11–12; Weinstein, *Ethical Dilemmas*, supra note 27, at 547.

37. Weinstein, *Role of Judges*, supra note 9, at 174.

38. *Id.*

gation and democratization, advancing the concept of the “quasi-class action” in those cases in which formal Rule 23 class certification may be absent.³⁹ Cognizant of the fact that Rule 23 may no longer be as available as a legal tool to consolidate individual cases,⁴⁰ Judge Weinstein has promoted other means to secure the same result. He has commented on the importance of using similar procedures, ordered by the court, to assure that individual plaintiffs understand their rights before exercising a voluntary choice to settle or not.⁴¹

Judge Weinstein’s opinions and writings concerning the concept of democratization have also had a profound extrajudicial impact. The most striking example is the September 11th Victim Compensation Fund (“Fund”), a statute enacted by Congress just eleven days after the 9/11 attacks.⁴² Pursuant to this new law, any family that lost a loved one as a result of the terrorist attacks, or any surviving victim who was physically injured, could voluntarily elect to waive the right to sue alleged domestic tortfeasors — the airlines, the World Trade Center, the airports, the manufacturer of the airline cockpit doors — and, instead, enter a no-fault administrative compensation system which would pay eligible claimants using public taxpayer funds.⁴³ The courts expressly had no role to play; the publicly funded compensation system would be administered by a single “Special Master” chosen by the Attorney General of the United States.⁴⁴ I was selected.

During the thirty-three month history of the Fund, some 97% of eligible families voluntarily entered it; in addition, approximately 2,300 individuals who suffered physical injuries as a result of 9/11 also opted to accept administrative compensation.⁴⁵ Only ninety-four families chose to sue in federal court in Manhattan rather than accept available public monies.⁴⁶ Over \$7 billion

39. *See In re Zyprexa*, 433 F. Supp. 2d 268, 271–72 (S.D.N.Y. 2006). *See also* Weinstein, *Role of Judges*, *supra* note 9, at 172–77 (2008)

40. For example, Supreme Court cases decided in the 2010–11 term have cut back on the availability of Rule 23 class certification. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

41. *See Zyprexa*, 433 F. Supp. 2d at 271–72.

42. 49 U.S.C. §§ 40101, 44302–44306 (2006).

43. 49 U.S.C. § 40101 note (2006).

44. *Id.*

45. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* 192–204 (2005).

46. *Id.*

was paid to eligible claimants.⁴⁷ The average award for a death claim, tax free, was approximately \$2 million; the average award for a physical injury, about \$400,000.⁴⁸ When the program expired by statute in December, 2003, over 5,000 claimants had received compensation from the Fund.⁴⁹

One key to the success of this program was the internal democratization process that had been promoted by Judge Weinstein in his court opinions and writings.⁵⁰ The Fund regulations permitted any individual claimant, before deciding whether to accept public compensation and waive the right to sue, to request a formal hearing under oath before the Special Master of the Fund.⁵¹ Such a hearing was not required; the choice would be made by the claimant.⁵² Although the statute did not contemplate formal hearings, I concluded that — based on the *Agent Orange* and *DES* precedents — affording claimants the voluntary choice to be heard would promote the credibility and acceptability of the Fund. Taking into account criticisms that such a hearing would delay the distribution of funds and trigger inefficiencies by affording potentially thousands of individuals the opportunity to be heard, the regulations advanced the concept as a voluntary option.⁵³

Over 1,500 claimants took advantage of the hearing opportunity (about half of all eligible families).⁵⁴ As many as twenty confidential hearings were conducted each day in New York City and Washington, D.C.⁵⁵ Claimants testified under oath, and the hearing record was transcribed and made available to any claimant requesting a copy.⁵⁶ Some claimants came alone; others were accompanied by a lawyer, an accountant, rabbi, or priest.⁵⁷ Some brought family members or friends with them.⁵⁸ There was no

47. *Id.* app. at 201.

48. *Id.* app. at 202.

49. *Id.*

50. *See generally id.* at 93–117.

51. 28 C.F.R. §§ 104.31, 104.33.

52. *Id.*; FEINBERG, *supra* note 45, at 99.

53. 28 C.F.R. §§ 104.31, 104.33.

54. FEINBERG, *supra* note 45, at 98–99.

55. *Id.* at 95.

56. *Id.*

57. *Id.*

58. *Id.*

time limitation and the average hearing usually lasted between forty-five minutes and one hour.⁵⁹

Claimants rarely discussed the subject of compensation.⁶⁰ Cold, hard numbers were not on their mind. Instead, they focused on the memory of a lost loved one, on what might have been but for the 9/11 attacks.⁶¹ Physical evidence was offered in abundance — photograph albums, videos, medals, ribbons, certificates of good conduct and diplomas.⁶² The transcribed oral testimony focused on the victim:

Why was my wife killed? She was a saint, a wonderful mother, a community leader. Why is she gone? . . .

I'll go on for the sake of my kids. I'll never give the murderers the satisfaction of knowing that they have beat me down. . . .

I feel he's in a better place, and that's what I hope, and that's what kind of gives me some kind of comfort is they say he's in a better place, and I look to that.⁶³

The Fund hearings followed the blueprint drafted by Judge Weinstein in the Agent Orange and DES litigations.⁶⁴ As with *Agent Orange*, the hearings were transcribed and under oath; but, as with *DES*, the hearings were confidential, not in open court, and were conducted in a more intimate, informal setting.⁶⁵ And, as with both *Agent Orange* and *DES*, the substance of the hearings focused more on personal emotional subjects rather than technical issues of compensation and waiver of the right to sue.⁶⁶

One cannot overemphasize the importance of the Fund hearings in convincing individual claimants to participate in the Fund rather than opt to litigate. As with *Agent Orange* and *DES*, the hearing process provided claimants with the opportunity to meet

59. *Id.*

60. *Id.* at 96.

61. *Id.*

62. *Id.*

63. *Id.* at 98, 132.

64. *Bilello v. Abbott Labs.*, 825 F. Supp. 475 (E.D.N.Y. 1993); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

65. FEINBERG, *supra* note 45, at 95.

66. *Id.* at 99.

face-to-face with a live human being, not some faceless government bureaucrat. The hearings encouraged claimants to take advantage of an official opportunity to memorialize memories of 9/11 victims. This was internal democratization at its best, a critical component of a statutory program not moored to the courts, but exhibiting some of the judicial characteristics advanced earlier by Judge Weinstein.

At the same time, on a parallel track, Judge Weinstein's notion of external democratization was advanced by town hall meetings conducted by the Special Master throughout the nation.⁶⁷ Hundreds of interested claimants attended these widely publicized meetings during which the details of the Fund were explained and claimants were invited immediately to submit claim forms.⁶⁸ In a manner strikingly similar to what Judge Weinstein did in *Agent Orange*, the Special Master traveled to New York City, Boston, Los Angeles and other cities, explaining Fund details, answering questions, and urging participation.⁶⁹ At the same time, I enlisted the valuable help of Judge Alvin K. Hellerstein of the Southern District of New York, who was coordinating all of the related 9/11 litigation, to assist the Fund in assuring that litigants understood the administrative compensation option if they voluntarily chose to exercise it. Like Judge Weinstein, Judge Hellerstein proved instrumental in promoting external democratization, which enhanced the credibility of the 9/11 Fund.

But democratization as an objective — especially the internal variety grounded in the opportunity to be heard — has its limits. These limitations are best exemplified by the Gulf Coast Claims Facility (GCCF) established by the Obama Administration and British Petroleum (BP) following the Deepwater Horizon oil rig explosion on April 20, 2010 in the Gulf of Mexico.⁷⁰ The explosion killed eleven workers, physically injured hundreds, and caused oil to spew into the Gulf from a wellhead almost a mile below the

67. FEINBERG, *supra* note 45, at 49–63.

68. *Id.*

69. *Id.* at 49–50.

70. Lee, *supra* note 24 (describing the decision by the Obama Administration and BP to establish a claims process to compensate victims of the oil spill); GULF COAST CLAIMS FACILITY, www.gulfcoastclaimsfacility.com (last visited April 18, 2012) (established to process such claims).

ocean surface.⁷¹ The flow of oil was not capped until July 15, 2010; an estimated 200 million gallons flowed into the Gulf.⁷² It was described as the worst environmental disaster in American history.⁷³

The Obama Administration and BP voluntarily entered into an escrow agreement in which BP promised to pay \$20 billion to compensate the victims of the oil spill.⁷⁴ An Administrator would be jointly appointed to design, implement and administer the compensation program.⁷⁵ No statute or judicial order mandated the creation of the GCCF. Although existing law — the federal Oil Pollution Act of 1990⁷⁶ — would guide the Administrator in his administration of the GCCF compensation program, the details surrounding who would be eligible, how damages would be calculated, and what litigation releases would be required from claimants accepting the compensation, were left to the Administrator.⁷⁷ I was selected and given wide discretion to design and administer the GCCF.

External democratization was not an issue. International media attention concerning the disaster was pervasive and relentless. The public was kept apprised on a daily basis concerning developments in the Gulf and the creation of the GCCF. Scores of town hall meetings were conducted in Alabama, Florida, Louisiana and Mississippi in an effort to explain the details of the compensation program to eligible claimants, both individuals and

71. Tom Bergin & Jonathan Stempel, *BP Oil Spill Trial Delayed for Settlement Talks*, REUTERS, Feb. 27, 2012, available at <http://www.reuters.com/article/2012/02/27/us-bp-idUSTRE81P0Q320120227>. See also *Overall Program Statistics*, GULF COAST CLAIMS FACILITY, 6 (2012), http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf [hereinafter OVERALL PROGRAM STATISTICS].

72. Harry R. Weber & Michasel Kunzelman, *BP, Plaintiffs Reach Gulf Oil Spill Settlement*, ASSOCIATED PRESS, Mar. 2, 2012, available at <http://news.yahoo.com/bp-plaintiffs-reach-gulf-oil-settlement-031032920.html>.

73. President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill> (“Already, this oil spill is the worst environmental disaster America has ever faced.”).

74. Lee, *supra*, note 24.

75. *Id.*; GULF COAST CLAIMS FACILITY, www.gulfcoastclaimsfacility.com (last visited Apr. 18, 2012).

76. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended in scattered sections of 33 U.S.C., 43 U.S.C., and 46 U.S.C.).

77. *Frequently Asked Questions: Section 1 — General Information About the Gulf Coast Claims Facility*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q1> (last visited Apr. 18, 2012).

businesses. In just its first year of operation, the GCCF distributed about \$5.5 billion to over 200,000 individuals and businesses, securing almost 190,000 releases from claimants who agreed not to litigate in return for compensation.⁷⁸

But the sheer volume of claims — over one million claims submitted by claimants residing in all fifty states and thirty-five foreign countries — challenged the ability of the GCCF to provide internal democratization to those requesting it.⁷⁹ As the magnitude of the claims increased, individual hearings become impractical. The ability to provide individual hearings and tailored one-on-one, face-to-face meetings with claimants was undercut by claims volume. The GCCF attempted to cope with this problem by increasing its staff and retaining the services of local liaisons — well known in regional communities throughout the Gulf — to meet with claimants.⁸⁰ Thirty-five regional GCCF claims offices were established throughout the Gulf region to make it more convenient for claimants to file claims and meet with local GCCF personnel.⁸¹ Nevertheless, without individual claimants benefiting from a formal opportunity to be heard, the credibility and transparency of the GCCF suffered. Without hearing firsthand why an individual claim was denied, or why the GCCF concluded that there was insufficient evidence of damage, claimants throughout the Gulf became skeptical about the bona fides of the GCCF and its mission. Although the compensation program has been a success,⁸² it certainly has its critics. The absence of a more efficient and transparent hearing process is one of the major criticisms.

78. See OVERALL PROGRAM STATISTICS, *supra* note 71.

79. *Id.*

80. See Press Release, Gulf Coast Claims Facility, Gulf Coast Claims Facility Announces Next Phase of the Compensation Program for Victims of the BP Oil Spill (Dec. 13, 2010), available at <http://www.gulfcoastclaimsfacility.com/pressB.php>.

81. *Id.* (mentioning the thirty-five local Claims Offices). Currently, because of reduced claims volume, there are seventeen GCCF Offices in operation either permanently or one-day per week. *Site Office Addresses & Directions*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/facility> (last visited Apr. 18, 2012).

82. The GCCF website documents this success. The facility has received over one million claims in just eighteen months, from fifty states and thirty-five foreign countries. OVERALL PROGRAM STATISTICS, *supra* note 71, at 1. It has honored over 500,000 claims and paid over \$6 billion to eligible claimants. *Id.* It has also secured over 200,000 releases from individuals and businesses electing not to litigate in favor of accepting final payments from the facility. *Id.* Based on these statistics, it appears that the facility satisfies any reasonable definition of “success.”

The GCCF is Exhibit A for the proposition that Judge Weinstein's notion of internal democratization has its limitations; as claims volume increases and the number of claimants soars, the ability to provide each claimant with an intimate, individual stake in the outcome becomes increasingly problematic.

Judge Weinstein understands all of this. What is most important to him is making sure that plaintiffs who are a part of a mass settlement understand the terms and conditions of the deal, and how these terms will impact their own individual claim. He understands as well as anybody the challenges posed by claims volume.

Finally, as Judge Weinstein predicted over twenty-five years ago in his *Agent Orange* opinions, claims volume raises serious questions about the role of the lawyers in representing claimants. Hundreds of GCCF claimants deny that they are represented by lawyers who have submitted their "clients" claim forms to the GCCF.⁸³ Numerous claimants allege "identity theft," arguing that they never agreed to be represented by the very lawyer who formally asserts such representation. The GCCF is compelled to delay payment of compensation in such cases until the dispute is resolved.⁸⁴ Mass complex litigation invariably raises the issue of whether, and to what extent, lawyers have adequately consulted with their "clients" before submitting their individual claims. It is part and parcel of the original democratization argument first raised by Judge Weinstein decades ago — what is the relationship between lawyer and client when it comes to mass litigation? How much personal contact has there been between them? What

83. *Client Authorization Form*, GULF COAST CLAIMS FACILITY, <https://cert.gulfcoastclaimsfacility.com/icfatty/Pdf/clientForm> (last visited Apr. 18, 2012) ("By my signature below, I advise the [GCCF] . . . that the Attorney identified in Section B hereof, 'Attorney Information,' is authorized by me to act on my behalf concerning my claim(s) with the GCCF, and is authorized by me to receive from the GCCF, either via wire to the Attorney's IOLTA or other similar trust account or via check made payable to me and sent in care of the Attorney, any payments that may be issued to me in connection with my claim(s).").

84. In such cases involving disputes between claimants and attorneys who purport to represent such claimants, the GCCF sends a letter to the designated attorney seeking clarification concerning the representation and requiring formal confirmation of such representation "in the form of a retainer agreement or another similar document executed by the claimant, or in the form of a completed Authorization Form signed by the claimant." See Letter Template from Kenneth R. Feinberg, Claims Administrator, Gulf Coast Claims Facility (on file with the Columbia Journal of Law and Social Problems).

protections exist to make sure that plaintiffs engaged in mass litigation are fully informed of their rights before exercising their options? The more massive the case, the more difficult the challenges posed by Judge Weinstein's concept of democratization.

No judge has been more attuned to all of the issues surrounding the tension between mass complex litigation and "democratization" than Judge Weinstein. He has resolutely pursued the subject both in his courtroom and his writings. He compels all of us — judges, lawyers, elected officials, the public and, most importantly, those citizens seeking the help of the courts and other entities like the 9/11 Fund and the GCCF — to prioritize the issue of democratization, to make sure that we do not succumb to the bureaucratic notion of "assembly-line justice."

Judge Weinstein is a one-man stimulus package, provoking all of us to think creatively in searching for ways to make our civil justice system and the rule of law more meaningful and responsive to all of those seeking justice.