

THE CORPORATE SETTLEMENT MILL

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INTRODUCTION

OVER the past two decades, corporate defendants have increasingly relied on their own mass settlement programs, which exist on the periphery of the civil litigation system, to resolve claims with large groups of people who cannot afford the cost of counsel. But even as federal laws encourage such private programs, few rules hold the companies that create them accountable to the people they serve. Consider the following:

- Just weeks after an explosion on the Deepwater Horizon oil rig caused the largest oil spill in United States history, BP opened one of the first of its thirty-five claim offices in a strip mall in Slidell, Louisiana,¹ as required by federal law.² Staffed by three claims adjusters outsourced from a private company, BP promised thirty-minute, one-on-one sessions with any injured person wishing to file a claim for compensation.³ In just eight weeks, BP paid out over \$144 million to nearly 30,000 private parties through its corporate claims facilities.⁴ But few rules spelled out who was eligible to recover, how parties should document their claims, and how BP itself should solicit input from shrimpers, oystermen, or other far-flung businesses impacted by the spill.⁵

¹ Christine Harvey, *BP Opens Slidell Claims Center to Help People Affected by Gulf Oil Spill*, *Times-Picayune* (May 17, 2010, 6:50 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/bp_opens_slidell_claims_center.html; Amy Schoenfeld, *Where BP's Money Is Landing*, *N.Y. Times*, July 4, 2010, at BU1; see also *Legal Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 85, 88–89 (2010)* (statement of Darryl Willis, Vice President, Resources, BP America), available at http://judiciary.house.gov/index.cfm/hearings?ContentRecord_id=3879697D-99A0-AC79-92C2-F0784C01C712 (discussing BP's claims process and the claims centers it opened after the oil spill).

² Oil Pollution Act of 1990, 33 U.S.C. §§ 2705(a), 2713, 2714(b) (2012).

³ Harvey, *supra* note 1.

⁴ Schoenfeld, *supra* note 1.

⁵ Jonathan Tilove, *BP Trying to Limit Its Payouts, Lawyers Say*, *Times-Picayune* (June 10, 2010, 9:26 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/firm_bp_is_using_to_handle_oil.html (describing “ongoing concerns related to delayed processing times for larger loss claims, claims pending with no action taken, payment calculations for individual loss of income claims . . . , translation of claims material and accessibility for the hearing-impaired”); see also Campbell Robertson, *Along Gulf, Many Wary of Promises After Spill*, *N.Y. Times*, May 10, 2010, at A12 (discussing the issues with processing claims after Hurricane Katrina and the impact on public perception of BP's

- Two weeks after a Costa Concordia cruise ship capsized off the coast of Tuscany, killing thirty-two passengers and stranding over 3200, the Italian division of the Carnival Cruise Lines company offered each passenger over \$14,000 for their psychological harm, medical payments, and cruise-related expenses.⁶ Even though the settlement promised “an immediate response” without legal expenses, the collective private settlement sought to head off a class action seeking at least ten times more in compensation.⁷
- Following accusations that many of the nation’s largest banks executed “robo-signed” mortgages or engaged in other sloppy mortgage practices, the Office of the Comptroller of the Currency (“OCC”) entered into a landmark settlement requiring banks to perform an “Independent Foreclosure Review” of past loans with borrowers.⁸ Citing the banks’ comparative expertise in evaluating distressed loans, federal regulators permitted banks themselves to decide how many people would receive payouts ranging from \$500 to \$125,000.⁹ Although the OCC claimed to “spot check” the banks’ work, their procedure for doing so included only approximately 100,000 foreclosure files out of four million, far short of a statistically reliable sample.¹⁰

claims procedures); Josh Wingrove, BP Pulls Disputed Waivers for Workers, *The Globe & Mail* (Toronto), May 3, 2010, at A11 (describing allegations that BP sought “to pull the wool over” the eyes of local fishermen by requiring litigation waivers).

⁶Nicole Winfield, Costa Cruises Offers \$14,460 Per Person for Concordia Cruise, *Huffington Post* (Mar. 28, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/01/27/costa-cruises-disaster-compensation_n_1236148.html.

⁷*Id.*

⁸U.S. Gov’t Accountability Office, GAO-13-277, *Foreclosure Review: Lessons Learned Could Enhance Continuing Reviews and Activities Under Amended Consent Orders 1, 4–5 & n.9* (2013) [hereinafter GAO Independent Foreclosure Review Study], available at <http://gao.gov/products/GAO-13-277>; Office of the Comptroller of the Currency, U.S. Dep’t of Treasury, *Interim Status Report: Foreclosure-Related Consent Orders 3–5* (2012) [hereinafter *Interim Status Report: Foreclosure-Related Consent Orders*], available at <http://www.occ.gov/news-issuances/news-releases/2012/2012-95a.pdf>.

⁹*Interim Status Report: Foreclosure-Related Consent Orders*, supra note 8, at 7, 12.

¹⁰GAO Independent Foreclosure Review Study, supra note 8, at 11; *Interim Status Report: Foreclosure-Related Consent Orders*, supra note 8, at 7–10. In addition to the “spot check” procedure, eligible borrowers could request review of a loan file. *Interim Status Report: Foreclosure-Related Consent Orders*, supra note 8, at 7–10.

Impatient with the slow, costly, and unpredictable nature of traditional litigation, policymakers have long experimented with “no-fault” programs.¹¹ Countless administrative schemes, class action settlements, attorney general payouts, and mandatory insurance policies have been designed to compensate victims without requiring that they prove in a courtroom that someone else was “at fault.” The appeal of these varied schemes takes a familiar form: In contrast to slow-going, one-by-one case determinations made inside the courtroom, “no-fault” programs promise to expand access to meaningful relief, offer injured victims swifter and more consistent results, reduce court congestion, and deter and punish bad behavior.

Most comprehensive legislative attempts to reform tort law along these lines, however, died a long time ago. Erstwhile efforts by policymakers to create “no-fault” plans for automobile accidents, for example, peaked and quickly petered out in the early 1930s, and again in the 1970s.¹² No wonder that leading tort scholars have concluded that the “no-fault” movement has “breathed its last breath.”¹³

“No-fault” systems persist, however, in a place one may not expect: the customer service departments of many private businesses. The United States legal system routinely encourages potential defendants—particularly corporate defendants threatened by numerous similar lawsuits—to design their own versions of these systems. The Oil Pollution Act of 1990 (“OPA”), for example, required BP to set up its own claims facilities to automatically reimburse claims for damages stemming from the Deepwater Horizon spill.¹⁴ Federal regulatory agencies require airlines,¹⁵ common

¹¹ See John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* 126, 134–37, 209–10 (2004) (describing efforts to adapt workers’ compensation and other models to United States tort law in the early 1900s).

¹² See, e.g., James M. Anderson et al., *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective* 25–30, 37–42, 55, 58 (2010).

¹³ Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11*, at 100 (2008); Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 *Md. L. Rev.* 699, 725 (2005).

¹⁴ See Oil Pollution Act of 1990, 33 U.S.C. §§ 2705(a), 2713, 2714(b) (2012).

¹⁵ See 14 C.F.R. §§ 250.1–250.9 (2012) (describing the Department of Transportation’s amended “Denied Boarding Compensation” policy for airlines).

carriers,¹⁶ and banks¹⁷ to develop mass settlement programs through regulations and enforcement actions. And increasingly, courts have rejected class actions when defendants have already established “superior” out-of-court plans to compensate consumers or recall goods.¹⁸ In each case, state actors have allowed, encouraged, or required putative corporate defendants to establish their own settlement programs that rely on commercial economies of scale to resolve disputes quickly, predictably, and in a high volume. Such private settlement systems often come without the traditional costs of litigation. They therefore provide a streamlined, if relatively unexamined, alternative to litigation that arguably serves many “no-fault” goals. We call such state-sponsored, high-volume, corporate settlement systems “corporate settlement mills.”

Although corporate settlement mills have the potential to ameliorate many of the most commonly criticized shortfalls of the United States’ individualized tort system—including high costs, lottery-like awards, and limited court access for those who cannot afford counsel—they impose costs of their own. Defendants who settle repeat cases in obscurity invite abuse, offer inconsistent payouts, and may undermine

¹⁶ See 49 U.S.C. § 14706(f) (2012) (permitting carriers to limit liability to shippers by “a written agreement”); accord *Hughes Aircraft v. N. Am. Van Lines*, 970 F.2d 609, 610–12 (9th Cir. 1992) (allowing a carrier to limit liability to \$.60 per pound of shipped goods when the agreement is properly filed with government regulators and the shipper had at least two settlement options).

¹⁷ See Interim Status Report: Foreclosure-Related Consent Orders, *supra* note 8, at 3–6.

¹⁸ See, e.g., *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377, 379, 384 (N.D. Ill. 2010) (refusing to certify class of consumers who purchased toys that produced comas when swallowed because of voluntary recall and refund program); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698–701 (N.D. Ga. 2008) (refusing to certify a class action for Salmonella-contaminated peanut butter when manufacturer had refund program); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622–23 (W.D. Wash. 2003) (finding effective recall of pharmaceuticals containing PPA more efficient than class litigation); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 452, 465 (D.N.J. 1998) (refusing to certify class of plaintiffs with defective anti-lock brakes after Chrysler instituted plan to reimburse owners of vehicles with defective ABS systems); *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 398–99 (S.D.N.Y. 1967) (refusing to certify a class for those purchasing unregistered stock after defendant set up program to refund purchase price); see also Eric P. Voigt, *A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action*, 31 *Rev. Litig.* 617, 636–59 (2012) (arguing that courts must deny class certification when a refund program for consumer goods is fair and efficient, and identifying features of a refund program that indicate fairness and efficiency); Andrea Joy Parker, Note, *Dare to Compare: Determining What “Other Available Methods” Can Be Considered Under Federal Rule 23(b)(3)’s Superiority Requirement*, 44 *Ga. L. Rev.* 581, 595–98 (2010) (collecting and summarizing cases evaluating private refund programs when determining whether to certify a class action).

public regulatory goals to deter future bad behavior. Claimants may unwittingly waive valuable rights because the defendants, as “repeat players” in the system, enjoy inherently superior bargaining positions. And by removing whole classes of disputes from the public realm of the courts, corporate settlement mills may undermine the rule of law. We argue that absent reform, the costs of corporate settlement mills may outweigh their potential contributions to the goals of increased access, equality, and efficiency. The challenge, therefore, is to minimize the costs of large private settlement systems while maintaining their advertised benefits of increased access, efficiency, and consistency.

The existing literature offers powerful, parallel critiques of settlements reached in individual cases,¹⁹ class actions and complex litigation,²⁰ criminal plea bargains,²¹ and legislative and executive compensation “funds.”²² Corporate settlement mills are different and potentially more dangerous than these arrangements, however, because they represent far more than an extension of parties’ rights to contract in the “shadow of the law.”²³ Even as public actors encourage corporate settlement mills, interested private parties may exclusively design, operate, and in some cases, oversee them entirely. Corporate settlement mills thus raise the question of how far policymakers should be

¹⁹ See Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1085 (1984).

²⁰ See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1367–84 (1995); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 *Cornell L. Rev.* 265, 267–69 (2011); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 *Duke L.J.* 381, 386–401 (2000); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *Vand. L. Rev.* 107, 109–10, 123 (2010); see also *Principles of the Law of Aggregate Litigation* § 3.06 reporters’ notes (2010) (collecting authorities involving the approval of settlement classes).

²¹ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 873–74 (2009); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2464, 2466–67 (2004); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2148–49 (1998).

²² See, e.g., Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 *La. L. Rev.* 819, 819–21 (2011); Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 *DePaul L. Rev.* 457, 459–60 (2003).

²³ Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. Legal Stud.* 225, 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 968 (1979).

permitted to go to privatize our public, and historically neutral, process of adjudication.²⁴

This Article proceeds in four parts. Part I demonstrates how large corporate defendants increasingly use corporate settlement mills to settle cases collectively; it also demonstrates how these private systems offer many of the same promises as aggregate litigation and other forms of public administration, including access, efficiency, consistency, and closure. Because of this, federal laws, enforcement actions, and courts expressly encourage—and sometimes even require—putative defendants to develop corporate settlement mills.

As set out in Part II, however, these private settlement systems require new forms of regulation to police against abuse. Frequently operating on a massive-scale with outsized bargaining power and access to critical information, corporate settlement mills may push claimants to waive their legal rights unwittingly. They may also treat similarly situated claimants differently, all the while forging final settlements in obscurity.

Part III explains how lawmakers' support of corporate settlement mills reflects a larger governmental trend to privatize public services. When public actors require that corporations *themselves* establish rules to resolve disputes with consumers and other individuals, they delegate the core judicial task—adjudication—to private parties. Corporate settlement mills therefore raise fundamental and important questions about privatization: Why is it acceptable to shift this public function to private corporations, trading formal adjudication for more efficient but private dispute resolution? Drawing on literature that addresses the growing privatization of government functions, we conclude that corporate settlement mills can serve as an appropriate alternative to public adjudication when, and only when, policymakers adopt internal and external “accountability mechanisms” to ensure that these privatized systems remain answerable to the regulators, courts, and claimants that rely on them.

²⁴ *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (“It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.”); *Tumey v. Ohio*, 273 U.S. 510, 524–26 (1927) (tracing the principle of independent and public adjudicators to fourteenth-century England); see also Judith Resnik, *Procedure as Contract*, 80 *Notre Dame L. Rev.* 593, 622–26 (2005) (identifying the impact of private dispute resolution on public procedures used in civil litigation).

Part IV turns to the question of how we can create and implement such accountability mechanisms. We offer several proposals for reform, including: (1) consumer or other stakeholder participation in the design of corporate settlement systems; (2) more comprehensive prospective administrative regulation for the operation of corporate settlement systems; (3) revised ethical standards for the lawyers who design these systems; and (4) enhanced judicial review of liability waivers acquired through these systems.

I. THE RISE OF CORPORATE SETTLEMENT MILLS

A. Defining the “Corporate Settlement Mill”

The term “corporate settlement mill” does not include every kind of process large organizations create to resolve disputes, from human resource programs in Fortune 500 companies to refund stations in local department stores. Rather, we mean those systems that a potential defendant might create in response to potential lawsuits filed by people claiming a legally protected interest in compensation. Such settlement practices, as Professors Samuel Issacharoff and John Witt observed in a related context, rely on the corporate form to take whole “classes of claimants as aggregates and develop mechanisms for the settlement of claims at the wholesale level,” rather than on a case-by-case basis.²⁵

Corporate settlement mills can be conceptualized as a new type of mass dispute resolution, at the extreme end of a spectrum of approaches to the high-volume, effective, and efficient resolution of disputes. At one end of the spectrum is the historical approach to resolving all tort claims—one-on-one litigation.²⁶ This traditional and idealized solution involves: (1) neutral adjudication;²⁷ (2) individual

²⁵ Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law*, 57 *Vand. L. Rev.* 1571, 1575 (2004).

²⁶ Kenneth S. Abraham, *What is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 *Md. L. Rev.* 172, 173 (1992) (describing the core conception of a tort claim as “the right to custom-tailored compensation for the actual loss suffered by the claimant”); John C.P. Goldberg, *Wrongs Without Recourse: A Comment on Jason Solomon’s Judging Plaintiffs*, 61 *Vand. L. Rev. En Banc* 9, 10–11 (2008).

²⁷ John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823, 824–25 (1985) (critiquing the American embrace of neutral judicial decision making, while recognizing more active, inquisitorial judicial management of “Big Case” multiparty disputes). But see Marc Galanter et al., *The Crusading Judge: Judicial Activism in Trial*

remedies;²⁸ (3) individualized representation in an adversarial system;²⁹ (4) court procedures and rules to join common claims, facts, or applicable legal standards;³⁰ (5) decisions about responsibility and liability;³¹ and (6) public regulation.³²

Corporate settlement mills fall at the opposite end of the spectrum, representing the mirror image of the traditional model of litigation in six ways. First, corporate settlement mills are expressly *not* neutral; they are run by a putative corporate defendant. Second, corporate settlement mills offer non-individualized remedies, apportioning sums to each claimant without regard to their specific facts and circumstances. Remedies are generally based on a few broad categories, like property damage, personal injury, age, or family status. Third, corporate settlement mills provide no (or at most, highly compromised) attorney representation in a system that is more inquisitorial than adversarial. Fourth, they rely on their own corporate form, as opposed to legal rules, to aggregate claims, facts, and applicable rules. Fifth, they decline to assign responsibility, expressly resting on no-fault systems. Finally, corporate settlement mills are subject to very weak forms of public oversight or regulation.

In between the two extremes fall a number of alternatives, which depart from the traditional idealized form of individualized adjudications without reaching the extreme represented by corporate settlement mills. In multidistrict litigations, like the thousands of lawsuits that alleged Merck's blockbuster painkiller, Vioxx, increased the risk of heart attacks and strokes, cases are joined before a single judge and typically result in

Courts, 52 S. Cal. L. Rev. 699, 706–08 (1979) (describing active judicial management in small claims court cases).

²⁸ John C.P. Goldberg, Twentieth-Century Tort Theory, 91 Geo. L.J. 513, 521–25 (2003); Benjamin C. Zipursky, Rights, Wrongs and Recourse in the Law of Torts, 51 Vand. L. Rev. 1, 80 (1998).

²⁹ Stephan Landsman, The Adversary System: A Description and Defense 38 (1984); Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 383 (1978).

³⁰ See, e.g., 28 U.S.C. § 1407 (2012) (permitting transfer of related actions to a single federal district court for coordinated pretrial proceedings); Fed. R. Civ. P. 23 (class actions).

³¹ Francis Hilliard, The Law of Torts or Private Wrongs 82 (1859) (“The liability to make reparation . . . rests upon an original moral duty, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another.” (emphasis omitted)); G. Edward White, Tort Law in America: An Intellectual History 14–16 (2003).

³² John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 541–49 (2005).

a master settlement that promises remedies according to a grid.³³ These settlements rarely include statements of liability or alleged wrongdoing,³⁴ but parties are still represented by their own counsel in individualized and adversarial proceedings.³⁵

In class actions, claims are similarly joined before a judge in what purports to be (but often is not) an adversarial proceeding.³⁶ In place of the individualized representation of traditional litigation, parties receive virtual representation by an attorney appointed to represent the class;³⁷ passive class members may be bound unless they affirmatively choose not to participate;³⁸ and the parties may settle with any or no statement of liability. But even as the vast majority of class action litigation

³³ See Erichson, *supra* note 20, at 386–408 (describing the ways plaintiffs and defendants coordinate and aggregate claims in complex litigation); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 892–95 (describing the rise of multiparty litigation strategies used to achieve efficiencies in litigation outside of class litigation). The ALI Principles of the Law of Aggregate Litigation refers to this idea of uniform or grid-like remedies, which are less tied to the facts and circumstances of individual claims, as “collective allocation.” See, e.g., Principles of the Law of Aggregate Litigation § 3.16(b)(2) cmt. c (2010).

³⁴ See, e.g., Alex Berenson, *Lilly Settles with 18,000 over Zyprexa*, N.Y. Times (Jan. 5, 2007), <http://www.nytimes.com/2007/01/05/business/05drug.html> (noting that “Lilly said the settlement did not change its view that Zyprexa is a safe and effective treatment for mental illness”); David Voreacos & Allen Johnson, *Merck Paid 3,468 Death Claims to Resolve Vioxx Suits*, Bloomberg (July 27, 2010, 5:27 PM), <http://www.bloomberg.com/news/2010-07-27/merck-paid-3-468-death-claims-to-resolve-vioxx-suits.html> (observing that “Merck didn’t admit that Vioxx caused injuries under an accord that set out how [an independent master would] analyze each claim, weighing such factors as a user’s age, their length of use, and their health risks such as obesity or hypertension”).

³⁵ See Silver & Miller, *supra* note 20, at 109–11 (discussing how judges choose lead counsel out of the pool of plaintiffs’ attorneys in a multidistrict litigation).

³⁶ See, e.g., *Isby v. Bayh*, 75 F.3d 1191, 1199–200 (7th Cir. 1996) (finding district court had not abused its discretion in approving settlement and finding collusion unlikely in part because the court had properly given weight to qualifications of class counsel); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); Manual for Complex Litigation (Fourth) § 21.612 (2004) (collecting cases where courts applied “closer judicial scrutiny” to police for potential collusion, particularly when there had been “little or no discovery” to test strengths and weaknesses of each party’s position).

³⁷ Fed. R. Civ. P. 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”).

³⁸ Members of a class certified under Rule 23(b)(3) have the opportunity to exclude themselves from a class. See Fed. R. Civ. P. 23(c)(2)(B)(v). Failure to exercise this “opt-out” right constitutes tacit agreement to be bound. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–14 (1985) (holding that absent class members do not need to affirmatively “opt in” to a class to be bound by a class action so long as there is an adequate means to “opt out”).

proceeds beyond the courtroom doors, it always remains within the purview of court supervision.³⁹

The corporate settlement mills we address here frequently resemble these alternatives to the traditional individualized model of adjudication. Certainly, they share similar goals of dealing effectively and efficiently with high volumes of claims. But whereas multidistrict litigation, class actions, and mandatory arbitration all retain some features of traditional litigation and continue to function in the shadow of the courts, corporate settlement mills represent a break from the traditional model. They privatize dispute resolution nearly completely, and are subject to far weaker (if any) forms of public regulation and oversight. As such, they raise risks that are both different in kind and more severe in extent than these other, more familiar means of dealing with high claim volumes.⁴⁰

The corporate settlement mills we describe below also have commonalities with “mills” that scholars have studied in other contexts. In the late nineteenth century, railroad companies and other industrial concerns formed some of the first formal claim departments to systematically resolve large numbers of injury cases commenced by their employees.⁴¹ Liability insurers similarly developed standardized settlement practices to efficiently respond to growing numbers of claims brought by maimed textile workers,⁴² and later, injured motorists.⁴³ In

³⁹ Manual for Complex Litigation (Fourth) §§ 21.612, 21.62 (2004). But see William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 *UCLA L. Rev.* 1435, 1468 (2006) (questioning effectiveness of judicial review of class action settlements).

⁴⁰ Some very recent, thoughtful scholarship has begun to recognize the existence of large private settlement systems and their threat to class action litigation. See Jaime Dodge, *Disaggregative Mechanisms: The New Frontier of Mass-Claims Resolution Without Class Actions*, 63 *Emory L.J.* 1253, 1293–302 (2014) (describing settlement mills as a form of “substantive streamlining” by defendants to avoid class action litigation); D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 *J. Tort Law* 91 (2014) (addressing when the existence of one mandatory arbitration and private settlement system should block future class action litigation). But, to date, no one seems to have explored the implications of more far-reaching legislative and administrative policies that require or encourage defendants to adopt such settlement systems.

⁴¹ Lawrence M. Friedman, *Civil Wrongs*, 1987 *Am. B. Found. Res. J.* 351, 372–73.

⁴² Issacharoff & Witt, *supra* note 25, at 1584–93.

⁴³ H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* 21 (1980) (finding that the system of insurance adjustment for automobile accidents “is individualistic mainly in theory; in practice, it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner”).

some cases, small groups of interpreters bundled together large portfolios of factory-worker claims for resolution, serving as intermediaries between management and large numbers of recent immigrants injured on the shop floor.⁴⁴ By the turn of the century, “the firm, the insurer, and the repeat-play claimants’ agents” were already aggregating cases to “manage the run of claims arising out of the mill’s operations.”⁴⁵

More recently, Professor Nora Engstrom observed that claim mills exist in the cubicles of high-volume, personal injury firms, offering both underappreciated advantages and significant dangers to plaintiffs and the court system more broadly.⁴⁶ Engstrom explains that by relying on non-lawyer assistants to juggle between 200 and 300 open files on any given day, these plaintiffs’ mills offer a mass-produced process for resolving claims,⁴⁷ reducing costs, adding consistency to awards, and offering limited access to the legal system for individuals who would be otherwise unable to afford more traditional attorney services. And yet, countless problems stem from many clients’ mistaken beliefs that they have hired “old fashioned” counsel.⁴⁸

Today’s corporate settlement mills offer many of the same advantages as plaintiff-side settlement mills, but they still function quite differently. Instead of operating out of plaintiffs’ law firms, they operate within the corporate defendants’ own offices or within the offices of the defendants’ private contractors and subsidiaries. Often designed in consultation with specialized claim services,⁴⁹ they typically begin with claims adjusters and other staff using scripts written by in-house lawyers or consultants to reach out to potential plaintiffs,⁵⁰ offering quick remuneration in exchange for a waiver of the right to sue. Accordingly,

⁴⁴ Issacharoff & Witt, *supra* note 25, at 1590–95.

⁴⁵ *Id.* at 1593.

⁴⁶ Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. Rev. 805, 809–11 (2011).

⁴⁷ *Id.* at 816.

⁴⁸ *Id.* at 810.

⁴⁹ CPR Inst. Comm’n on Facilities for the Resolution of Mass Claims, *Mass Claims Resolution Facilities*, in *CPR Master Guides on Conflict Prevention and Resolution* 9 (2011); Deborah E. Greenspan & Matthew A. Neuburger, *Settle or Sue? The Use and Structure of Alternative Compensation Programs in the Mass Claim Context*, 17 *Roger Williams U. L. Rev.* 97, 108 (2012).

⁵⁰ Greenspan & Neuburger, *supra* note 49, at 100–02; Adam S. Zimmerman, *Funding Irrationality*, 59 *Duke L.J.* 1105, 1115–20 (2010) (describing features of private and public settlement facilities).

corporate settlement mills resemble the private administrative schemes that are frequently created by lawyers after a class action settlement⁵¹ much more than they resemble the plaintiffs' settlement mills described by Engstrom, which offer at least some separate representation for claimants seeking compensation from a defendant.

In the following Subsections, we describe how would-be defendants are increasingly relying on corporate settlement mills as a principal means of resolving disputes. In some cases, addressed in Subsection 1, corporate actors create settlement mills voluntarily. In a number of cases, addressed in Subsection 2, they do so to comply with a large regulatory or enforcement scheme.

1. Voluntary Corporate Settlement Mills

Companies that voluntarily create their own high-volume settlement systems rely on their own economies of scale to resolve disputes swiftly. Moved by perceived high costs and risks of litigation, corporate counsel and other business advisors have increasingly embraced mediation and other out-of-court approaches to managing and resolving disputes.⁵²

In the 1990s, for example, Owens Corning ("Corning") famously created its own National Settlement Program ("NSP") to manage liability arising from asbestos litigation.⁵³ The principal features of the plan resembled many "no-fault" schemes: prompt payment of many different claims according to a grid that relied on standardized medical criteria to determine the severity of a person's disease. But the arrangement was purely contractual and was not subject to court supervision or oversight.

⁵¹ Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *Stan. L. Rev.* 1361, 1368 (2005); Georgene Vairo, *Why Me? The Role of Private Trustees in Complex Claims Resolution*, 57 *Stan. L. Rev.* 1391, 1397 (2005).

⁵² Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 *Ohio St. J. on Disp. Resol.* 1, 15–16 (1998); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 *Harv. Negot. L. Rev.* 1, 9 (2014) (describing corporate adoption of alternative dispute systems in response to "significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery").

⁵³ See *Fairness in Asbestos Compensation Act of 1999: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 137–42 (1999) (statement of Maura J. Abeln, General Counsel, Owens Corning) [hereinafter *Abeln Testimony*].

For a time, the NSP succeeded, at least from Corning's perspective. The company was able to extract favorable settlements from potential plaintiffs by (ironically) acquiring another company battling numerous asbestos cases, Fibreboard Corporation.⁵⁴ Owning the largest share of asbestos liability gave Corning tremendous leverage with potential plaintiffs—particularly those whose lawyers specialized in asbestos litigation and therefore had a significant incentive to prevent the largest chunk of asbestos liability from going into bankruptcy. Aware of the leverage this incentive created, Corning used the threat of bankruptcy to attract and convince over eighty plaintiff-side law firms to forego litigation in favor of its settlement process. In so doing, Corning claimed to have achieved the fair and efficient compensation that officials sought through public processes and legislation, but “without a federal bureaucracy and its attendant costs.”⁵⁵ The experiment ultimately failed publicly—Corning filed for bankruptcy in 2000 as new plaintiffs' lawyers entered the market and challenged its leverage to negotiate settlements.⁵⁶ But before it did, Corning resolved over 215,000 claims using its own medical criteria and procedures, through a wholly owned subsidiary devoted to processing claims.⁵⁷

Just as Owens Corning attempted to leverage the power of a dominant defendant to exploit the concentration of firms in the plaintiffs' bar, the Center for Claims Resolution (“CCR”) created “a cartel of defendant-negotiators” to coordinate all settlements on behalf of twenty major asbestos defendants.⁵⁸ Using the same criteria applied

⁵⁴ See Richard A. Nagareda, *Mass Torts in a World of Settlement* 109–10 (2007).

⁵⁵ Abeln Testimony, *supra* note 53, at 138.

⁵⁶ Press Release, Owens Corning, Owens Corning Files Voluntary Chapter 11 Petition to Resolve Asbestos Liability (Oct. 5, 2000), available at <http://www.prnewswire.com/news-releases/owens-corning-files-voluntary-chapter-11-petition-to-resolve-asbestos-liability-74793792.html>; Joseph B. White & Jim VandeHei, Owens Corning Files for Chapter 11, Citing Escalating Asbestos-Liability Claims, *Wall St. J.*, Oct. 6, 2000, at A3.

⁵⁷ Abeln Testimony, *supra* note 53, at 138; Press Release, Owens Corning, Owens Corning Launches Integrex, New Service Business Offering Scientific Testing and Litigation Management (June 25, 1999), available at <http://www.prnewswire.com/news-releases/owens-corning-launches-integrex-new-service-business-offering-scientific-testing-and-litigation-management-78070432.html> (claiming that Integrex, which “derives its name from the words ‘integrated’ and ‘expertise,’” would produce “cost efficiencies for Owens Corning’s existing and future tort litigation, while simultaneously offering the same expertise to external organizations”).

⁵⁸ Lawrence Fitzpatrick, *The Center for Claims Resolution*, *Law & Contemp. Probs.*, Autumn 1990, at 13, 17–18; Samuel Issacharoff, *Commentary*, “Shocked”: Mass Torts and

in aggregate litigation, the CCR developed sophisticated “injury matrices” to calculate award values based on historic averages for each injury.⁵⁹ Despite the CCR’s early success, it failed to keep up with the pace of asbestos filings and ultimately foundered, much like the National Settlement Program. More recently, potential defendants have begun settling directly with unrepresented victims. Such cases range from grounded cruise liners and self-igniting televisions⁶⁰ to defective “build-a-bears.”⁶¹

Other voluntary settlement systems do not require confidentiality or even waivers of liability. For example, Pacific Gas and Electric (“PG&E”), one of California’s largest utility companies, pledged to spend as much as \$100 million to help rebuild a neighborhood in San Bruno that was devastated when its natural gas lines ruptured into a deadly fireball.⁶² PG&E relied upon its own organization of staffers to grant homeowners immediate payments ranging from \$10,000 to \$50,000, depending on the severity of the damage, “with no strings attached”⁶³ (although PG&E later attracted attention when it suggested that its settlement process actually released the company from liability in early case filings).⁶⁴

Aggregate Asbestos Litigation After Amchem and Ortiz, 80 Tex. L. Rev. 1925, 1936–37 (2002).

⁵⁹ Issacharoff, *supra* note 58, at 1937.

⁶⁰ Press Release, Sony Electronics Inc., Notice for Sony Bravia LCD HDTV (Oct. 11, 2011), available at http://esupport.sony.com/US/perl/news-item.pl?news_id=441 (establishing an evaluation and refund program for certain models of Sony televisions that contain components that “may overheat and at times ignite inside of the television”).

⁶¹ Build-A-Bear Workshop Recalls 300,000 ‘Colorful Heart’ Teddy Bears, Huffington Post (Dec. 28, 2011, 6:48 PM), http://www.huffingtonpost.com/2011/12/28/build-a-bear-recall-colorful-hearts_n_1173463.html (“That we have conducted three product recalls this year despite the fact that we have not received a single injury report related to any of those three products clearly demonstrates how seriously we take product safety.”).

⁶² John Hoeffel, PG&E Announces \$100-Million Relief Fund for San Bruno Gas Explosion Victims, L.A. Now (Sept. 13, 2010, 1:38 PM), <http://latimesblogs.latimes.com/lanow/2010/09/pge-announces-100-million-relief-fund-for-san-bruno-gas-explosion-victims.html>.

⁶³ Demian Bulwa, San Bruno Blast Victims Get Buyout Offer from PG&E, S.F. Gate (Oct. 19, 2010, 4:00 AM), <http://www.sfgate.com/news/article/San-Bruno-blast-victims-get-buyout-offer-from-PG-E-3249420.php>; Jason Dearen & Terry Collins, PG&E Creates \$100 Million Fund for Blast Victims, NBCNews.com (Sept. 13, 2010, 6:27 PM), http://www.nbcnews.com/id/39157440/ns/us_news-life/t/pge-creates-million-fund-blast-victims/.

⁶⁴ In the interest of full disclosure, we note that Adam Zimmerman advised PG&E on some aspects of this fund.

Voluntary private settlement systems—those created by Owens Corning, PG&E, Concordia, and others—share several central features. They are entirely and exclusively created and run by the putative defendants themselves. They offer neither individualized representation nor remedies to claimants; they entail no admissions of fault on the part of the company; and they are subject to little or no public oversight. But they are designed with the goals of preempting mass litigation and combatting potential public relations crises and therefore have to be sufficiently attractive to attract claimants away from the option of courtroom litigation. “Otherwise, relatively few claimants will opt into the private administrative regime over time, leaving defendants no better off in ongoing tort litigation than they were before.”⁶⁵

2. *Required Corporate Settlement Mills*

In addition to voluntary arrangements, companies increasingly create collective settlement systems because they are required to by federal laws and regulations, consent decrees, or as a matter of litigation practice. This occurs in a number of ways.

Legislatures and agencies may expressly require corporate settlements. For example, under the Oil Pollution Act of 1990, Congress required BP to reimburse claims for damages automatically, without mandating that parties waive rights to additional funds.⁶⁶ It also required BP to publicize information about how injured parties could make claims. Any victims BP was unable to compensate could make direct claims to the U.S. Coast Guard, which could tap a special trust, funded by oil companies. Congress thereby attempted to strike an appropriate balance between promoting settlement and closure, on one hand, and claimants’ interests in fair compensation, on the other.⁶⁷

In other contexts, rules require companies to adopt specific settlement terms. Regulations originally developed by the now-defunct Civil Aeronautics Board (“CAB”), for example, require that airlines offer

⁶⁵ Richard A. Nagareda, *Future Mass Tort Claims and the Rule-making/Adjudication Distinction*, 74 *Tul. L. Rev.* 1781, 1804 (2000).

⁶⁶ See Oil Pollution Act of 1990, 33 U.S.C. §§ 2705(a), 2713, 2714(b) (2012).

⁶⁷ See, e.g., Robert Force, Martin Davies & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 *Tul. L. Rev.* 889, 950–51 (2011) (“OPA’s presentment requirement is . . . a mandatory condition precedent to filing suit against a responsible party. . . . In enacting this presentment requirement, Congress sought to promote settlement and avoid litigation.”).

liquidated damages when they overbook customers on a flight.⁶⁸ This now-familiar “denied boarding compensation” program involves two steps. First, overbooked airlines must ask passengers to voluntarily give up their confirmed reservations in exchange for some agreed-upon compensation, often set by the air carrier. If that process fails, the airline must provide government-set compensation for passengers involuntarily “bumped” off the plane, according to a fixed schedule.⁶⁹ Under newly adopted rules established by the Obama administration, when a domestic passenger is bumped and suffers a one to two hour delay, the airline must offer 200% of the customer’s airfare back (up to \$650).⁷⁰ If the delay is more than four hours, the compensation is doubled.⁷¹ Most bumped passengers take what the airlines offer, even though airlines have been known to apply these rules inconsistently and consumers retain the right to sue.⁷² Nevertheless, the denied boarding compensation scheme reflects the view that “controlled overbooking” benefits travelers in the aggregate—offering more passengers flexibility when reserving flights while reducing pressure on higher fares as airlines fill more seats.⁷³

Government actors may also require private mass settlements after the fact to resolve enforcement actions. For example, as part of a long-awaited deal between the Office of the Comptroller of the Currency and the Federal Reserve, five of the nation’s largest mortgage servicers agreed to set aside billions of dollars to resolve disputes between the banks and homeowners. Rather than set up a public or independent fund, the settlement obligated each bank to use its own servicing department

⁶⁸ See 14 C.F.R. § 250.9 (2014).

⁶⁹ This two-step procedure is intended to allocate the risk of overbooking to the least inconvenienced travelers while guaranteeing bumped passengers at least “some compensation.” See Civil Aeronautics Bd., *Oversales*, 47 Fed. Reg. 52,980, 52,980–01 (Nov. 24, 1982) (codified as amended at 14 C.F.R. § 250 (2014)).

⁷⁰ 14 C.F.R. § 250.9 (2014). If a domestic passenger’s delay exceeds two hours, the airline must offer 400% of the customer’s fare (up to \$1300). For international customers, the airline must offer 200% of the one-way fare (up to \$650) for a one to four hour delay and 400% of the one-way fare (up to \$1300) for a delay of over four hours. *Id.*

⁷¹ *Id.*

⁷² See, e.g., *Nader v. Allegheny Airlines*, 426 U.S. 290, 294–95 (1976); *Goranson v. Transworld Airlines*, 467 N.Y.S.2d 774, 780–81 (Sup. Ct. 1983).

⁷³ Civil Aeronautics Bd., *Oversales*, 47 Fed. Reg. at 52,980; see also, e.g., *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110, 23135–36 (Apr. 25, 2011) (codified as amended at 14 C.F.R. §§ 244, 250, 253, 259, 399 (2014)) (comparing the benefits to consumers in a “well-controlled oversales system” with an “unlimited auction” system).

to award amounts ranging from \$500 to \$125,000 to reduce the principal on loans to homeowners facing foreclosure.⁷⁴

Moreover, relying on private settlement systems to manage restitution through civil and criminal enforcement is hardly unique to the banking crisis. In areas ranging from false advertising scams⁷⁵ to cable subscription overcharges⁷⁶ to securities fraud,⁷⁷ government actors have required, or taken into account, corporate attempts to develop high-volume settlements. In each case, government actors have relied on corporate defendants' substantial economies of scale to respond to claims of widespread injury.

Finally, in some cases, court-made rules of complex litigation practice strongly encourage defendants to design settlement systems. Increasingly, courts are rejecting petitions to certify class actions if the defendant has designed and implemented a private, out-of-court program to resolve putative class members' claims.⁷⁸ In those cases, courts conclude that a class action would not be "superior" to the existing voluntary settlement program, which may resolve problems more quickly, efficiently, and predictably than a class action while saving court costs. For example, after the Consumer Product Safety Commission determined that tiny "aqua dot" toy beads were hazardous to small children, the manufacturer of the toy beads voluntarily recalled

⁷⁴ See sources cited supra note 8.

⁷⁵ *United States v. Brennan* (In re *Newsday* Litig.), No. 08-MISC-96, 2008 WL 4279570, at *1 (E.D.N.Y. Sept. 18, 2008) (appointing a magistrate judge to examine the sufficiency of *Newsday's* reimbursement program arising out of an alleged multi-million dollar false advertising scheme); *United States v. Brennan*, 526 F. Supp. 2d 378, 381 (E.D.N.Y. 2007) (reporting that *Newsday's* reimbursement program has repaid approximately \$90 million).

⁷⁶ See, e.g., Press Release, N.Y. Att'y Gen. Eric T. Schneiderman, A.G. Schneiderman Obtains \$2.2 Million in Refunds for 18,000 Time Warner Cable Consumers Upstate (Mar. 7, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-22-million-refunds-18000-time-warner-cable-consumers-upstate> (describing settlement where Time Warner Cable itself would rebate thousands of consumers an average of \$119 in overcharges).

⁷⁷ See, e.g., Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. Rev. 500, 527–33 (2011) (describing agency settlements with corporate defendants that provide restitution to large groups of victims, like class actions).

⁷⁸ See, e.g., *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377, 385 (N.D. Ill. 2010) (refusing to certify class of consumers who purchased toys that produced comas when swallowed because of voluntary recall and refund program); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 450, 463 (D.N.J. 1998) (refusing to certify class of plaintiffs with defective anti-lock brakes after Chrysler instituted plan to reimburse owners of vehicles with defective ABS systems).

them and set up an administrative program to refund its consumers.⁷⁹ In the litigation that followed, the district court refused to certify a class action of purchasers on the theory that the putative class members would end up with virtually the same result of an administrative settlement fund, only without the “needless judicial intervention, lawyer’s fees [and] delay” associated with a large lawsuit.⁸⁰

As we discuss in more detail below, whether a private administrative fund is ever, in fact, “superior” to a class action should involve more than a consideration merely of the size and speed of corporate payout, but other interests served by collective litigation, including efficient deterrence, equity among different victims, finality, and other rule-of-law values.⁸¹ In part for those reasons, a number of courts have imposed limits in these cases to combat substantial power imbalances and information asymmetries. In some class actions, courts may monitor defense settlement efforts to ensure that private resolution systems do not mislead plaintiffs to accept less than desirable outcomes,⁸² frustrate their attempts to seek out counsel, or fail to require defendants to internalize the costs of the harm they created.⁸³

But, even in those cases where aggregate litigation remains a theoretical alternative, the threat of a competing private fund, endorsed by laws, regulations, or government actors, adds new uncertainty for the entrepreneurial attorneys who must finance their own aggregate litigation.⁸⁴ The ability of defendants to offer their own rival settlement

⁷⁹ *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. at 379–80, 385.

⁸⁰ *Id.* at 385.

⁸¹ Rave, *supra* note 40, at 116 (“Because the bargaining process is less robust than in a class settlement, there is actually a *greater* need for judicial review into the structure of the ADR process in a voluntary compensation scheme before it should block future class litigation.”).

⁸² See, e.g., *Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985) (characterizing bank program to resolve discriminatory loan practices as “unsupervised, unilateral communications” with plaintiffs that “sabotage[d] the goal of informed consent”); *Turner v. Murphy Oil*, C.A. No. 05-4206, slip op. at 8–11 (E.D. La. Nov. 14, 2005) (requiring defendant to modify outreach efforts, to inform parties of their right to seek counsel, and to add new language in settlement and release forms).

⁸³ See Fiss, *supra* note 19 (“To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying.”).

⁸⁴ On the risks faced by lawyers who finance complex litigation, see Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1286–91 (2012), and Charles Silver, *Due Process and the Lodestar Method: You Can’t Get There from Here*, 74 Tul. L. Rev. 1809, 1837–39 (2000).

may complicate the practical ability of plaintiffs' attorneys to commence their own litigation.⁸⁵

Like the voluntary arrangement discussed above, required corporate settlement mills share certain core features. Although they are motivated or required by lawmakers, they are actually created by corporate defendants themselves. They replace individualized representation with off-the-rack remedies in largely inquisitorial proceedings, which seek to determine harm to the claimant, not fault or liability on the part of the defendant. They join claims not pursuant to formal court proceedings or judicial determinations of commonality, but pursuant to the defendants' own in-house rules. And, although frequently created in response to prospective legislation, administrative regulation, or a court order, they are subject to weak ongoing oversight or monitoring.

Settlement mills often involve modest sums. But these less-examined ways to resolve disputes—as well as their place in our legal order (public or private, state or federal)—all raise questions about the desired level of public regulation for settlements that are, in Professor Judith Resnik's words, "rarely custom made."⁸⁶ They also implicate several other important issues, including the accessibility of courts, the challenges dispute resolution systems face when adverse litigants possess different resources, and the broader public interest in our increasingly private and standardized approach to resolving disputes. This next Section explores the benefits of such systems in their current form.

⁸⁵ For example, private attorneys argued that the government "hijacked" their own litigation when a year after they commenced class actions against the nation's largest banks, several state attorneys general settled with the same defendants to establish a rival settlement for the same set of victims: "That's what happens when you have two different process [sic] . . . the defendant can pick door number one or door number two." Nate Raymond, Plaintiffs Lawyers in Muni Bond Derivative MDL Object to UBS Bid-Rigging Settlement, *Am. Law.* (May 11, 2011) (quoting William Isaacson, co-lead class counsel in a class action against UBS).

⁸⁶ 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, 80 (2011).

*B. The Shared Promise of Legal Aggregation and Settlement Mills**1. The Promise of Legal Aggregation*

Defense-side settlement mills promise many of the same advantages as other forms of legal aggregation—improving legal access, efficiency, and equality in dispute resolution. Commentators have long described the potential benefits of aggregate litigation in such terms. In federal and state courts, aggregate litigation seeks to provide greater access by enabling the resolution of claims that otherwise would not be brought individually.⁸⁷ It seeks greater efficiency for group-wide harm by eliminating the time and expense associated with traditional one-on-one adjudication.⁸⁸ Finally, it seeks more uniformity in outcomes—treating like parties in a like manner.⁸⁹ At the same time, aggregation promises closure by bringing an ongoing controversy to a peaceful end.⁹⁰

It is not only courts, but also administrative agencies, that seek increased access, efficient procedures, and consistent outcomes in adjudicative processes.⁹¹ In theory, if not always in practice, agencies promote access by assuring parties meaningful opportunities to be heard

⁸⁷ See Zimmerman, *supra* note 50, at 1115–17 (describing alternative goals of class action litigation); see also *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (“A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

⁸⁸ *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986) (quoting a lower court opinion regarding the months or years of “the same witnesses, exhibits and issues from trial to trial” and granting certification of a class action involving asbestos). See generally Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 135–36 (1995) (noting that economies of scale reduce discovery and expert fees); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 *Cornell L. Rev.* 837, 837–38 (1995) (explaining how class actions are seen as a remedy to duplicative litigation activity).

⁸⁹ See Fed. R. Civ. P. 23(b)(1)(B); Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present, and Future*, 4 *Just. Sys. J.* 197, 211 (1977).

⁹⁰ See Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 *U. Chi. Legal F.* 141, 142 (“This sense of closure, and the predictability that comes with it, are what defendants seek above all else in a class settlement.”); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 *Geo. L.J.* 371, 420 (2001) (noting that defendants seek class certification to achieve finality).

⁹¹ Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 *UCLA L. Rev.* 1157, 1159–60 (1995) (assessing “fundamental” values of accuracy, efficiency, and acceptability); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 *Cornell L. Rev.* 772, 773–75 (1974).

on actions that affect them.⁹² Their expertise allows them to implement desired policies efficiently.⁹³ And through “rulemaking,” a quasi-legislative process whereby agencies invite comments from the general public on proposed regulations, administrative agencies make consistent policies that affect large groups. The U.S. Supreme Court has expressly recognized that agencies may rely on a single rulemaking process—which resembles hearings used in class action litigation—to avoid “case-by-case” considerations that would require an agency continually to re-litigate identical issues that recur in individual hearings.⁹⁴

In all systems of legal aggregation, large case volumes create new risks. The sheer number of claims may itself threaten legal access, efficiency, and consistency by replacing individual hearings with a potentially faceless, alienating bureaucracy.⁹⁵ Aggregation may also entrust decision-making power to untrustworthy representatives, distracted by the promise of profit or power,⁹⁶ and may thereby increase

⁹² See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976) (describing precedent establishing the importance of notice and opportunity to be heard before or after deprivation of a government interest); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (requiring an evidentiary hearing prior to termination of welfare benefits). See generally Henry J. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1279–95 (1975) (outlining the elements of a fair hearing).

⁹³ Cf. J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 Tex. L. Rev. 1443, 1452 (2003) (describing alternative theories of agency delegation); Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1391–92 (2011) (same).

⁹⁴ *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (citing *Fed. Power Comm’n v. Texaco Inc.*, 377 U.S. 33, 41–44 (1964); *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956)); see also Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 921 (1996) (comparing mass tort settlements to rulemaking proceedings conducted by administrative agencies).

⁹⁵ Compare, e.g., *From Max Weber: Essays in Sociology* 216 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (“[T]he more the bureaucracy is ‘dehumanized,’ the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation.”), with Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 425 (1982) [hereinafter Resnik, *Managerial Judges*] (arguing that granting judges procedural control over actions transforms the judges into managers and creates “opportunities for judges to use—or abuse—their power”), and Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1198 (1982) (“Respect for individual dignity, autonomy, and self-expression demands that those with rights directly at risk have an adequate means of registering their concerns.”).

⁹⁶ Compare Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276, 1283 (1984) (arguing that judicial review is a necessary check on bureaucratic discretion), with John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 889–90 (1987)

the prospect and consequence of error. But despite these concerns—which we discuss below in Parts II and III—the same potential advantages of public and private forms of legal aggregation are also in play with corporate settlement mills.

2. The Promise of Settlement Mills

Like legal forms of aggregation in class actions and administrative law, corporate defendants have promoted settlement mills as advancing three principal policies: (a) efficient access to compensation; (b) fairness and consistency through centralization; and (c) peaceful dispute resolution.

a. Efficient Legal Access

Corporate defendants and lawmakers routinely extol private collective settlement systems as a means of ensuring efficient access to compensation. Testifying before Congress, Owens Corning’s representative highlighted the comparative efficiencies of its private National Settlement Program and others like it: “[T]he NSP is working, and will work in the future, by . . . providing prompt, predictable settlement payments to qualifying claimants who would otherwise wait many years in the tort system to resolve their cases.”⁹⁷ Costa Concordia’s legal counsel similarly emphasized that its own collective settlement process represented “an immediate response, no legal expenses, and [a process for claimants to] put this whole thing behind them.”⁹⁸

Agencies and lawmakers join corporate actors in touting the efficiency of mandatory private settlement systems as compared to individualized private litigation. Even as the Civil Aeronautics Board oversaw deregulation of the nation’s airlines, it simultaneously claimed that government-required airline compensation systems for bumped passengers offered greater efficiency, simplicity, and flexibility than unregulated solutions, which would likely lead to litigation. “Simple to understand, and easy to administer,” proclaimed the CAB, “[a]irlines are given flexibility in their overbooking policies When an oversale

(explaining challenges associated with judicial oversight of plaintiffs’ attorneys in class action litigation).

⁹⁷ Abeln Testimony, *supra* note 53, at 140.

⁹⁸ Winfield, *supra* note 6.

does occur[.] . . . [c]arriers may offer non-cash inducements such as free tickets or service upgrades, which are popular with passengers while having little marginal cost to the airline.”⁹⁹

Agencies also emphasize the comparative efficiencies of permitting private companies or contractors to manage their own payouts in settlements promising victim restitution. They explain that delegating authority to parties intimately familiar with the nature of the claims gets the process moving more quickly than an otherwise expensive government procurement process.¹⁰⁰ The Food and Drug Administration (“FDA”), National Highway Protection Agency, and Consumer Product Safety Commission routinely point to such efficiencies when they require companies to structure their own voluntary recall and refund programs.¹⁰¹ Courts in complex litigation have similarly found private settlement systems to be more efficient and, thus, “superior” to class adjudication. After the FDA warned that ConAgra’s peanut butter was linked to several cases of salmonella poisoning, ConAgra refunded customers nearly \$3,000,000 and its retailers over \$30,000,000 for inventory subject to the recall.¹⁰² The court rejected a separate class action, concluding that the existing refund program could provide a better remedy without the time or judicial resources demanded by a class action.

b. Fairness and Uniformity

Large private settlement systems are also heralded for their consistency. Commentators have long observed that asbestos manufacturers, including Owens Corning, adopted settlement systems that “followed the familiar matrix pattern” by identifying particular

⁹⁹ Civil Aeronautics Bd., *Oversales*, 47 Fed. Reg. 52,980, 52,982 (Nov. 24, 1982) (codified as amended at 14 C.F.R. § 250 (2014)).

¹⁰⁰ Francine McKenna, *GAO Blames Regulators for Faulty Foreclosure Reviews but That’s Not the Whole Story*, *Forbes* (Apr. 4, 2013, 8:13 AM), <http://www.forbes.com/sites/francinemckenna/2013/04/04/gao-blames-regulators-for-faulty-foreclosure-reviews-but-thats-not-the-whole-story/>.

¹⁰¹ See generally Recommendations of the Administrative Conference of the United States, *Procedures for Product Recalls* (Recommendation No. 84-2), 49 Fed. Reg. 29,940 (July 25, 1984) (“Recalls operate more quickly and efficiently than most standard setting. In recall cases, government and industry often share a sense of urgency that a hazardous product should be removed from the marketplace. This has led agencies to adopt informal, flexible settlement procedures which have made it easier for companies to agree to undertake recalls.”).

¹⁰² *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 691 (N.D. Ga. 2008).

injuries with distinct settlement values on a grid.¹⁰³ The CAB's denied boarding compensation system similarly promised more fairness and consistency—the agency explained that “[t]he uniformity of the rule provides a number of other benefits.”¹⁰⁴ Among other things, carriers and travel agents would save time “by not having to provide explanations of how and why the rules of various airlines differ. Consumers are more likely to know their rights and demand that airlines abide by the rule.”¹⁰⁵ Similarly, one of the central goals of the OCC's independent mortgage foreclosure review was “to treat similarly situated borrowers across all 14 servicers similarly, and to help restore public confidence in the mortgage market.”¹⁰⁶

c. Closure

Finally, corporate actors creating settlement mills emphasize the promise of closure. Announcing that the NSP would make its own liability more predictable while compensating victims in need, Owens Corning struck the promising, conciliatory tone of proud litigants following a class action settlement:

For more than 25 years, our industry and tens of thousands of people have been stuck in the morass of asbestos litigation. The plaintiffs' bar must be credited with exceptional vision and responsiveness to their clients by helping us to move the issue from the arena of litigation to the arena of settlement.¹⁰⁷

Lawmakers frequently appeal to the peacemaking value of large private settlement systems in much the same way. In the Oil Pollution Act, Congress required defendants to establish their own claim settlement facilities to promote finality and to avoid costly and “cumbersome litigation.”¹⁰⁸ Emphasizing the value of dispute resolution

¹⁰³ Issacharoff, *supra* note 58, at 1937.

¹⁰⁴ Civil Aeronautics Bd., *Oversales*, 47 Fed. Reg. at 52,982–83.

¹⁰⁵ *Id.*

¹⁰⁶ GAO Independent Foreclosure Review Study, *supra* note 8, at 1.

¹⁰⁷ Press Release, Owens Corning, Owens Corning Announces National Settlement Program with Firms Representing 176,000 Asbestos Cases (Dec. 15, 1998), available at <http://www.prnewswire.com/news-releases/owens-corning-announces-national-settlement-program-with-firms-representing-176000-asbestos-cases-77770597.html> (quoting Glen Hiner, then-CEO of Owens Corning).

¹⁰⁸ See 135 Cong. Rec. 26,940 (1989) (statement of Rep. Norman F. Lent); *id.* at 26,942–43 (statement of Rep. John P. Hammerschmidt); see also *Boca Ciega Hotel v. Bouchard*

in achieving closure, Congress explained that lawsuits were appropriate only “where attempts to reach a settlement with the responsible party . . . were unsuccessful.”¹⁰⁹ Accordingly, the OPA provides that injured parties must hold off for ninety days on litigation arising from oil spills, while responsible parties work to broker a private resolution.¹¹⁰ Other environmental laws similarly require responsible parties to promote finality and closure by resolving disputes privately, often through claim settlement facilities.¹¹¹

II. THE PITFALLS OF CORPORATE SETTLEMENT MILLS

Notwithstanding these advantages, defense-side settlement mills impose a number of costs, which may outweigh their potential contributions to increased access, equality, and efficiency. First, defendants who settle massive numbers of cases in obscurity may invite abuse, award inconsistent payouts, and undermine public regulatory goals. Second, injured parties who participate in these programs may unwittingly waive their legal rights. Third, the legal profession’s ethical guidelines, which overwhelmingly focus on litigation, offer the attorneys who create these systems little or no guidance. Fourth and finally, the withdrawal of whole classes of disputes from the public realm of the courts undermines the rule of law. This Part addresses these concerns in turn.

Transp. Co., 51 F.3d 235, 240 (11th Cir. 1995) (dismissing an OPA claim because plaintiff had not yet presented claims directly to defendant as the law requires); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310–11 (E.D. Va. 1993) (relying on the OPA’s legislative history to dismiss litigation because plaintiff failed to exhaust remedies through defendant’s settlement facility).

¹⁰⁹ H.R. Rep. No. 101-242, pt. 2, at 66 (1989).

¹¹⁰ 33 U.S.C. § 2713(a), (c) (2012).

¹¹¹ Cf. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989) (plaintiff’s failure to comply with Resource Conservation and Recovery Act’s sixty-day notice and presentation requirement mandates dismissal of case). Government agencies similarly applaud the certainty and closure that are provided to customers by denied boarding compensation systems and other required settlements policies. Civil Aeronautics Bd., *Oversales*, 47 Fed. Reg. 52,980, 52,982 (Nov. 24, 1982) (codified as amended at 14 C.F.R. § 250 (2014)) (“The rule facilitates the resolution of airline-passenger disputes because passengers are immediately informed of their rights and options. There is no question about how much and when a passenger must be paid. The problem is generally resolved on the spot, thus maintaining passenger goodwill and eliminating the need for costly lawsuits.”).

A. Settlement Mills Are Not Transparent

Transparency can serve as a powerful disciplinary force—after all, “the more strictly we are watched, the better we behave.”¹¹² But unlike court-administered or public settlement funds, where the possibility of outside monitoring guards against inaccurate or unfair administration, many voluntary private settlement systems are entirely confidential. Even when government actors require, or attempt to oversee, defendants’ private settlement systems, they often impose reporting requirements that are ambiguous, inconsistent, or overly deferential. The resulting lack of transparency increases the risk that funds may be disbursed unfairly or inequitably.

For example, notwithstanding the public pressure on BP to disburse funds fairly and efficiently, critics claimed that BP was not serious about making victims whole. They pointed to statements by ESIS, the private consultant BP hired to manage claims, advertising “superior recovery management services” with the goal of “reducing our client’s loss dollar payouts.”¹¹³ Similarly, an after-the-fact study by the Consumer Financial Protection Bureau (“CFPB”) showed that when, as part of the Independent Foreclosure Review, the OCC delegated authority to conduct the reviews back to the banks’ servicing departments, the banks profited by deliberately under-investing in their servicing processes.¹¹⁴

¹¹² See Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 *Law & Ethics Hum. Rts.* 2, 25 (2011); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 *Geo. Wash. L. Rev.* 628, 690–92 (2011) [hereinafter Resnik, *Compared to What?*]; accord Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 *Vill. L. Rev.* 771, 784 (2008) [hereinafter Resnik, *Courts In and Out*].

¹¹³ ESIS, Inc., *Recovery Services International, Inc.* (2008), available at http://www.ehumanrights.org/docs/ESIS_Recovery_Services_Fact_Sheet.pdf. (“For more than 75 years, Recovery Services International, Inc. (RSI) has been providing superior recovery management services with the goal of reducing our clients’ loss dollar payouts.”); see also Tilove, *supra* note 5 (observing that “when BP promised to pay every ‘legitimate claim’[,] the public didn’t realize it was depending on a company to handle that process that boasts of its skill in paying as little as possible”). Shortly after President Obama appointed Kenneth R. Feinberg to oversee the claim administration process, Feinberg replaced ESIS with two other independent contractors. Sasha Chavkin, *In Shakeup, Incoming Spill Claims Czar Will Drop BP’s Contractor*, *ProPublica* (Aug. 5, 2010), <http://www.propublica.org/article/incoming-spill-claims-czar-will-drop-bps-contractor>.

¹¹⁴ Shahien Nasiripour, *Big Banks Save Billions as Homeowners Suffer*, *Internal Federal Report by CFPB Finds*, *Huffington Post* (Mar. 28, 2011, 7:41 PM), http://www.huffingtonpost.com/2011/03/28/big-banks-save-billions-homeowners-suffer_n_841712.html (describing a confidential CFPB report demonstrating that several banks

Subsequently, the Government Accountability Office (“GAO”) criticized the OCC’s Independent Foreclosure Review for missing “opportunities to develop common criteria or reference documents to help consultants navigate complexities involving State foreclosure law.”¹¹⁵ The GAO concluded that “consultants developed their own test questions to determine harm and potential remediation,” raising the risk of inconsistent treatment for similarly situated borrowers and undermining public trust in the system.¹¹⁶

By undermining consistency in payouts, the weak transparency of corporate settlement mills can also create “sorting” problems for claimants. For claimants with similar losses—for example, parties demanding a small refund for a defective toy or necessary repairs for recalled tires—a defendant’s private settlement system may provide efficient and effective redress. The defendant may want to address these individuals’ concerns quickly and fully in order to diminish the likelihood of court action and may, therefore, design a settlement mill that compensates these individuals generously. But when recalled products create serious and irreparable physical injuries that differ between claimants, settlement mills may risk undercompensating more serious injuries at the same time that they overcompensate less serious claims. Putative claimants will often lack the requisite information to determine if this is the case. For example, some claimed that BP’s opaque process imposed onerous and inconsistent paper requirements with “chaotic” and “random” results—“If you knew how to make a lot of noise and demand a check, you could get one, but many people didn’t know how to do that.”¹¹⁷

together saved nearly \$25 billion “in lieu of making the necessary loan-processing adjustments as delinquencies and foreclosures rose”).

¹¹⁵ Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews, Part II: Hearing Before the Subcomm. on Hous., Transp., & Cmty. Dev. of the Comm. on Banking, Hous., & Urban Affairs, 113th Cong. 3–4 (2013) (statement of Lawrance L. Evans, Jr., Director, Financial Markets and Community Investment, Government Accountability Office).

¹¹⁶ *Id.*

¹¹⁷ Jennifer Weeks, *After the BP Oil Spill: Kenneth Feinberg and the Gulf Coast Claims Fund, Case Study of Post-Disaster Compensation Programs 5* (2012) (unpublished case study written for Arnold M. Howitt, Executive Director, Ash Institute for Democratic Governance and Innovation), available at <http://www.gulfcoastdisaster.com/etc/deepwater/files/docs/GCCF%20case%20April%204%202012.pdf> (quoting Martha Bergmark, President, Mississippi Center for Justice) (internal quotation marks omitted).

Inadequate transparency in corporate settlement mills may also deprive the public of important information regarding activities, products, and practices that cause group-wide injuries.¹¹⁸ Like the repeat private settlements between property owners and drillers who employ “fracking,” corporate settlement mills may shield important information regarding product safety and reliability from regulators and the public. Putative defendants who stress their commitment to addressing problems quickly and proactively may also avoid otherwise applicable civil or criminal sanctions. But when defendants can buy their way out of court proceedings and public relations disasters *ex post*, they may invest far less to avoid problems *ex ante*.

Relatedly, the weak transparency of corporate settlement mills deprives the public of important information regarding applicable legal and regulatory requirements.¹¹⁹ When claimants routinely participate in a private settlement arrangement, they circumvent the routine application of law.¹²⁰ The less that mandatory laws are visibly enforced and applied, the less informed the public will be. This may explain airline travelers’ widespread ignorance of the relevant regulations dictating what an airline may and must do to compensate an individual who has been bumped off an overbooked flight.¹²¹

Finally, poor transparency deprives the public of important information about private settlement systems themselves.¹²² Without sufficient information about procedures and substantive outcomes, claimants and others will be unable to challenge the efficacy and legitimacy of a defendant’s private settlement system. In some cases, such as with Owens Corning’s National Settlement Fund and the

¹¹⁸ See, e.g., Lynn M. LoPucki, *Court-System Transparency*, 94 *Iowa L. Rev.* 481, 510 (2009) (“Court-system transparency would also provide the public with a valuable source of general information.”); Resnik, *Compared to What?*, *supra* note 112 (asserting that openness improves accuracy); Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 *U.C. Davis L. Rev.* 151, 210–11 (2000) (indicating how a lack of transparency in private settlements may harm the public).

¹¹⁹ See LoPucki, *supra* note 118, at 497; Resnik, *Compared to What?*, *supra* note 112, at 636.

¹²⁰ Thornburg, *supra* note 118, at 212–17.

¹²¹ Christopher Elliot, *The Navigator: Flier’s Long Bumpy Road to Denied-Boarding Compensation*, *Wash. Post* (Dec. 20, 2012), http://articles.washingtonpost.com/2012-12-20/lifestyle/36015998_1_boardings-passenger-rights-departure-time (“Few air travelers know that there are rules governing oversales, so it isn’t uncommon to see passengers simply walk away when they’re bumped, without asking for any compensation.”).

¹²² See Resnik, *Compared to What?*, *supra* note 112, at 679, 694.

Independent Foreclosure Review, problematic aspects of the settlement system might eventually come to light. In other cases, the secrecy of a system may forever protect it from exposure and challenge. The “vanishing trial” may soon be followed by the “vanishing settlement.”¹²³

B. Settlement Mills Exploit Unequal Bargaining Power

Inevitably, there will be significant power imbalances between defendants and claimants in settlement mills, giving rise to a second set of dangers. The advantages enjoyed by repeat litigants are by now familiar—unlike those who employ the legal process infrequently, repeat players have the knowledge, experience, and resources to “play for the rules,” setting down legal precedent advantageous for them in future cases.¹²⁴ These problems are magnified by poor court oversight of corporate settlement mills.¹²⁵ Unlike class actions and collective bargaining, where a class action attorney at least purports to represent the interests of absent plaintiffs in a collective settlement, defendants are the only repeat players in a purely voluntary settlement mill. In this context, they do not just play for the rules; they unilaterally dictate them. Most often, they do so with little, if any, oversight or review.¹²⁶ Even compulsory settlement systems, created at the encouragement or requirement of the law, frequently exploit the compromised positions of travelers stranded at a gate, shrimpers grounded by an oil spill, or homeowners facing foreclosure.¹²⁷

Power imbalances will often translate into overwhelming pressure on claimants to participate in the private settlement system, even if it means

¹²³ Id. at 684–85.

¹²⁴ Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 *Law & Soc’y Rev.* 95, 100–03 (1974).

¹²⁵ Fiss, *supra* note 19, at 1078–82; Richard Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 *UCLA L. Rev.* 949, 963–64 (2000); Thornburg, *supra* note 118, at 212–17.

¹²⁶ Not only is there no judge tasked with ensuring the parties meet each other on (relatively) equal footing in court, there is no equivalent discovery practice that permits claimants to gain relevant information about the defendant’s practices and culpability. See Thornburg, *supra* note 118, at 200 (“When a private dispute resolution system limits discovery, it limits a device that otherwise serves to equalize the parties’ relative positions within the lawsuit . . .”).

¹²⁷ See, e.g., Campbell Robertson, Along Gulf, Many Wary of Promises After Spill, *N.Y. Times*, May 10, 2010, at A12 (describing a case where BP officials made “boat owners, many of whom have been temporarily put out of work by the spill, sign agreements to work in the cleanup effort that included waivers of certain kinds of liability”).

waiving their rights to go to court. The pressure may flow from a simple information imbalance. A defendant may voluntarily create a compensation schedule that offers less than claimants may legally demand; claimants, unaware that they are legally entitled to more, may frequently accept the prescribed compensation. Far more troubling, the pressure to accept may entail intentional coercion. Owens Corning, for example, leveraged its market share of the asbestos liability to persuade claimants, who could receive nothing if Owens Corning went bankrupt, to waive their rights to sue and participate in its National Settlement Program.¹²⁸ Moreover, powerful plaintiffs' attorneys played a central role in shepherding large numbers of clients through the NSP. In this and similar cases, waivers are not the result of informed and freely given consent by claimants, but rather of the advantages enjoyed by repeat players of the game.¹²⁹

As noted, corporate settlement mills generally entail little or no oversight and therefore fail to guard against the coercive effects of severe power imbalances. Settlement mills that defendants create voluntarily are only weakly regulated by garden-variety contract law.¹³⁰ While settlement mills that defendants are encouraged or required to create by statute or administrative regulation may require putative defendants to report disputes to federal officials, the practice of any given settlement facility is rarely subject to anything more than minimal standards for oversight.¹³¹ These problems may be aggravated when

¹²⁸ Nagareda, *supra* note 54, at 109–11 (describing Owens Corning's efforts to "accumulate a sufficiently large chunk of the remaining liability in the asbestos litigation" to induce plaintiffs to participate in the NSP).

¹²⁹ See David Marcus, From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure, 56 St. Louis U. L.J. 1231, 1264 (2012) (doubting whether "informed and freely given consent is ever possible" in the context of informally aggregated lawsuits).

¹³⁰ See, e.g., *Mangini v. McClurg*, 249 N.E.2d 386, 392 (N.Y. 1969) (observing that "[w]hen general peace is the consideration[,] there can be no mutual mistake as to the extent of the injuries, known or unknown").

¹³¹ See, e.g., Dep't of Transp., *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110, 23,136 (Apr. 25, 2011) (rejecting minimum standards for the amount of compensation offered to passengers solicited to volunteer for denied boarding, arguing that "other than the requirement that carriers must solicit volunteers before bumping any passengers involuntarily, the procedures for solicitation of volunteers and the amounts of incentive offered to potential volunteers should remain within carriers' discretion"); GAO *Independent Foreclosure Review Study*, *supra* note 8, at Highlights (concluding that complexity of review process, "overly broad guidance, and limited monitoring for

courts subject existing settlement arrangements to weak scrutiny before deeming them “superior” to a class action and denying class certification.¹³²

C. Settlement Mills Are Not Constrained by Lawyers’ Ethical Duties

The ethical obligations of the lawyers involved in creating, negotiating, and administering settlement mills also provide a source of potential oversight. But in their current form, the profession’s ethical rules do not mitigate, and in fact may exacerbate, problems of inadequate transparency and unequal bargaining power in corporate settlement mills.

Beginning with the 1908 Canons, which were the American Bar Association’s (“ABA”) first official statement of ethical standards, and continuing through subsequent amendments and revisions, the legal profession’s codes of conduct have focused overwhelmingly on the traditional model of courtroom litigation. Their provisions primarily address representations that are individualized and adversarial, envisioning a lawyer who has a close relationship of loyalty, confidentiality, and trust with a single, and most often individual, client.¹³³ They assume that the goal of representation is zealous advocacy on the client’s behalf against an opponent, also represented by counsel,¹³⁴ and that court proceedings will be open for the public to

consistency impeded the ability of the [OCC and the Federal Reserve] to achieve the goals of the foreclosure review”).

¹³² See sources cited supra notes 78–83 and accompanying text; see also Rave, supra note 40.

¹³³ See Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 481 (1994) [hereinafter Weinstein, Ethical Dilemmas] (“[The ethical rules assume] a Lincolnesque lawyer strongly bonded to an individual client.”); Weinstein, supra note 88, at 85 (“The traditional ethical rules . . . rel[y] on the single-litigant, single-lawyer model.”). But see Model Rules of Prof’l Conduct R. 1.13 (2012) (addressing the challenges of entity representation).

¹³⁴ James W. Jones, Future Structure and Regulation of Law Practice: An Iconoclast’s Perspective, 44 Ariz. L. Rev. 537, 541 (2002) (explaining that the traditional model was constructed around the assumption that “litigation is the ‘normal’ . . . setting for a lawyer’s work” and that “partisan advocacy is the norm for resolving all matters and for serving clients’ best interests in all settings”); Carrie Menkel-Meadow, Ethics and the Settlement of Mass Torts: When the Rules Meet the Road, 80 Cornell L. Rev. 1159, 1188 (1995) (“[T]he Model Rules still represent an ethics for lawyers who are presumed to be engaged in a generic practice, with a focus on litigation—even transactional problems are analyzed with an assumption of the adversary model.”).

view.¹³⁵ The ABA's Model Rules of Professional Conduct,¹³⁶ its current articulation of appropriate and ethical standards of conduct, remain almost silent on collective representations, non-adversarial approaches to lawyering, and out-of-court settlement.¹³⁷

Bar leaders and commentators have increasingly criticized the assumptions at the base of the Model Rules, acknowledging that not all lawyers are litigators and not all clients are individuals.¹³⁸ Thus, specialty bar associations in diverse areas of practice are questioning, pushing, and in some cases, reinterpreting the Model Rules to acknowledge legitimate interests in collectivity, confidentiality, and collaboration.¹³⁹ But significant ambiguity remains regarding appropriate and ethical lawyerly conduct in these representations.

¹³⁵ Charles W. Wolfram, *Modern Legal Ethics* 54 (1986) (noting that the ethical rules "speak of a kind of law practice that was carried on almost entirely in the courtroom").

¹³⁶ The ABA's Model Rules of Professional Conduct have been adopted in substantially similar form by virtually every jurisdiction. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 *SMU L. Rev.* 1385, 1451 (2004) ("As of 2003, forty-four states and the District of Columbia had adopted some version of the Model Rules.").

¹³⁷ James J. Alfani, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 *N. Ill. U. L. Rev.* 255, 256 (1999) (observing that the profession has "not created the necessary ethics infrastructure to support this settlement culture"); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 *Calif. L. Rev.* 79, 79–80 (1997); Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 *Geo. Wash. L. Rev.* 717, 718 (2011) (noting an absence of scholarly discussion regarding ethics rules that apply to lawyers in aggregate litigation); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 *Geo. J. Legal Ethics* 179, 182 (2004) ("Settlement negotiations are, in many respects, the ethical no-man's land of legal practice.").

¹³⁸ The current Model Rules ostensibly recognize that not all lawyers are litigators. They include provisions that address the various roles a lawyer can hold: advisor, Model Rules of Prof'l Conduct R. 1.2, 1.4, 2.1 (2012); negotiator, *id.* R. 4.1; and mediator, Model Rules of Prof'l Conduct R. 2.2 (2001) (Rule 2.2, however, was deleted from the Model Rules in 2002.). Model Rule 1.13 addresses the particular challenges of entity representation. Model Rules of Prof'l Conduct R. 1.13 (2012). Still, the Rules continue the traditional approach of viewing the profession as unitary and the duties of lawyers as uniform, based on litigation. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 *Tex. L. Rev.* 335, 385 (1994).

¹³⁹ For example, the American Academy of Matrimonial Lawyers issued interpretive guidance acknowledging that the adversarial model does not always fit the family law context. See *Bounds of Advocacy: Goals for Family Lawyers* prelim. stmt. (Am. Acad. of Matrimonial Lawyers 2000) ("A counseling, problem-solving approach . . . in resolving difficult issues and conflicts within the family is one model Mediation and arbitration offer alternative models."). The guidance encourages divorce lawyers to "advise the client of the emotional and economic impact of divorce and explore the feasibility of reconciliation," and not just to seek the best financial deal possible. *Id.* R. 1.2. The ABA Model Rules' assumptions are being similarly tested among criminal defense lawyers, who have moved

Tensions between the Model Rules' assumptions and realities on the ground are particularly pronounced in the context of corporate private settlement mills. Commentators have noted some of these tensions in the context of informally aggregated settlements.¹⁴⁰ Model Rule 1.8(g), which prohibits collective settlements absent individualized consent from all settling clients,¹⁴¹ purports to preclude the increasingly common practice of plaintiffs' attorneys settling on behalf of an informally aggregated class of clients.¹⁴² The American Law Institute ("ALI") has recommended revision of Model Rule 1.8(g) to facilitate informal aggregation by condoning advance waivers.¹⁴³ But collective settlement—a practice that may be at play if and when plaintiffs' counsel attempt to shepherd multiple clients through a corporate settlement mill—can be dangerous.¹⁴⁴ As illustrated in extreme form in the Owens Corning settlement, the interests and incentives of plaintiffs' lawyers will not always be aligned with those of their clients.¹⁴⁵

beyond traditional models of the attorney-client relationship to team-based representation, see Ronald F. Wright, *Padilla* and the Delivery of Integrated Criminal Defense, 58 UCLA L. Rev. 1515, 1517–18 (2011) (observing a shift in criminal defense practice from the traditional model of an individual lawyer representing an individual client to a new bureaucratic model where representation is provided by a defense team), or horizontal representation, which entails representation of a criminal defendant by a different lawyer at every stage of the case, see Anne Bowen Poulin, Strengthening the Criminal Defendant's Right to Counsel, 28 Cardozo L. Rev. 1213, 1254 (2006).

¹⁴⁰ See, e.g., Howard M. Erichson, Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation, 2003 U. Chi. Legal F. 519, 562 n.155 (2003); Erichson & Zipursky, *supra* note 20, at 298–99.

¹⁴¹ Model Rules of Professional Conduct R. 1.8(g) (2012) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement . . . unless each client gives informed consent, in a writing signed by the client.").

¹⁴² See Lester Brickman, Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics, 79 Geo. Wash. L. Rev. 700, 700 (2011) (describing the rule and arguing that "lawyers' fees in some aggregate settlements are of such a magnitude that they simply overwhelm any proclivity of lawyers to adhere to the rule").

¹⁴³ See Thomas D. Morgan, Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements, 79 Geo. Wash. L. Rev. 734, 743–44 (2011); Charles Silver & Lynn A. Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733, 755–56 (1997).

¹⁴⁴ See Carol Needham, Advance Consent to Aggregate Settlements: Reflections on Attorney Fiduciary Obligations and Professional Responsibility Duties, 44 Loy. U. Chi. L.J. 511, 520–23 (2012).

¹⁴⁵ See Howard M. Erichson, The Trouble with All-or-Nothing Settlements, 58 U. Kan. L. Rev. 979, 1017–22 (2010) (noting the incentives for lawyers to misrepresent the nature of the settlement in order to gain client's consent and to collude with the defendant to secure that consent).

On the other side of corporate settlement mills—among the defense counsel that help create and administer them—ethical tensions arise that are at once less recognized but more threatening. These lawyers operate outside of the structures of the adversary system, out from under the oversight of a third-party neutral and, often, free from the constraints of a watchful adversary. Arguably, these lawyers should be subject to heightened ethical standards to ensure that, even absent traditional structural checks on their conduct, they continue to balance loyalty to their client with professional duties to the state and the public at large. Instead, the Model Rules offer them little ethical guidance apart from the general directions in the Preamble that apply to all lawyers: instruction to serve their clients with loyalty, confidentiality, and care, and broad exhortations to serve the public and the state as well.¹⁴⁶

D. Settlement Mills Upset the Rule of Law

By transferring control over entire classes of disputes from courts to defendants, corporate settlement mills also undermine rule-of-law values in our legal system. They do so in a number of ways. First, they deny claimants the symbolic and therapeutic benefits of having their day in court,¹⁴⁷ which entails not only an opportunity to voice grievances, but also to exercise autonomy through control of one's own affairs.¹⁴⁸ Second, they allow defendants to circumvent otherwise mandatory law.¹⁴⁹ For example, contract and consumer protection laws might require a court to find certain contract terms unenforceable and certain warranties nondisclaimable.¹⁵⁰ By creating private settlement systems and substituting in their own preferred rules, defendants could avoid these laws while also preventing the laws from accounting for and

¹⁴⁶ Model Rules of Prof'l Conduct Preamble 1–3 (2012); see also id. R. 8.4 (barring all lawyers from “engag[ing] in conduct that is prejudicial to the administration of justice”).

¹⁴⁷ E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Soc'y Rev.* 953, 980–81 (1990); Thornburg, *supra* note 118, at 206; Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 *SMU L. Rev.* 433, 439–42 (1992).

¹⁴⁸ Stephen Yeazell, *Collective Litigation as Collective Action*, 1989 *U. Ill. L. Rev.* 43, 45; Fiss, *supra* note 19, at 1078–82; see also Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *Fordham L. Rev.* 1177, 1184 (2009).

¹⁴⁹ Thornburg, *supra* note 118, at 212–13, 215–16.

¹⁵⁰ See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965).

evolving to address various claims and disputes. Third, they deprive the public of any role in the creation and application of legal norms.¹⁵¹ In place of public debate and consensus building, they allow powerful private economic interests to direct substantive outcomes in furtherance of their self-interest, free from public participation and prevailing social norms.¹⁵²

Finally, by withdrawing whole classes of cases from courts, corporate settlement mills deprive society of important democratic moments.¹⁵³ Judith Resnik explains that “participatory parity is an express goal of courts, even if not always achieved,”¹⁵⁴ and “[a]djudication can itself be a democratic practice—an odd moment in which individuals can oblige others to treat them as equals, as they argue in public about their disagreements.”¹⁵⁵ When large classes of disputes are routinely resolved in-house, participants and the public are deprived of experiencing or witnessing these democratic moments.

Professor Resnik’s words apply not only to the corporate settlement mills we describe, but also arguably to all procedures that give rise to out-of-court settlements, including multidistrict litigation, class actions, and mandatory arbitrations. The traditional response from those defending large, aggregate forms of litigation and settlement is grounded in the advantages of efficiency and pragmatism, noted above. Unlike traditional one-on-one adjudication, which may involve years of the “same witnesses, exhibits and issues” before a case gets to trial (if it ever gets to trial),¹⁵⁶ aggregation ensures that all injured parties get “some kind of hearing” at some point in their lives.¹⁵⁷ But as Resnik and others

¹⁵¹ Resnik, *Courts In and Out*, supra note 112, at 804.

¹⁵² Fiss, supra note 19, at 1085.

¹⁵³ Resnik, *Compared to What?*, supra note 112, at 694; Resnik, *Courts In and Out*, supra note 112, at 806.

¹⁵⁴ Resnik, *Courts In and Out*, supra note 112, at 806–07.

¹⁵⁵ Resnik, *Compared to What?*, supra note 112, at 693.

¹⁵⁶ *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986) (quoting lower court opinion) (granting certification of a class action involving asbestos); see also Thomas E. Willging, *Fed. Judicial Ctr., Appendix C: Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group 20* (1999) (observing that grouping claims provides “an opportunity to correct more systematically the harms that products have caused, [and] to meet more consistently and completely the compensation goals of the tort system”); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, 30 *Cardozo L. Rev.* 1, 174 (2008) (observing that the procedural benefits include a substantial reduction in “costs of discovery, retention of experts, legal research and legal fees”).

¹⁵⁷ Friendly, supra note 92, at 1275 (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

recognize, these questions of efficiency do not exist in a vacuum. They reflect other political choices about how Congress staffs and funds courts and when Congress creates statutory rights that, when violated, lead to even more cases. Accordingly, we need a deeper account of why and when it is appropriate to shift traditionally sovereign legal functions from courts and regulators to private corporations. When is it appropriate to privatize dispute resolution within corporations, using the same sorts of assembly-line processes that gave rise to claims of widespread harm in the first place?

III. CORPORATE SETTLEMENT MILLS AND PRIVATIZATION

As described in Part I, some corporations create high-volume private settlement programs voluntarily, to improve public relations, build their reputations with customers, and preempt litigation.¹⁵⁸ Others adopt them because laws or government policies require or encourage them to do so. In the latter case, corporate settlement mills arguably represent the delegation of a core government task—adjudication—away from courts and to private parties.

As such, corporate settlement systems raise important questions about privatization: When and why is it acceptable to shift public functions to private corporations and to sacrifice formal adjudication for more efficient, but private, dispute resolution? Drawing on literature addressing the growing privatization of government functions, we argue in this Part that corporate settlement mills can serve as an appropriate alternative to public adjudication, as long as policymakers adopt sufficiently robust controls and constraints to ensure that the settlement systems remain accountable to the regulators, courts, and claimants that rely on them.¹⁵⁹

Broadly speaking, privatization refers to government efforts to transfer public functions to private hands.¹⁶⁰ Federal, state, and municipal governments have long relied on private actors to accomplish

¹⁵⁸ Stipanowich & Lamare, *supra* note 52, at 3–5.

¹⁵⁹ See, e.g., Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (2007); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *Harv. L. Rev.* 1285 (2003) [hereinafter Freeman, *Extending Public Law Norms*]; Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. Rev.* 543, 617–18 (2000); Gillian Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1367 (2003).

¹⁶⁰ See Freeman, *Extending Public Law Norms*, *supra* note 159, at 1287.

public policy goals,¹⁶¹ including dispute resolution,¹⁶² but privatization has indisputably increased and accelerated in recent years.¹⁶³ Many commentators contend that the trend has extended so far that it may no longer be possible to draw a meaningful line between private and public.¹⁶⁴ And yet, our constitutional order depends on the existence of such a line—on the existence of certain private domains into which government cannot intrude and certain core public functions which government cannot outsource.¹⁶⁵ The contours of these two realms have continuously shifted over time,¹⁶⁶ but in both theory and practice, the

¹⁶¹ Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *Harv. L. Rev.* 1229, 1229–30 (2003) (reviewing a long history in this country of outsourcing numerous government functions to private actors).

¹⁶² Even leaving aside the relatively recent ascendancy of commercial arbitration, facilitated and encouraged by Supreme Court jurisprudence, see *infra* notes 202–06 and accompanying text, there is a long history of private merchant dispute resolution in the eighteenth and nineteenth centuries. See, e.g., Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 *N.Y.U. L. Rev.* 443, 469–73 (1984) (describing the history of commercial arbitration, rooted in private dispute resolution mechanisms established by trade associations in the eighteenth century).

¹⁶³ Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 *N.C. L. Rev.* 397, 401 (2006) [hereinafter Verkuil, *Public Law*] (“Privatization has been part of government management since the post World War II period, but its acceleration to the limits of accountability is a relatively recent phenomenon.” (footnote omitted)).

¹⁶⁴ See, e.g., Metzger, *supra* note 159, at 1369 (“Ours is a system in which private actors are so deeply embedded in governance that ‘the boundaries between the public and private sectors’ have become ‘pervasive[ly] blurr[ed].’” (alteration in original) (citation omitted)); see also Minow, *supra* note 161, at 1234 (asking “[w]hat may make a particular function fundamentally public as opposed to private?” and noting the difficulty of answering the question); Verkuil, *Public Law*, *supra* note 163, at 402 (“For anyone who has studied the administrative state here and abroad, the most complicated question is understanding where the line between public and private is drawn. Often the effort is abandoned as unproductive.”).

¹⁶⁵ See David M. Lawrence, *Private Exercise of Governmental Power*, 61 *Ind. L.J.* 647, 647–48 (1986) (arguing that “we do recognize certain powers as essentially governmental: rulemaking, adjudication of rights, seizure of person or property, licensing and taxation” and tracing such characterizations to the exercise of coercion over others, not grounded in property or contract).

¹⁶⁶ Verkuil, *Public Law*, *supra* note 163, at 405 (“In our society, the Constitution continuously expands or contracts the private category through definitions of property or privacy.”); see also Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1423, 1426 (1982) (providing a historical perspective on the traditional distinction between public and private institutions).

existence of distinct spheres is “[a] foundational premise of our constitutional order.”¹⁶⁷

Protecting the second sphere—the core public functions of government—is critical to promoting public law norms of open, accountable, rational, and fair decision making, and ensuring that government actors do not shirk their constitutional and political obligations simply by delegating their duties.¹⁶⁸ These concerns are addressed, in part, through the state action doctrine,¹⁶⁹ which characterizes some private actors as government actors, bound by constitutional obligations, and, in part, through the private delegation doctrine,¹⁷⁰ which characterizes certain government functions as so essential that they cannot be privatized. The private delegation doctrine lacks force in practice,¹⁷¹ but in theory it stands for the proposition that some services are “so inherently governmental as to be categorically non-delegable.”¹⁷²

Defining the precise contours of this category of inherently governmental functions is difficult, if not impossible.¹⁷³ It may be straightforward in extreme cases—for example, it is relatively uncontroversial to claim that the President cannot delegate his power to

¹⁶⁷ Metzger, *supra* note 159, at 1369–70 (“A foundational premise of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not.”).

¹⁶⁸ Minow, *supra* note 161, at 1246 (“Privatization creates possibilities of weakening or avoiding public norms that attach, in the legal sense, to ‘state action’ or conduct by government.”); Verkuil, *Public Law*, *supra* note 163, at 419 (observing that “unrestrained delegation of government functions to private hands challenges the role of government and the rule of law that sustains it”).

¹⁶⁹ Metzger, *supra* note 159, at 1410.

¹⁷⁰ *Id.* at 1437–38.

¹⁷¹ Kimberly N. Brown, “We The People,” *Constitutional Accountability and Outsourcing Government*, 88 *Ind. L.J.* 1347, 1365 (2013) (“Although tailor-made for confining the outsourcing of federal powers to private parties, the private delegation doctrine does not fulfill its constitutional potential.”).

¹⁷² Freeman, *Extending Public Law Norms*, *supra* note 159, at 1295 (2003); see also David Horton, *Arbitration as Delegation*, 86 *N.Y.U. L. Rev.* 437, 437 (2011) (arguing for the revival of nondelegation principles to address the “river of privately made law” that has resulted from the Court’s interpretation of the FAA); Verkuil, *Public Law*, *supra* note 163, at 401–02 (observing that “[l]ongstanding practice assumes that the contracting out of ‘inherent government functions’ is not permitted” and arguing “that inherent government functions must be preserved in the process of contracting out”).

¹⁷³ Verkuil, *Public Law*, *supra* note 163, at 420 (conceding that “[i]t may be no easier to locate these [inherently public] functions than it was to determine what businesses are affected with a public interest, what private actions are public functions, or what property transfers amount to public use”).

pardon to Haliburton or his power to veto to the Brookings Institution. But beyond the extreme cases, it can be very difficult to define those “core responsibilities” that cannot, under any circumstances, be delegated to a private person. For example, upon taking an oath of office to control litigation on behalf of the United States, the Attorney General’s “core responsibility is both to exercise and to oversee the exercise of government powers.”¹⁷⁴ Nevertheless, since the Civil War, private parties have been empowered to represent the government in civil actions through *qui tam* suits.¹⁷⁵

The power and responsibility to adjudicate and shape the law is indisputably a “core responsibility” of courts and agencies. Professor Martha Minow observes that private dispute resolution presents a profound challenge to the practice of “public justice for all,” as it threatens to turn courts into places for those “too poor to afford access to private dispute resolution . . . that the participants themselves shape and control.”¹⁷⁶ The Supreme Court itself has recognized an absolute, but almost imperceptible, limit to delegating judicial functions. According to the Court, Congress could not create a “phalanx” of unsupervised private arbitral panels that handled the “entire business of the Article III courts” without violating the core functions of the federal judiciary.¹⁷⁷

¹⁷⁴ *Id.* at 425; see also *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802–09 (1987) (finding that the Attorney General’s duty to be “disinterested” disqualified a private attorney from presenting a violation of a court order).

¹⁷⁵ See, e.g., False Claims Act, 31 U.S.C. §§ 3729–3733 (2012). The Supreme Court, however, has never actually resolved whether *qui tam* suits violate Article II’s admonition that members of the executive branch “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, cl. 4. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (upholding the False Claims Act against an Article III challenge, but reserving the question as to Article II); see also *FEC v. Akins*, 524 U.S. 11, 34–37 (1998) (Scalia, J., dissenting) (noting that laws that “confer upon the entire electorate the power to invoke judicial direction of prosecutions” may violate the President’s Article II requirement of “faithful[] execut[ion]” of the laws).

¹⁷⁶ Minow, *supra* note 161, at 1254; see also *id.* at 1247 (noting that where “private providers are unregulated . . . [t]he result may improve efficiency and reduce costs, but it may also vitiate public values”); Resnik, *supra* note 24, at 622–27 (arguing that the procedures followed by private dispute resolution rest on different assumptions than the due process model used in the court system).

¹⁷⁷ Compare *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 855 (1986) (cautioning that separation of powers issues may arise “if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision . . . and without evidence of valid and specific legislative necessities”), with *Stern v. Marshall*, 131 S. Ct. 2594, 2610–11, 2620 (2011) (holding that a bankruptcy court is constitutionally prohibited from entering a final judgment on a state law

Corporate settlement mills certainly do not fall beyond that limit, and there are significant differences between corporate settlement mills and court or agency adjudication. Broadly speaking, adjudication is a legal process in which a neutral arbiter retrospectively applies broad rules to assess individual facts when determining the legal rights and obligations of parties to a dispute.¹⁷⁸ Corporate settlement mills, by contrast, ostensibly offer negotiated settlements under a theory of mutual consent. In fact, one could argue, as some commentators have,¹⁷⁹ that settlements negotiated between corporate defendants and large groups of plaintiffs create opportunities for federal judges to expand their own power—accomplishing broad, innovative reforms and solutions unlike those available in traditional, one-on-one adjudication.

Nevertheless, corporate settlement mills raise many of the same issues as privatizing adjudication, revealing that the lines between adjudication and other forms of dispute resolution may be blurring for these purposes. First, many of these systems explicitly or practically require the potential plaintiff to forgo relief in court.¹⁸⁰ In many of the settlement mill situations described above, aggrieved claimants may not consent in any meaningful way.¹⁸¹ Faced with losing their jobs after an oil spill or with the prospect of foreclosure following a banking crisis, individuals may feel they have little choice but to participate in a corporate dispute

tortious interference counterclaim when granted sweeping authority to decide private claims, unrelated to a bankruptcy scheme, without supervision by an Article III court).

¹⁷⁸ See Rubenstein, *supra* note 90, at 410–11 & n.181.

¹⁷⁹ Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Full(erian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 *Ariz. St. L.J.* 1109, 1114 (2012) (“Trial and appellate court judges, particularly those feeling comparatively less constrained by traditional notions of the limits of judicial law-making power . . . possess enormous discretion under the common law to reinterpret precedents in an expansive manner enabling them to extend adjudication to directly affect nonparties.”); Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale L.J.* 27, 30 (2003) (“In pretrial practice, many judges rely on informal case management techniques like the settlement conference, which allow them a level of control and a degree of discretion that strain the boundaries of their traditional role.”).

¹⁸⁰ See sources cited *supra* notes 78–85 and accompanying text (describing barriers to class actions and complex litigation posed by corporate settlements); see also *supra* Section II.B (describing obstacles to informed consent and other coercive practices).

¹⁸¹ See, e.g., *supra* Subsection I.A.1 (describing Corning's process to corner the market on asbestos-related claims); *supra* Subsection I.A.2 (describing mortgage foreclosure process); cf. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 355–58 (S.D.N.Y. 2002) (refusing to dismiss litigation in U.S. courts in favor of private insurance process to compensate Holocaust victims for stolen policies because the private process lacked independence from the defendant insurers: “it is in a sense the company store”).

resolution process and to accept the determinations made therein. Second, policymakers have actively encouraged corporations to create settlement systems as a substitute for dispute resolution in court.¹⁸² Third, these determinations are rarely “negotiated”; rather, most settlement programs render top-down, “off-the-rack” decisions by relying on claim forms, grids, and matrixes similar to those used by public administrative agencies to adjudicate benefits for unrepresented veterans, disabled children, and coal miners.¹⁸³ Perhaps it should come as little surprise, then, that government actors, with an eye towards increased access and efficiency, encourage corporate settlement programs precisely because they perceive them to be a desirable private substitute for public adjudicative processes.

Nevertheless, laws encouraging private parties to exercise adjudicative power typically vested in courts and agencies create a perverse dynamic. Congress enables companies to shape the penalties they pay for violating people’s rights by deciding for themselves the value of claims filed against them. In some ways, these problems resemble critiques of class actions, mandatory arbitration, and aggregate settlements brokered on the courthouse steps or in the halls of Congress. Scholars and commentators worry that large class action settlements may actually function as judicially blessed business transactions,¹⁸⁴ lacking sufficient process,¹⁸⁵ fairness,¹⁸⁶ or transparency, while denying

¹⁸² See *supra* Subsection I.A.2.

¹⁸³ See, e.g., Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 *Cardozo L. Rev.* 1, 21–22 (2003); Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration’s Disability Programs*, 62 *Admin. L. Rev.* 937, 942–43 (2010).

¹⁸⁴ See, e.g., Resnik, *Managerial Judges*, *supra* note 95 (arguing that granting judges procedural control over actions transforms the judge into a manager and creates “opportunities for judges to use—or abuse—their power”); Rubenstein, *supra* note 90, at 419 (characterizing class action settlements as large business transactions that exchange bundles of legal rights for money).

¹⁸⁵ Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 *Calif. L. Rev.* 1573, 1616 (2007) (arguing that modern procedural due process in class actions is insufficient to protect the class members’ right to litigate autonomously); see also Complex Litigation Project 24 (Proposed Final Draft 1993) (“The procedural fairness achieved by processing claims individually may sacrifice the fairness of reaching a just result in a timely fashion.”).

¹⁸⁶ See, e.g., Fiss, *supra* note 19, at 1084–85 (arguing that settlement procedures are the “products of a bargain between the parties rather than of a trial and an independent judicial judgment”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Chi. L.*

victims the psychological benefits associated with actually going to court.¹⁸⁷ Scholars similarly critique large compensation schemes passed by Congress, such as the September 11 Fund or the National Vaccine Program,¹⁸⁸ that offer compensation in exchange for waiver of the right to sue in court.¹⁸⁹ Still others complain when private companies rely on independent arbitrators to broker their disputes with large groups of people. Because those companies may return to the same arbitrators to resolve disputes in the future, regulators and commentators question whether the arbitration is truly independent or whether the case might as well be resolved by the corporation itself.¹⁹⁰ But corporate settlement mills are distinct from all of these situations because in most cases, the corporate actor *actually decides cases for itself*—without the pretense of courts, legislatures, or arbitrators, and often without even offering attorney representation. As a result, and unlike class actions, mandatory arbitration, or aggregate settlements, corporate settlement mills raise

Rev. 494, 545 (1986) (criticizing the development of large alternative compensation schemes and trusts because they empower private administrators to decide compensation “without providing sufficient justification of why they deserve expanded authority”).

¹⁸⁷ See Tom R. Tyler, A Psychological Perspective on the Settlement of Mass Tort Claims, 53 *Law & Contemp. Probs.* 199, 204 (1990) (“[H]aving one’s day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved.”).

¹⁸⁸ The National Vaccine Injury Compensation Program (“VICP”) offers parties the opportunity to opt out of the program to pursue litigation in court, in some cases, 240 days after they file a claim with the VICP. 42 U.S.C. § 300aa-21(b)(1) (2012). The September 11 Victim Compensation Fund, by contrast, gave claimants two years to opt into the fund. Air Transportation Safety and System Stabilization Act § 405(a)(3), 49 U.S.C. § 40101 (2012).

¹⁸⁹ See, e.g., Gillian K. Hadfield, Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund, 42 *Law & Soc’y Rev.* 645, 645 (2008) (finding that “the choice to forego litigation required the sacrifice of important nonmonetary, civic values”); Tom R. Tyler & Hulda Thorisdottir, A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund, 53 *DePaul L. Rev.* 355, 358 (2003) (observing that the Victim Compensation Fund violates perceptions of procedural and distributive fairness because rules creating the Fund were determined without “procedurally fair” mechanisms). But see Brian H. Bornstein & Susan Poser, Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund, 17 *Cornell J.L. & Pub. Pol’y* 75, 96 (2007) (finding that September 11 claimants’ perceptions of justice were correlated with the amount of compensation participants received).

¹⁹⁰ See, e.g., Fed. Trade Comm’n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 47–51 (2010) (discussing possible reasons for bias among arbitrators); *Developments in the Law: Access to Courts*, 122 *Harv. L. Rev.* 1151, 1174–75 (2009) (describing bias “in favor of the repeat-player corporation” in consumer arbitration).

more significant questions regarding the broader government trend towards privatization.

There are, however, potential advantages of this form of privatized dispute resolution that extend beyond increased access and efficiency. Delegations of public functions to private parties may be socially desirable insofar as they extend public values into traditionally private realms.¹⁹¹ Delegating judicial functions to certain industry actors, with sufficient oversight, may improve the ways those businesses interact with the public. For example, although some airlines endorsed the Obama administration's changes to the airline denied boarding compensation rules, they likely would not have adopted the changes in the otherwise competitive marketplace of air travel without regulation.¹⁹² Delegation with oversight may also empower in-house lawyers to exercise independent professional judgment in advising approaches to dispute resolution that embody the values of our legal system, rather than exclusively advancing the interests of the corporation.¹⁹³ These salutary effects can only be achieved, however, by ensuring meaningful accountability.

¹⁹¹ Freeman, *Extending Public Law Norms*, supra note 159, at 1285. Jody Freeman similarly suggests a process of "publicization," whereby private contractors are embraced and brought within mainstream legislative, executive, judicial, and social oversight norms. Jody Freeman, *Extending Public Accountability Through Privatization*, in *Public Accountability: Designs, Dilemmas, and Experiences* 83, 83–84 (Michael W. Dowdle ed., 2006) [hereinafter *Freeman, Public Accountability*]; see also Minow, supra note 161, at 1245 ("Privatization stimulates new knowledge and infrastructure by drawing new people into businesses previously handled by government. In addition, experimentation and institutional innovation can promote learning and participation, in tune with the democratic values of participation and dialogue.").

¹⁹² See *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110, 23,136 (Apr. 25, 2011); see also Note, *Federal Preemption of State Law: The Example of Overbooking in the Airline Industry*, 74 Mich. L. Rev. 1200, 1201 (1976) (noting that the rule was spurred by passenger anger at "ticketing time limits" and the "imposition of reservation service charges"). But see Elliot Blanchard, Note, *Terminal 250: Federal Regulation of Airline Overbooking*, 79 N.Y.U. L. Rev. 1799, 1811 (2004) (observing that a uniform system of damages may create perverse incentives in the marketplace, punishing airlines that choose not to overbook while rewarding airlines that overbook often).

¹⁹³ Empirical research supports the notion that lawyers can and sometimes do constrain imprudent or illegal business strategies by, for example, advising conservative approaches to risk tolerance and insisting on proper disclosure. See Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *Law & Soc'y Rev.* 457, 468 (2000); Christine E. Parker, Robert Eli Rosen & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 *Geo. J. Legal Ethics* 201, 207–10 (2009).

In light of these potential benefits and how frequently these systems are being used, the most pressing question is not whether certain judicial functions are inherently nondelegable, but rather how to ensure that the private actors to whom these functions are delegated are held accountable in substantive and meaningful ways. What tools exist or can be designed to facilitate public oversight of delegated judicial power? Are the resulting arrangements sufficiently accountable to the government actors and claimants that rely on them? Are there ways of enjoying corporate settlement mills' benefits of increased access and efficiency without extracting an unacceptable price in liberal democratic norms and values?

A number of scholars have proposed accountability mechanisms that address the risks of privatization in other contexts.¹⁹⁴ Their proposals generally encompass two necessary features. First, meaningful accountability involves an *external check*—an outside individual or entity holds the party in question accountable for its conduct.¹⁹⁵ Second, accountability involves an *internal check*—the person held accountable has mechanisms through which to receive feedback from the external check and to respond by modifying behavior and/or accepting sanctions.¹⁹⁶

By calling for accountability along these lines, a number of influential scholars have sought to embrace the potential benefits of privatization while checking the potential risks. For example, addressing the education-privatization debate over school vouchers, Martha Minow contemplates a dynamic partnership between the public and private sectors with increased external review. Among other things, she suggests legislative or administrative hearings to adopt guidelines for government contracting and to review privatization decisions, and ongoing oversight by a public commission, composed of private and

¹⁹⁴ See, e.g., Brown, *supra* note 171, at 1350; Metzger, *supra* note 159 (“Under the proposed analysis, the critical question is whether delegations of authority to private entities are adequately structured to enforce constitutional constraints on government power.”); Minow, *supra* note 161, at 1259 (“That balance can be achieved only by demanding and instituting measures of public accountability when governments privatize social provision.”); Verkuil, *Public Law*, *supra* note 163, at 423–24 (collecting cases establishing accountability limits on delegation, but not addressing “the proposition that some government functions are nondelegable under any circumstances”).

¹⁹⁵ Brown, *supra* note 171, at 1350 (citing Richard Mulgan, “Accountability”: An Ever-Expanding Concept?, 78 *Pub. Admin.* 555, 555 (2000)).

¹⁹⁶ Richard Mulgan, “Accountability”: An Ever-Expanding Concept?, 78 *Pub. Admin.* 555, 556 (2000).

public representatives.¹⁹⁷ Jody Freeman similarly recommends a combination of public-private exchange and external oversight including, among other things, legislative supervision and judicial scrutiny of privatization contracts.¹⁹⁸ Gillian Metzger, for her part, has proposed that all government delegations to private parties should be evaluated pursuant to “a two-step inquiry”:¹⁹⁹ First, she would determine whether an agency has given, or a private actor has taken, sufficiently essential government power to warrant special scrutiny. Second, she would ask whether adequate “alternative accountability mechanisms exist.”²⁰⁰ Like others, she views effective accountability mechanisms as entailing external and internal controls. These include court oversight, administrative complaint systems offering government review of private decision making, and the provision of multiple service providers to ensure that no single provider can exert control over participants in privatized programs.²⁰¹

Metzger’s two-part framework is consistent with Supreme Court decisions addressing when agencies can promote non-judicial forms of dispute resolution without undermining the values served by a public court system. From cases involving optional no-fault workers’ compensation programs²⁰² to arbitration involving brokers²⁰³ and

¹⁹⁷ Minow, *supra* note 161, at 1269 (“The mere existence of a government initiative would provide a focal point for reporting by private, nongovernmental groups as well as an occasion for media attention, public education and debate, and citizen action.”).

¹⁹⁸ Freeman, *Public Accountability*, *supra* note 191, at 83, 106–07.

¹⁹⁹ Metzger, *supra* note 159.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1372–74. Metzger explains the advantages of her approach as follows: “[I]t gives governments an incentive to adopt measures that protect against potential private abuses. . . . Equally important, avoiding direct constitutional scrutiny of private actors allows the government greater flexibility because the government can choose among a variety of accountability mechanisms in structuring instances of privatization to meet constitutional demands.” *Id.* at 1374. For other advocates of external and internal forms of accountability, see, e.g., Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 *Fordham Urb. L.J.* 1477, 1500–05 (2001) (reform through administrative statutes and oversight); Jack M. Beermann, *Administrative-Law-Like Obligations on Private[Ized] Entities*, 49 *UCLA L. Rev.* 1717, 1720–24 (2002) (arguing corporate law doctrines can ensure accountability); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 *Calif. L. Rev.* 569, 635–39 (2001) (arguing contract law should play an important role in ensuring legal accountability in the welfare program setting).

²⁰² See, e.g., *Crowell v. Benson*, 285 U.S. 22, 39 (1932).

²⁰³ See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive

intellectual property agreements,²⁰⁴ the Court has repeatedly concluded that in appropriate circumstances, agencies may create private dispute resolution systems without frustrating the work of the federal judiciary.²⁰⁵ In line with Metzger’s framework, the Court has done so by asking whether (1) the power involves private rights or remedies traditionally resolved by federal courts, and (2) whether sufficient external and internal mechanisms exist to hold the private dispute resolution systems accountable to the agencies and parties they serve. In answering the second half of the inquiry, relevant factors include: the presence or absence of judicial control over the ultimate decision-making process; a clearly articulated need for and purpose of the program; and the nature and extent of the delegation and whether the parties consented (in a meaningful way) to the alternative dispute resolution system.²⁰⁶

These insights from the scholarly literature and jurisprudence on privatization suggest, as we propose below, that corporate settlement mills require meaningful accountability mechanisms²⁰⁷ to ensure that in achieving increased access and efficiency, they do not impermissibly sacrifice other values of our judicial system. More specifically, corporate settlement programs require *external checks*—sufficient tools for courts and agencies to police their power. And they require *internal checks*—mechanisms for corporations to absorb and “accept” that outside oversight. In the next Part, we offer suggestions about which corporate settlement mills pose the greatest risk to the democratic norms

because the limitations serve institutional interests that the parties cannot be expected to protect.”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985).

²⁰⁴ *Union Carbide*, 473 U.S. at 584.

²⁰⁵ See *Schor*, 478 U.S. at 851.

²⁰⁶ *Id.* at 855.

²⁰⁷ Like many scholars of business organization, complex litigation, and democratic theory, Martha Minow usefully explains accountability as applied to privatization as requiring three factors: (1) exit (the ability to leave the “relationship” with the private entity); (2) voice (to “express disagreements” with private decision making); and (3) loyalty (the capacity to confidently remain a member of a “private entity”). Compare, e.g., Minow, *supra* note 161 (expressing the three factors of exit, voice, and loyalty), with John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 *Colum. L. Rev.* 370, 406–17 (2000) (discussing how much voice is needed within a plaintiff class), and Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 *Sup. Ct. Rev.* 337, 369 (highlighting how elevating the role of individual consent can further complicate complex litigation). See also Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (1970) (providing a comprehensive analysis of exit, voice, and loyalty).

and values of public adjudication to warrant heightened oversight, and what accountability mechanisms, both external and internal, should be used to address those risks.

IV. BEYOND THE CORPORATE SETTLEMENT MILL

A. When Corporate Settlements Warrant Heightened Oversight

Corporate settlement mills offer the most promise when they address claims that are similar and relatively low value, and when they do not prevent participants from seeking additional relief in courts. Settlement mills that share these characteristics are the least likely to suffer from the problems discussed above regarding insufficient transparency and “sorting” problems, disparate bargaining power, and ethical violations that take advantage of unrepresented parties. They are also the least likely to upset the ability of courts to hear claims and to shape the law.²⁰⁸ In contrast, when corporate parties create settlement mills with broader preclusive effects to handle more valuable claims and more variable interests—such as those created for the BP oil spill and the mortgage foreclosure crisis—they problematically compromise individuals’ abilities to access public courts and agencies.

Drawing distinctions based on value, variability, and preclusion is consistent with existing principles of complex litigation. Scholars have long observed that as the value of claims increase in aggregate litigation, so does the process that claimants deserve before being denied the right to pursue litigation in court.²⁰⁹ Accordingly, some have called for

²⁰⁸ Perhaps the only circumstances where the ability to shape law may remain impacted are cases where courts reject petitions to certify class actions if the defendant has designed and implemented a private, out-of-court program to resolve putative class members’ claims. See, e.g., sources cited *supra* notes 78–82 and accompanying text. Such cases may still warrant oversight if the program’s very existence precludes a class action and claim values remain so low that individual litigation would be impossible.

²⁰⁹ See, e.g., Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 *Notre Dame L. Rev.* 1057, 1065 (2002) (explaining the opt-out right for class members as “a recognition of at least a formal right to litigant autonomy in cases that could plausibly be cast as stand-alone claims for recompense”). But see Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 *Yale L.J.* 718, 732 (1975) (challenging the idea “that the procedural needs of a complex antitrust action . . . and an environmental class action . . . are sufficiently identical to be usefully encompassed in a single set of [procedural] rules which makes virtually no distinctions [between them]”).

additional rights to opt-out of the settlement and to participate in court-run “fairness hearings” that test the fairness of the final settlement.²¹⁰

Scholars have also observed that absent parties deserve heightened process when a settlement purports to serve a wide variety of interests, implicating many different variables and forms of evidence and increasing the chances of error.²¹¹ Thus, for example, damages class actions require more notice than cases involving relatively uniform harm.²¹²

Preclusion generally requires increased process as well. When participation in an out-of-court dispute resolution system (whether an aggregate settlement, mandatory arbitration, or corporate settlement mill) bars access to private litigation, parties deserve heightened process to protect their legal rights.

Accordingly, valuable, variable, and preclusive corporate settlement schemes present the greatest risks of harm, and are in the greatest need of suitable and effective accountability mechanisms.²¹³ To address this need, the next Section recommends best practices, which were designed to respond to similar challenges in the context of aggregate litigation and public administration. We argue that with some modification and adaptation, these strategies that have been used to minimize risks in

²¹⁰ See, e.g., Geoffrey P. Miller, Rethinking Certification and Notice in Opt-Out Class Actions, 74 UMKC L. Rev. 637, 646–49 (2006); George Rutherglen, Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions, 71 N.Y.U. L. Rev. 258, 260, 270–71, 281, 293 (1996); Rhonda Wasserman, The Curious Complications with Back-end Opt-out Rights, 49 Wm. & Mary L. Rev. 373, 376–77 (2007); Mark C. Weber, A Consent-Based Approach to Class Action Settlement: Improving *Amchem Products, Inc. v. Windsor*, 59 Ohio St. L.J. 1155, 1158 (1998).

²¹¹ Principles of the Law of Aggregate Litigation § 2.04 & cmt. a (2010) (distinguishing “indivisible” from “divisible” damage remedies).

²¹² See id. § 2.04(c) (suggesting courts “authorize aggregate treatment of common issues concerning an indivisible remedy . . . even though additional divisible remedies are also available that warrant individual treatment or aggregate treatment with the opportunity of claimants to exclude themselves”); Elizabeth Chamblee Burch, Adequately Representing Groups, 81 Fordham L. Rev. 3043, 3044 (2013) (“When the underlying right arises from an aggregate harm—a harm that affects a group of people equally and collectively—and demands an indivisible remedy, courts should tolerate greater conflicts among group members when evaluating a subsequent claim of inadequate representation.”).

²¹³ Scholars of complex litigation and privatization have long recognized that accountability becomes more strained in binding aggregate settlements involving conflicting and valued interests. Compare, e.g., Coffee, supra note 207 (discussing the disparate interests that can arise within a plaintiff class), with Issacharoff, supra note 207 (suggesting that retaining individual autonomy as a member of a plaintiff class is unrealistic).

those contexts can be useful and productive when applied to defendants' private settlement systems.

B. External and Internal Checks on Accountability

In this Section, we recommend four ways in which settlement mills may offer better responses to group-wide harm. Two involve *external* checks to hold corporations more accountable to outside actors: prospective regulation and judicial review. Two involve *internal* checks to encourage corporate settlement facilities to respond meaningfully to that oversight: revised ethical standards for those who design corporate settlement and increased stakeholder participation in the design of those settlements.

1. Prospective Regulation

A first means of addressing the dangers of corporate settlement mills is through more comprehensive administrative regulations to address the issue of waivers and to enhance the transparency and monitoring of settlement programs required by statutes and administrative regulations. Administrative agencies could, for example, address coercive settlement practices by prescribing the type of notice and consent required to legitimize waivers of the right to sue. The Oil Pollution Act of 1990 provides one such model. Recognizing the difficult positions many businesses face in the wake of a devastating spill, the Act requires that any party "responsible" for personal injury, property damage, or business losses establish a private settlement facility to pay "short-term" damages on an emergency basis.²¹⁴ Anyone receiving that kind of compensation may still recover "damages not reflected in the paid or settled partial claim."²¹⁵

Regulators could increase transparency of corporate settlement mills by publishing recovery grids or formulas for public consumption. Such grids are common in class action and other public compensation funds,²¹⁶ and could greatly enhance participant understanding of any given corporate settlement mill.

²¹⁴ 33 U.S.C. § 2705(a) (2012).

²¹⁵ *Id.*

²¹⁶ For example, it is not uncommon for a large settlement fund to follow "damage averaging," using grids or compensation schemes that ignore some components of an individual claim to expedite payment to many different people. In *re* MetLife

Public regulators could also offer better oversight of and public participation with private companies that develop settlement mills pursuant to consent decrees. Although the OCC claimed to “spot check” the work performed by banks in the independent mortgage foreclosure settlement, only one hundred thousand foreclosure files out of four million were actually reviewed for errors or fraud.²¹⁷ Better monitoring should entail clearer instructions and guidelines for private settlement facilities, consistent reporting requirements, and standardized models to determine that settlement mills comply with public regulatory goals.

Addressing the shortcomings of defense-side settlement mills through increased administrative regulation will encounter all of the problems and criticisms of reliance on administrative regulation generally. Agencies may be captured by the entities they regulate, leading to regulations that exacerbate rather than mitigate problems of distributive justice.²¹⁸ Ossification may interfere with flexible and efficient responses to changing circumstances.²¹⁹ And, in light of the increasing burdens imposed through judicial review, agencies may be reluctant to step into a new area of regulation.²²⁰ Finally, administrative regulations that prescribe monetary awards by grid will inevitably fail to account for the full range of variation among injured parties, leading to complaints that recovery is insufficiently tailored to individual needs.

These weaknesses counsel against exclusive reliance on traditional forms of administrative regulation to address the problems posed by defensive settlement mills, but they are not a reason to forego administrative regulation entirely. They can be addressed, at least in

Demutualization Litig., 689 F. Supp. 2d 297, 342 (E.D.N.Y. 2010) (“‘Fluid recoveries’ of this type, which do not call for direct calculation and distribution of precise recoveries to the class members, can be a fair means of delivering value to class members without undue administrative costs.”); Principles of the Law of Aggregate Litigation § 1.04 cmt. f (2010).

²¹⁷ See sources cited supra note 10.

²¹⁸ Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1059–67 (1997) (describing the theory of agency capture: “the agency often becomes closely identified with and dependent upon the industry it is charged with regulating”).

²¹⁹ Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525, 533–36 (1997); Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 Duke L.J. 1385, 1397–98 (1992) (describing ossification in the rulemaking process).

²²⁰ Richard J. Pierce, Jr., Seven Ways to Deossify Rulemaking, 47 Admin. L. Rev. 59, 65–66 (1995) (explaining that burdens imposed by the courts over the years have made notice-and-comment rulemaking expensive, time consuming, and uncertain, such that administrative agencies are increasingly reluctant to undertake it).

part, by looking past traditional forms of command-and-control style regulation to new and more participatory forms. For example, an agency seeking to address a particular source of injuries through an administrative scheme could rely on negotiated rulemaking. The agency could require the potential defendant to negotiate with injured parties in producing a proposed recovery plan; the agency would then adopt the recovery plan as an official administrative response. Doing so would address unequal bargaining power by increasing transparency and creating a place at the table for injured parties while also bolstering the legitimacy of the lawmaking process.

2. *Increased Judicial Scrutiny*

A second step in addressing the dangers of corporate settlement mills would be to increase judicial scrutiny of liability waivers. Unlike individual settlement negotiations, where judges provide very little judicial review out of a respect for the parties' litigation choices, judges in most forms of aggregate litigation carefully review attorney representatives to police potential conflicts of interests between counsel and represented parties.²²¹ For example, judges in class actions may evaluate conflicts within the class by scrutinizing outcomes that award greater sums to some class members at the expense of others. Even in cases that do not involve class actions, courts may intervene to address the potential for abuse, conflicts, and communication problems that routinely arise in repeat settlements.²²²

No comparable judicial review exists for purely in-house settlements. At most, courts indirectly monitor system administration in determining whether a putative class action would offer potential claimants "superior relief" to the outcomes offered by a private company.²²³ Aside from that,

²²¹ Manual for Complex Litigation (Fourth) § 21.612 (2004) ("Class actions certified solely for settlement . . . sometimes make meaningful judicial review more difficult and more important."); id. § 21.612 n.965 (collecting cases).

²²² Weinstein, *Ethical Dilemmas*, supra note 133, at 480–81 ("Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations."); Silver & Miller, supra note 20, at 110–11.

²²³ 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1779 (3d ed. 2005 & Supp. 2014) (collecting cases); Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Actions*, 18 *Geo. J. Legal Ethics* 1419, 1421–28 (2005) (collecting cases).

courts have little existing authority to directly monitor and oversee in-house private dispute systems.

Courts could, however, take a more active role in reviewing post-injury releases to ensure that putative plaintiffs do not unwittingly waive their rights to sue. As set out above, courts historically enforced post-injury releases of liability like any other contract, even for physical injuries that did not manifest until well after the contract was signed.²²⁴ But increasingly, courts have been willing to impose limits, particularly for repeat “sham” or oppressive settlement practices.²²⁵ Courts could do the same when collective settlement practices prevent claimants’ lawyers from “giving due consideration to differing claims, differing strengths of those claims, and differing interests in one or more proper tribunals in which to assert those claims.”²²⁶ At a minimum, when courts consider whether a defendant’s settlement program obviates the need and justification for a class action, they should look carefully at whether claimants are being meaningfully informed of their rights before being asked to waive them.

Alone, increased judicial review will be inadequate to address the dangers of defense-side settlement mills as it provides relief that may be too little and that may come too late. Moreover, judicial review assumes that claimants recognize they have been wronged by a settlement mill and have the resources to retain an attorney to represent them in challenging it. Increased judicial review may also undermine some of the benefits of defense-side settlement mills by undermining peace and certainty, preventing closure, and increasing monetary and time costs.²²⁷ In conjunction with other reforms, however, judicial review may reduce some of the dangers of unregulated defensive settlement mills by counteracting unequal bargaining power, increasing transparency, and bolstering the rule of law.

²²⁴ See, e.g., *Mangini v. McClurg*, 249 N.E.2d 386, 392 (N.Y. 1969) (observing that “[w]hen general peace is the consideration[,] there can be no mutual mistake as to the extent of injuries, known or unknown”).

²²⁵ *Hooters of Am. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999); *Richardson v. Emp’rs Liab. Assurance Corp.*, 102 Cal. Rptr. 547, 552 (Ct. App. 1972).

²²⁶ *Johnson v. Nextel Commc’ns*, 660 F.3d 131, 140 (2d Cir. 2011).

²²⁷ Cf. *Pierce*, supra note 220, at 68–69 (identifying the costs that judicial review imposes on agency decision making).

3. Stakeholder Participation in Program Design

Involving consumers and other stakeholders in the design of corporate settlement systems could provide an important internal check on many of their dangers. For example, corporations that choose mass settlement systems could solicit opinions and advice regarding the types and degree of process that will be perceived as fair,²²⁸ or the types of notice that will ensure waiver of future rights is truly informed. With the goal of soliciting feedback from a range of perspectives within and outside of the legal community, corporate actors could employ focus groups to determine appropriate payouts for different types of injuries following an accident or incident, and to monitor the efficacy of implementation following creation of a settlement system. The GAO, for example, recently recommended similar “best practices” to improve the multibillion dollar Independent Foreclosure Review,²²⁹ and two months into its own compensation process, BP consulted with charter-boat crews to develop a “compensation template that takes into account the seasonal nature of the charter-fishing business.”²³⁰

Such a process would resemble the judicially and administratively supervised mediations that have been designed to promote participation, transparency, and rule of law values in other aggregate settlement contexts.²³¹ In collective litigation, for example, judges appoint special masters to oversee negotiations between representative parties.²³² Judges

²²⁸ See Tyler, *supra* note 187 (“[H]aving one’s day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved.”); see also *supra* Section II.D (explaining the importance of public participation in dispute resolution).

²²⁹ GAO Independent Foreclosure Review Study, *supra* note 8, at 7 (recommending regulators use “tests or focus groups, to assess the readability of the outreach materials” and “solicit input from consumer groups when reviewing initial communication materials”).

²³⁰ Pete Spotts, BP: We’ve Been Too Slow to Pay Oil Spill Claims, *Christian Sci. Monitor* (Jun. 10, 2010), <http://www.csmonitor.com/USA/2010/0610/BP-We-ve-been-too-slow-to-pay-Gulf-oil-spill-claims>.

²³¹ See David M. Pritzker & Deborah S. Dalton, *Admin. Conference of the U.S., Negotiated Rulemaking Sourcebook 1–8* (1990) (providing background on the operation of negotiated rulemaking procedures under the Negotiated Rulemaking Act); Philip J. Harter, *Negotiating Regulations: A Cure For Malaise*, 71 *Geo. L.J.* 1, 2–8 (1982) (offering the original description and proposal for negotiated rulemaking).

²³² *Manual for Complex Litigation* (Fourth) § 22.91 (2004) (observing that judges may appoint magistrate judges, special masters, or even settlement judges to oversee and facilitate settlement); see also *In re Simon II Litig.*, No. 00-5332, 2002 WL 862553, at *1 (E.D.N.Y. Apr. 23, 2002) (describing efforts by special master to reach negotiated global tobacco settlement); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 1994 WL

may divide parties into subclasses (specific interest groups represented by separate counsel),²³³ or they may hold fairness hearings to solicit objections and to produce other evidence about the fairness of the settlement.²³⁴ In so doing, judges attempt to give participants in class action settlements increased opportunities to offer feedback and to have “transformative exchanges about . . . [the] social and moral values” implicated by the proposed settlement.²³⁵

Public administrative agencies also rely on “interest group representation” when developing broad programs that, like settlement mills, are likely to trigger contention among large and diffuse groups of people.²³⁶ In a negotiated rulemaking, for example, an agency appoints a “convener” (or mediator) who, in turn, identifies parties interested in the proceeding. The convener establishes a committee that represents all identifiable interests in formulating a generally applicable rule, in this case, a complex litigation order.²³⁷ The agency then notifies affected parties in the Federal Register, announcing its intention to use a negotiated rulemaking committee in the proceeding, naming the members of the committee, and describing the interests that will likely be affected. The end result is generally a rule, like a class action judgment, that applies to all parties, but is subject to the same rules of administrative process and judicial review as any other agency rulemaking.²³⁸ Although originally conceived as a way of avoiding

578353, at *23 (N.D. Ala. Sept. 1, 1994) (appointing three judges to mediate global settlement); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 918 (D. Nev. 1983) (special master appointed to coordinate settlement).

²³³ Fed. R. Civ. P. 23(c)(5); Manual for Complex Litigation (Fourth) § 21.23 (2004).

²³⁴ Of course, parties who do not want to participate may opt out of the settlement, except in limited, well-defined circumstances. See Fed. R. Civ. P. 23(b)(1)–(2).

²³⁵ Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 382 (1996); accord Resnik, *Managerial Judges*, supra note 95, at 382 (summarizing democratic theories involving access to litigation).

²³⁶ The Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570 (2012), and the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583 (2012), authorize agencies to directly involve stakeholders in the decision-making process. For an extensive review of such approaches, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 32–36 (1997) (illustrating instances of interest group participation and recommending a new “collaborative model” to involve groups in agency decision making).

²³⁷ 5 U.S.C. § 564(a) (2012). In addition, those who believe they will not be adequately represented on the committee may apply, or nominate another representative, for membership. *Id.* § 564(b).

²³⁸ An agency may rely on the committee’s results only “to the maximum extent possible consistent with [its] legal obligations.” 5 U.S.C. § 563(a)(7).

contentious court battles over environmental regulations, negotiated rulemaking also aspires to improve participation in an agency proceeding through a combination of private negotiation and public oversight.

Broad-based stakeholder participation in private settlement systems offers a number of comparable benefits. By soliciting and accounting for a wide variety of viewpoints, corporate defendants can increase the likelihood that their settlement programs will satisfy both injured parties and members of the public at large. Controlled public access would also bring defensive settlement mills out from behind closed doors, disseminating relevant information about the procedures and substantive outcomes of the settlement system to parties injured in the same way. At least ideally, public participation would also facilitate new legal norms.

These benefits will admittedly come with costs. Increased stakeholder participation will require time, money, and effort, and will interfere with one of the primary advantages of defensive settlement mills—their efficiency.²³⁹ But efficiency is just one value to be balanced with many others. As discussed above, it exacts too great a cost when pursued to an extreme.

Increased stakeholder participation will also pose new risks. Potential defendants might rely on sham participation to increase the perceived legitimacy of a process while continuing to exclude the voices and perspectives of marginalized stakeholders. To minimize this danger, public regulators could involve stakeholders directly in the formation of rules that would govern corporate settlement mills. When considering whether a class action would be superior to an existing system of compensation, courts could solicit feedback from the same victims dependent on the private settlement process for relief.

The timing of participation will matter. It may be difficult to secure meaningful participation in designing settlement systems in advance of actual injuries. Individuals tend to assign significantly different values to injuries before and after incurring them.²⁴⁰ Thus, *ex ante* focus groups

²³⁹ See Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 Nw. U. L. Rev. 173, 224–25 (1997) (observing the costs of increasing the information available in the decision-making process).

²⁴⁰ See Daniel T. Gilbert & Timothy D. Wilson, Miswanting, in *Feeling and Thinking: The Role of Affect in Social Cognition* 178, 186–87 (Joseph P. Forgas ed., 2000); Timothy D. Wilson & Daniel T. Gilbert, Affective Forecasting, in 35 *Advances in Experimental Social Psychology* 345, 381–84, 388–89 (Mark P. Zana ed., 2003); Daniel Kahneman & Richard H. Thaler, Utility Maximization and Expected Utility, 20 *J. Econ. Persp.* 221, 224 (2006).

may suggest significantly discounted recovery schemes, which victims would later find insufficient. In light of this, courts reviewing a settlement system to determine its adequacy as against class certification should afford less weight to *ex ante* as opposed to *ex post* stakeholder participation. *Ex post* outreach would likely elicit much more meaningful feedback regarding what types of injuries are being incurred, what types of costs are being imposed, and what types of redress would be satisfactory to victims.

4. Revised Ethical Standards for Lawyers

A final internal check on the accountability of corporate settlement mills would be enhanced ethical standards. As discussed above, many settlement mills are regulated only indirectly, through the professional ethical rules of the lawyers who design, negotiate, and effectuate them. But these ethical rules remain rooted in the traditional model of the lawyer as an adversarial advocate—far afield from the roles occupied by lawyers who design and advise on settlement mills. These lawyers are usually in-house counsel who advise their clients and rarely, if ever, interact directly with claimants. They do not appear in court and generally do not engage in the conduct that the rules envision. And yet, they frequently engage in indirect communication with, and exert significant influence over, claimants. To serve as a check on the conduct of these lawyers, the ABA or ALI should issue interpretive guidance, applying the generalized guidance of the Model Rules to the challenges of this lawyering context.²⁴¹

²⁴¹ Similar difficulties occur on the plaintiffs' counsel side of settlement mills, suggesting the need for interpretive guidance there as well. Currently, the Model Rules require that each client in an aggregate settlement give her informed consent to the settlement amount allocated to her by her lawyer. Model Rules of Prof'l Conduct R. 1.8(g) (2012). The American Law Institute has recently proposed that this Model Rule be amended to allow the use of advance waivers. Principles of the Law of Aggregate Litigation § 3.17 (2010). The two sides of the debate illustrate concerns of efficiency and workability of mass settlements on one hand, and client protection and autonomy on the other. Compare id. § 3.17 cmt. (c)(1) (2010) (explaining that the "purpose of modifying the strict requirements of the aggregate-settlement rule is to facilitate large-scale settlements that may have been impeded by the mechanical application of the aggregate-settlement rule to a substantial multiparty settlement"), with Moore, *supra* note 137, at 719 (arguing that "the *Principles*' failure to address ethical rules governing communication and conflicts of interest outside the context of aggregate settlements makes it likely that mass tort lawyers will continue to treat their clients as if they were absent members of a class, without the protections afforded a class").

In particular, the profession should offer more particularized guidance for applying the rules governing lawyers' interactions with represented and unrepresented parties—Model Rules 4.2 and 4.3, respectively—in this context. Model Rule 4.2 provides that a lawyer cannot communicate directly about a matter with a party represented by counsel; she must interact only with the party's counsel.²⁴² Rule 8.4(a) supplements this by providing that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another,”²⁴³ which includes the acts of a client. The comments to Rule 4.2 clarify, however, that a lawyer *can* advise a client on a communication that the client may engage in with another party.²⁴⁴ The bounds of this safe harbor are far from clear. Lawyers who advise corporations in creating and administering defensive settlement mills act in a resulting unregulated gray area between the permissible conduct of advising a client on their own communication and the impermissible conduct of communicating through a client.²⁴⁵ Where they do not personally contact claimants, they can reasonably claim that they are not communicating with claimants; they are only aiding and advising their client in communicating with the claimants.²⁴⁶ Claimants, after all, are likely unaware of their existence and involvement.

These lawyers' communications with unrepresented claimants are similarly exempt from regulation under existing rules. Model Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the

²⁴² Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (2012) (“A lawyer may not make a communication prohibited by the Rule through the acts of another.”).

²⁴³ Id. R. 8.4(a).

²⁴⁴ Id. R. 4.2 cmt. 4 (“Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”); cf. 2 Restatement (Third) of the Law Governing Lawyers § 94 cmt. a (2000) (permitting broad assistance by the lawyer, and suggesting that a lawyer could permissibly draft communications between the client and an opponent).

²⁴⁵ Carl A. Pierce, Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II), 70 Tenn. L. Rev. 321, 332–38 (2003) (describing the ambiguity surrounding “advice”).

²⁴⁶ Id. at 335–37. Lawyers could do so even if they are scripting the client's communications, effectively turning the client into the lawyer's agent in violation of Rule 4.2. Id.

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matter, the lawyer shall make reasonable efforts to correct the misunderstanding.²⁴⁷

Again, Rule 8.4 prohibits a lawyer from violating this Rule through the acts of another, but again, lawyers advising clients on the creation of settlement mills could claim that they are merely advising their clients who are communicating with the claimants. The lawyers themselves, they would claim, are not communicating with claimants directly or indirectly. Moreover, even if the Rule does technically apply, much of its content has little relevance in this context. Given that the recipient of the communication will likely remain unaware of the lawyer's existence, there is little risk that he or she will misunderstand the lawyer's role. And the Rule's comment explains that a lawyer is prohibited from offering unrepresented individuals legal advice (aside from advice to secure independent counsel) but is permitted to provide them with information.²⁴⁸ As commentators have long noted, the line between relaying information (permitted) and offering advice (prohibited) is ambiguous at best.²⁴⁹ A lawyer advising on a settlement mill could reasonably claim to act within the bounds of the rule by helping a client draft communications that inform claimants of the details and advantages of the settlement system. But given that this will likely be the claimant's only source of information about the settlement system or other options, the effect of the conversation will often be the same as if "legal advice" had been offered—the defendant's lawyer will have influenced the unrepresented claimant to follow a particular course of action.

On top of these ambiguities regarding each individual rule, it will frequently be unclear which of the two rules apply. Lawyers designing defensive settlement mills will often advise clients on communications that will be made with both represented and unrepresented claimants.

²⁴⁷ Model Rules of Prof'l Conduct R. 4.3 (2012).

²⁴⁸ See Engler, *supra* note 137, at 98 (discussing the ambiguity and proposing that "[t]he critical inquiry is whether a statement has the effect of influencing the party's course of action, rather than whether it constitutes legal advice").

²⁴⁹ On the one hand, a lawyer is clearly permitted to inform a party of a client's proposed course of action or settlement offer. On the other, a lawyer is clearly prohibited from offering a legal opinion regarding the unrepresented party's position and from persuading, cajoling, or pressuring an unrepresented party from pursuing a particular course of action. There is significant gray area in between, raising questions as to the extent to which a lawyer can propose a course of action that the unrepresented person might want to pursue. See Engler, *supra* note 137, at 84.

Meaningful ethical guidance will therefore prescribe appropriate conduct for lawyers who are advising and aiding their clients in communicating with large numbers of claimants, some represented and some not. New guidance could outline best practices for such communications, including the following statements: the settlement proposal was designed in consultation with counsel; the communication was intended to convey information but not to suggest the best course of action for the claimant; the unrepresented claimants were encouraged to obtain independent counsel; and represented claimants were encouraged to consult their counsel.

A third rule with potential relevance to lawyers' conduct in designing and administering settlement systems is Rule 4.1: Truthfulness in Statements to Others. The Rule provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;
or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.²⁵⁰

A comment then explains that the rule applies only to statements of fact and that “[u]nder generally accepted conventions in negotiation, certain types of statements”—such as estimates of price or value placed on the subject of a transaction or the extent of an injury—“ordinarily are not taken as statements of material fact.”²⁵¹

This rule, designed with individual negotiations in mind, is arguably inappropriate for the institutionalized and collective context of corporate settlement mills. In individual negotiations, statements of value are personal to the speaker, highly subjective, and always subject to change. Values placed on particular injuries in settlement mills, in contrast—and particularly those that rely on recovery grids—are the result of significant research and planning by defendants. Bluffing or puffing

²⁵⁰ Model Rules of Prof'l Conduct R. 4.1 (2012).

²⁵¹ Id. R. 4.1 cmt. 2 (2012); see also Alfini, *supra* note 137, at 266–67 (explaining that the rule “opens the door to what some refer to as ‘puffery,’ and others as lying, in negotiations”); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Negotiation Ethics*, 16 *Harv. Negot. L. Rev.* 95, 99 (2011) (“Model Rule 4.1 legitimizes some deceitful negotiation techniques . . .”).

with respect to these values, which are arguably much less subjective, seems wholly inappropriate. The Rule's comment should therefore be revised to clarify that, in this negotiating context, Rule 4.1 does not permit bluffing or puffing.²⁵² This type of context-specific ethical guidance would address a troubling hole in the profession's ethical rules, while also addressing the significant discrepancy in bargaining power between defendants and claimants.²⁵³

These changes would undoubtedly entail challenges. In particular, enforcement would be difficult. In all contexts, the vast majority of complaints regarding attorney conduct are filed by clients, but the clients here—the potential defendants—have little incentive to object to conduct that is helping them vis-à-vis claimants. The burden of reporting will fall on the claimants, often unrepresented, who will rarely perceive a problem and even more rarely pursue a claim.

Weak enforcement of the profession's ethical standards is a significant problem in all contexts, but it is not a reason to forego disciplinary efforts as a solution to the problems of defensive settlement mills. Rather, it is a reason to view tailored ethical guidance as one of many solutions. It also suggests that tailored ethical guidance should take the form of best practices, bolstered by reputational norms that reward compliance, rather than binding rules, which depend on effective enforcement. Courts could also look to compliance with newly articulated best practices as a factor in determining whether a comprehensive settlement system provides adequate, efficient, and fair compensation.

CONCLUSION

The corporate settlement mills we describe above represent a new category of mass dispute resolution, which uses the state-conferred corporate form to achieve economies of scale in resolving high volumes

²⁵² Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. Rev. 181, 190–92 (1981) (describing multiple variations on Rule 4.1 considered during the drafting process); see also Model Rules of Prof'l Conduct R. 4.1 (Discussion Draft 1980); Engler, *supra* note 137, at 138 (proposing modifications to the rule).

²⁵³ In advocating interpretive guidance, we do not suggest support for a regime of entirely distinct codes of conduct for different contexts. Such a system would fail to address current problems while creating a set of new ones. See Dana Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 Duke L.J. 1243, 1245–47, 1282 (2014).

of claims quickly, efficiently, and predictably. Like other forms of mass dispute resolution—class actions, mandatory arbitration, and aggregate litigation—corporate settlement mills diverge from the traditional one-on-one model of courtroom adjudication in order to provide relief to parties who, because of the nature or size of their claims, would otherwise be unable to afford counsel and gain access to court. They also offer many of the same promises as forms of mass dispute resolution with which we are familiar, including increased access, efficiency, consistency, and closure.

But unlike those more familiar forms, corporate settlement mills offer none of the traditional public functions of adjudication, such as deterring bad behavior by wrongdoers, bringing important information to light, and allowing disparate segments of society to participate in the development of the law. Also unlike those more familiar forms, corporate settlement mills represent a complete break from the traditional model of courtroom litigation. They are created, implemented, and run within the putative defendant itself, often at the encouragement or requirement of government actors.

As such, corporate settlement mills reflect a broader movement within government to privatize traditionally public functions. From welfare benefits to military functions to dispute resolution, our government is increasingly pushing public functions out into private forms.²⁵⁴ Lawmakers do so to increase quality, decrease costs, and enhance access. In doing so, they may also encourage private actors to internalize public values and norms in their dealings with customers, clients, and members of the public generally.

Despite these potential advantages, corporate settlement mills also pose formidable risks. The self-interested private parties who create and run them may treat their in-house dispute resolution forums as a part and cost of doing business—or a “company-owned” court.²⁵⁵

We have proposed a conceptual framework designed to harness the benefits of private dispute resolution through corporate settlement mills, without sacrificing the democratic values that animate public adjudication in the court system. Corporate settlement mills can serve as an appropriate alternative to public adjudication when policymakers

²⁵⁴ Verkuil, *supra* note 159, at 25–40; Gilman, *supra* note 201, at 572; Resnik, *supra* note 24, at 622–27.

²⁵⁵ See *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that First Amendment protections extend to a “company-owned” town).

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adopt sensitive tools to hold them answerable to the regulators, courts, and claimants who rely on them.

