ERIE AND AGGREGATE SETTLEMENT IN DIVERSITY JURISDICTION SUITS

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INTRODUCTION

Over the last decades, United States federal courts have sharply curtailed the ability of parties to reach a global resolution, including through voluntary settlement, in mass tort and similar class action lawsuits.[1] As a result, the multidistrict litigation (MDL) statute[2] continues to play an ever-increasing role in the resolution of these mass claims. Primarily, this is because the MDL process forgoes the more strenuous requirements for class certification under Federal Rules of Civil Procedure 23(a) and 23(b).[3] In an MDL proceeding, the Judicial Panel on Multidistrict Litigation (JPML) can order individual cases, either sua sponte or on the request of one or more parties to the litigation, to be consolidated in a single transferee district court for pretrial proceedings, including settlement negotiations.[4] The JPML can then decide when to remand the cases back for trial in the

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1 *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999) (overruling a grant of settlement class certification to plaintiffs bringing personal injury claims stemming from asbestos exposure under Federal Rule of Civil Procedure 23(b)(1)(B)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624–25 (1997) (denying settlement class certification to plaintiffs bringing similar asbestos-based personal injury claims for failure to comply with Federal Rules of Civil Procedure 23(a)(4) and 23(b)(3)); *see also* PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 1.02 cmt. b(1)(B) reporters' note (AM. L. INST. 2010) ("[T]he class action has fallen into disfavor as a means of resolving mass-tort claims arising from personal injuries.").

2 28 U.S.C. § 1407 (2018).

3 *Compare* FED. R. CIV. P. 23(a) (requiring that a putative class establish numerosity, commonality, typicality, and adequacy of the named plaintiff's representative ability as necessary prerequisites for class certification), *with* § 1407 (requiring that claims aggregated for pretrial proceedings merely "involv[e] one or more common questions of fact").

4 *See* § 1407(a).

original transferor court for each individual claim.[5] By some recent estimations, claims aggregated for pretrial proceedings pursuant to the MDL statute make up a staggering portion of the federal docket, with a reported 437,102 claims pending in an MDL proceeding as of June 2024.[6] A clear plurality of pending MDL proceedings sound in products liability and tort law[7]—claims whose substantive standards and rules of decision, outside of certain particular circumstances, will be governed by state law.[8] Despite its rise in popularity as an alternative forum for mass tort, products liability, and other aggregate dispute resolution, MDL proceedings lack a unique and valuable protection for plaintiffs and defendants alike—the Rule 23(e) class action settlement fairness hearing.[9] Rule 23(e) grants broad authority for the trial court to conduct a sweeping inquiry as to whether the class settlement is "fair, reasonable, and adequate."[10]

Neither the MDL statute nor the federal rules contain a provision authorizing trial courts in non–class action proceedings to exercise the formal procedural power to review aggregate settlements for both procedural and substantive fairness.[11] Nevertheless, judges presiding over MDL and other aggregated proceedings have asserted such a procedural power despite a lack of formal authority.[12] There is no shortage of existing critiques of this approach, with the primary issue being the lack of a positive, enacted source of procedural au-

5 *Id.*

6 U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (June 3, 2024).

7 *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DOCKET TYPE SUMMARY (Aug. 1, 2024). Products liability actions alone comprised 67 of the 178 individual MDL proceedings before district courts as of August 2024. *Id.*

8 *But see* E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 865 (1986) (incorporating products liability law, "including strict liability, as part of the general maritime law"); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (2018) (establishing federal standards for consumer product warranties and providing for federal resolution of claims stemming from breaches of those standards).

9 *See* FED. R. CIV. P. 23(e) (creating a rare requirement that private settlements may be entered into "only with the court's approval"). For other scenarios in which judicial review of private settlements is required, see Rule 23.1 (derivative suits) and Rule 66 (receiverships). FED. R. CIV. P. 23.1, 66.

10 FED. R. CIV. P. 23(e)(2).

11 *But see* FED. R. CIV. P. 23(e)(2)(B) (requiring that the class settlement be "negotiated at arm's length"); FED. R. CIV. P. 23(e)(2)(C) (requiring that the monetary "relief provided for the class is adequate").

12 *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., No. 04-MD-01596, 2005 WL 3117302, at *1 (E.D.N.Y. Nov. 22, 2005) (approving a global settlement in an MDL products liability action); *In re* World Trade Ctr. Disaster Site Litig., 124 F. Supp. 3d 281, 283 (S.D.N.Y. 2015) (describing how Judge Hellerstein "rejected the [previous] settlement" because it "gave too much money to attorneys and not enough to those who were injured").

thority for the trial judge to conduct a fairness inquiry into settlements between present, private parties.[13]

There are two distinct issues that arise with the use of the federal judicial power to review non-class settlements. First, if not from the federal rules, then where does the procedural authority for a judge to review (and ultimately approve or disapprove) a private, non-class settlement come from? Second, if that *procedural* authority exists, then what *substantive* standards determine whether the settlement meets some threshold level of fairness such that it can be approved? Part I of this Note will examine that first question and argue that the procedural authority to approve settlements in non-class aggregate proceedings is justifiable under existing models of federal common law. Part II will analyze the substantive standards that govern settlement approval and ultimately conclude that, under the broad guidelines of *Erie Railroad Co. v. Tompkins*,[14] trial courts must apply state law in determining the fairness of aggregate settlement agreements in diversity jurisdiction suits. The overall fairness of a settlement agreement is a product of its procedural fairness (i.e., the fairness of the settlement contract's formation) and its substantive fairness (i.e., the fairness of the settlement contract's terms).[15] Part III will survey potentially adequate sources of state law for such findings if trial courts choose to assert the procedural authority to police aggregate settlements. Finally, Part IV will briefly offer a practical work-around applicable to some high-profile, non-class aggregate settlements as tested in the recent 3M earplug litigation.[16]

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13 *See, e.g.*, United States v. City of Miami, 614 F.2d 1322, 1330 (5th Cir. 1980) ("If the [private] parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved. . . . [T]he trial court plays no role in overseeing or approving any settlement proposals."); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 165 (2012) ("[N]o statute or rule authorizes or requires judicial review of private mass tort settlements."); Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 353 (2011) ("[J]udges should embrace non-class mass litigation as a private contract in which the parties, and not the judges, choose when and how to settle."); Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1958 (2023) (describing the review of private settlements as an unconstitutional exercise of a "beneficial power" as opposed to the use of an inherent power strictly necessary to the exercise of the Article III judicial power).

14 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

15 The procedural fairness of a settlement contract is distinct from the procedural *authority* that a court possesses to conduct a settlement fairness inquiry in the first instance. The former is discussed in Part II. The latter is discussed in Part I.

16 The 3M Combat Arms Earplug litigation was comprised of over 240,000 active claims as of August 2023. *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885, 2023 WL 8609280, at *3 (N.D. Fla. Aug. 29, 2023) (case management order). In

I. THE PROCEDURAL AUTHORITY TO POLICE NON-CLASS SETTLEMENTS FOR FAIRNESS

A. Background

The first question that must be answered is whether federal trial courts in non-class proceedings can exercise the procedural authority to police aggregate settlements. Typically, the grant of such a formal authority would come from Congress directly, as is the case with the MDL transfer authority in § 1407,[17] or from the Federal Rules of Civil Procedure as authorized by the Rules Enabling Act.[18] In the absence of such direct action, the procedural powers of the court must be impliedly found in some unenacted source of authority. There are two distinct approaches to determining the scope of implied federal trial court procedural authority. The first is the constitutionally focused "inherent powers" model outlined most comprehensively by Professors Robert J. Pushaw, Jr., and Charles Silver.[19] This approach places emphasis on Article III of the Constitution and the structural foundations of the federal judicial power.[20] Specifically, in Pushaw and Silver's view, Founding-era sources and foundational understandings of our constitutional structure counsel in favor of a narrow view of inherent judicial powers, including the ability for federal courts to implement, absent congressional legislation, new procedural powers such as the ability to police non-class settlements for fairness.[21] The second is the procedural common law model, best outlined by then-Professor Amy Coney Barrett.[22] This model tackles *Erie* head-on, outlines a few key doctrinal areas in which federal courts have asserted a procedural rulemaking authority outside the bounds affirmatively set

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an innovative move, the trial judge asserted the authority to approve or disapprove the settlement under 15 U.S.C. § 77c(a)(10) given that the proposed settlement involved the transfer of stock into a settlement fund. *See In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885, 2023 WL 9034299, at *1–3 (N.D. Fla. Dec. 31, 2023).

17 *See supra* notes 2–5 and accompanying text.

18 *See* 28 U.S.C. § 2072 (2018) (delegating to the Supreme Court the power to "prescribe general rules of practice and procedure" so long as those rules do not "abridge, enlarge or modify any substantive right").

19 *See generally* Pushaw & Silver, *supra* note 13.

20 *See id.*

21 *See id.* at 1882–88 (surveying Founding-era historical sources and concluding that "the federal courts' implied or 'inherent' authority would be especially narrow compared to that of the other branches"); *see also infra* notes 28–32 and accompanying text (applying this model to judicial policing of non-class aggregate settlements).

22 *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

by Congress, and provides potential justifications for such an ad hoc rulemaking authority.[23]

B. The Inherent Powers Model

As argued by Professors Pushaw and Silver, there are two species of unenacted federal judicial inherent powers: "indispensable" and "beneficial" implied inherent powers.[24] The former are strictly necessary to effectuate the general vesting of the judicial authority in the Supreme Court of the United States (and subsequently the lower federal courts) by Article III of the Constitution.[25] These implied indispensable powers are constitutional regardless of whether they are codified by enacted law or impliedly necessary.[26] In fact, under this model, implied indispensable powers cannot be abrogated or otherwise impaired by Congress due to their necessity to the exercise of the Article III judicial power.[27] Absent the permissible assertion of such implied indispensable powers, Congress could hamstring the courts' abilities to render final judgments and subject the courts to excessive supervision.

Distinct from the constitutionally permissible exercise of indispensable inherent powers are *beneficial* implied powers. This second species of implied powers is merely helpful to the court in its exercise of its Article III judicial power and is constitutionally impermissible absent congressional authorization.[28] One example of a beneficial implied power identified under this model is the procedural authority of trial court judges to review a non-class aggregate settlement. In analyzing a trial court judge's decision to reject a non-class aggregate settlement,[29] it was not enough that the trial court felt a "pressing need" to resolve litigation that clogged its docket.[30] In effect, exercising the power to review private settlements would be arguably per-

23 *See id.* at 824–29 (outlining abstention, forum non conveniens, stare decisis, remittitur, and preclusion as five examples of procedural doctrine "prescribed by judicial decision rather than enacted law").

24 *See* Pushaw & Silver, *supra* note 13, at 1916–17.

25 *See id.* at 1917.

26 *See id.* at 1916–17 (discussing "implied indispensable powers" that are necessary to finding facts, finding and applying the governing law, and rendering a final judgment). This understanding of implied powers finds support in near-Founding-era caselaw. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . because they are necessary to the exercise of all others.").

27 *See* Pushaw & Silver, *supra* note 13, at 1917.

28 *See id.* at 1917–18.

29 *See infra* note 117 (detailing Judge Hellerstein's rejection of a settlement addressed here by Pushaw and Silver).

30 *See* Pushaw & Silver, *supra* note 13, at 1958.

missible as an indispensable implied power only when the trial judge would be entirely "unable to manage [their] docket."[31] However, since "[c]ourts can enter orders dismissing cases without saying a word about the reasonableness of settlements, their desirability, or anything else having to do with them," the assertion of an implied indispensable power to review non-class settlements "has no valid legal basis."[32]

This understanding of federal implied inherent powers would place greater restrictions on unenacted exercises of the federal judicial power than those that currently exist. Generally, the Supreme Court has upheld exercises of implied powers absent any "necessity or seemingly applicable federal laws."[33] Examples of these unnecessary powers—what this model would label as unconstitutional beneficial implied inherent powers not enacted by Congress directly or through delegation—include, but are not limited to, forum non conveniens[34] and sua sponte dismissal for a plaintiff's failure to prosecute an action.[35] In both of these scenarios and others outlined by Pushaw and Silver,[36] the Court leaned into a presumption that, absent something approaching a clear statement from Congress, it will presume that the exercise of inherent powers, even those best understood as merely beneficial, is impliedly authorized.[37] In contrast, Pushaw and Silver's inherent powers model flips that presumption. Namely, it maintains that courts can constitutionally exercise an implied inherent power only when it is either (1) indispensable or (2) both beneficial and affirmatively sanctioned by Congress.[38]

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31 *Id.*

32 *Id.* at 1956, 1958.

33 *Id.* at 1914–15.

34 *See generally* Am. Dredging Co. v. Miller, 510 U.S. 443 (1994) (reinforcing the validity of forum non conveniens as a justification for dismissing a suit even when the statutory requirements of jurisdiction and venue are met).

35 *See generally* Link v. Wabash R.R. Co., 370 U.S. 626 (1962) (affirming the trial court's ability to dismiss an action despite a lack of formal authority in Federal Rule of Civil Procedure 41(b) to do so absent a motion requesting such action by the defendant).

36 *See* Pushaw & Silver, *supra* note 13, at 1905, 1907 (discussing motions in limine and habeas relief respectively).

37 *See* Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1163–64 (2006) ("Modern inherent power jurisprudence imposes upon Congress a type of clear statement rule, presuming that Congress legislates against a backdrop of inherent power 'law.'"); *see also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (explaining that the Court "do[es] not lightly assume that Congress has intended to depart from established principles" of judicial inherent powers (citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944))).

38 *See* Pushaw & Silver, *supra* note 13, at 1877, 1890–91 (explaining that federal courts unilaterally asserting authority to announce implied beneficial inherent powers would deprive Congress of its ability under the Necessary and Proper Clause to legislate

C. The Procedural Common Law Model

The procedural common law model outlined by then-Professor Barrett more closely tracks the standards regarding inherent procedural powers set forth by the Supreme Court.[39] While this model recognizes a justification for the development of procedural common law based in the inherent powers of the court,[40] it finds further justification for federal courts to assert procedural authority beyond what can fairly be considered "indispensable" under the inherent powers model.

As an initial matter, *Erie*'s command that "[t]here is no federal general common law"[41] is not quite as broad as it may seem on its face. Federal courts retain some ability to engage in substantive common law rulemaking in those areas of the law "concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[42] However, the common law of procedure continues to play an important role in federal courts,[43] despite not being specifically outlined by the Court as an area in which it is "necessary to protect uniquely federal interests"[44] or in which Congress has impliedly "left to federal courts the creation of a federal common law."[45]

Professor Barrett's procedural common law model presents three possible justifications for federal, judge-made procedural doctrines. The first is that there exists a general statutory grant of ad hoc procedural rulemaking authority to courts.[46] This justification lacks force for two main reasons. First, the Rules Enabling Act mandates that any rules of procedure be adopted only after public notice and comment.[47] In other words, procedural rules cannot be adopted on

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on those powers that would be merely beneficial to the courts' exercise of their Article III judicial power).

39 *See generally* Barrett, *supra* note 22.

40 Professor Barrett defines procedural common law as "common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations." Barrett, *supra* note 22, at 814–15.

41 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

42 Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (footnotes omitted). Here, the Court declined to find a federal common law rulemaking authority in a case lacking "uniquely federal interests" or a vesting by Congress in the federal courts of the power to create governing rules of law. *Id.* at 642 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

43 *See supra* note 23 and accompanying text.

44 *Banco Nacional*, 376 U.S. at 426.

45 Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

46 *See* Barrett, *supra* note 22, at 835–37.

47 *See id.* at 836; 28 U.S.C. § 2071(b) (2018).

an ad hoc basis by individual courts. Second, the Rules Enabling Act mandates that only Congress, not the Supreme Court, can confer common law rulemaking authority on the Court.[48]

The second possible justification is that Article III and the associated exercise of the judicial power imbue the judiciary with the inherent power to regulate its own procedure.[49] The historical and precedential support for this justification largely tracks that found by Pushaw and Silver, though Professor Barrett does not agree that the inherent powers of the Court to regulate its own procedure are limited to those powers that are strictly necessary to effectuate the broader judicial power of Article III.[50] The third and final justification, which can partially harmonize modern procedural common law with Pushaw and Silver's more restrictive inherent powers model, is that procedural common law is merely another "enclave" of federal common law on par with other enclaves such as the law of admiralty or interstate disputes.[51] These approaches can be partially harmonized through the "enclave" justification because it does not rely on a broad understanding of the ability of courts to craft ancillary powers either necessary or beneficial to their Article III judicial power. Rather, procedural common law is justifiable in a similar manner as is federal substantive common law—namely, that federal interests in some areas of law are so strong as to preempt state law from controlling. Congress can act at any time to mandate rules of decision in areas otherwise controlled by federal substantive common law,[52] and the same would be true for (at least some) areas of procedure.[53] This

48 *See* Barrett, *supra* note 22, at 837; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 773–74 (1986) ("Because Federal Rules cannot validly provide for the creation of federal common law . . . they are sources of power only if, fairly read, they may be said to require it.").

49 *See* Barrett, *supra* note 22, at 879–88.

50 *See id.* at 880–82 ("[The Court] has never mentioned, much less applied, the [strict necessity] limit in the context of inherent procedural authority, and the procedures it has approved as falling within that authority go far beyond what is strictly necessary to the decision of cases." *Id.* at 882.). Pushaw and Silver address this argument head on, arguing that these authorized procedural rules made by federal common law are unconstitutional. *See* Pushaw & Silver, *supra* note 13, at 1921–22 (arguing that modern forum non conveniens doctrine is unconstitutional).

51 *See* Barrett, *supra* note 22, at 838, 838–42.

52 *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965) (maintaining that Congress has the power to "make rules governing the practice and pleading in those [federal] courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance *and procedure*, are rationally capable of classification as either" (emphasis added)).

53 Congress could always abrogate its delegation of rulemaking authority to the Supreme Court under the Rules Enabling Act. However, there is a strong argument that

ability for Congress to abrogate procedural common law comports with the approach the Court has taken with respect to the authority of federal courts to implement new inherent powers.[54] While this "enclave" justification flips the presumption adopted by Pushaw and Silver,[55] it has its advantages.

Other than tracking current Court precedent better than the inherent powers model's beneficial/necessary distinction, the main advantage lies with the fact that treating federal procedural common law as a traditional "enclave" of federal common law post-*Erie* will, if anything, *undershoot* the ultimate authority of federal courts to regulate procedure in an ad hoc, common law manner. Treating it as an "enclave" means that Congress retains the full ability to abrogate any procedural innovations made by federal courts, just as it does with any substantive common law innovations.[56] So, for those worried about the possible unconstitutionality of certain implied "beneficial" inherent powers to regulate procedure, Congress can always remedy such a purported breach through appropriate legislation. This means that while Congress could presumably not take away necessary inherent powers,[57] federal courts could not assert new beneficial inherent powers absent some level of acquiescence by Congress.[58] Additionally, treating procedural common law as just another enclave of

certain procedural doctrines cannot be abrogated by Congress without infringing on the ability of federal courts to exercise their Article III judicial power. *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 212–20 (2001). *See generally* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004) (arguing that the original meaning of the Constitution places Congress at the forefront of procedural rulemaking for the courts).

54 *See supra* note 37 and accompanying text.

55 Pushaw and Silver find that the Court has adopted a quasi–clear statement rule, whereby it is presumed that Congress has not abrogated the ability to assert inherent powers of the court unless it speaks clearly. *See* Pushaw & Silver, *supra* note 13, at 1922. However, their model adopts the opposite presumption—that courts can assert implied procedural powers only if those powers are either clearly necessary to exercise the Article III judicial power or if courts are explicitly authorized to do so by Congress. *See id.* at 1921–22.

56 *See supra* note 52 and accompanying text.

57 *See* Pushaw & Silver, *supra* note 13, at 1875.

58 *Cf.* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456–57 (2015) (maintaining that Congressional inaction with respect to a past interpretation of a statute is a reason to rule in favor of maintaining a past interpretation). Establishment of unenacted procedural common law doctrines necessarily interprets the Rules Enabling Act as rejecting the idea that the Supreme Court, acting upon the Congressional delegation of rulemaking authority, is the sole arbiter of new procedural rules and doctrines. *See* 28 U.S.C. § 2072 (2018); *see also* Link v. Wabash R.R. Co., 370 U.S. 626, 629–33 (1962) (arguing that Rule 41(b), enacted under the authority granted by the Rules Enabling Act, did not displace the inherent procedural power to sua sponte dismiss a plaintiff's claim with prejudice).

the federal common law would retain all the same constraints the *Erie* framework already places on the development of a federal substantive common law standard.[59] Within this framework, Congress maintains its authority to abrogate any procedural authority asserted by federal courts for their own benefit. Additionally, any assertion of a new procedural authority, developed on an ad hoc, common law basis, would need to adequately balance federal and state interests[60] and satisfy the "twin aims" of *Erie*.[61]

D. Erie *as Applied to the Procedural Authority to Police Non-Class Settlements*

The *Erie* framework, discussed in greater detail in Sections II.A and II.C, as applied to procedural common law rules, counsels in favor of permitting federal courts to assert a procedural authority to check non-class settlements for fairness. This analysis is conditional on the federal court employing state *substantive* standards for determining the overall fairness of the formation and terms of the settlement contract discussed in Part II.

First, there is no federal rule on point as no rule, outside of some specific contexts such as class actions,[62] derivative suits,[63] and receiverships,[64] grants federal courts the procedural authority to review non-class settlements for fairness. There is also no state rule on point. While some states do have a procedural mechanism analogous to the federal MDL regime, none appear to provide for a procedural authority to review non-class settlements.[65] Presumably, few mass tort or other complex cases sounding in state substantive law remain in

59 *See, e.g.*, Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1305–09 (11th Cir. 2002) (applying *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), among others, to determine that the federal forum non conveniens doctrine can apply in lieu of the state forum non conveniens doctrine due to the unique federal interests at play).

60 *See generally* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (concluding that the federal interest in retaining jury decisions over questions of fact meant that federal courts did not have to yield to the state rule in the interest of creating uniform outcomes in both state and federal courts).

61 *Hanna*, 380 U.S. at 468.

62 *See* FED. R. CIV. P. 23(e).

63 *See* FED. R. CIV. P. 23.1.

64 *See* FED. R. CIV. P. 66.

65 *See, e.g.*, TEX. R. JUD. ADMIN. 13.8 (providing for twelve distinct powers of the transferee multidistrict litigation court yet omitting any authority to review final settlement agreements); Glenn A. Grant, Admin. Off. of the Cts., N.J. Cts., Directive No. 02-19 (Feb. 22, 2019) (same with respect to New Jersey's multicounty litigation regime); *cf.* FLA. R. CIV. P. 1.201 (establishing specific "complex" litigation procedures but omitting the procedural authority to review settlements for fairness).

state courts due to the unlikelihood that all plaintiffs will be citizens of the same state as a defendant. Defendants, who tend to prefer litigation in federal court, will therefore be likely to remove cases with sufficient diversity of parties.[66] As a result, state courts have a lessened need compared to federal courts to develop a procedural authority to check non-class aggregate settlements for fairness.

So, when mass tort or other non-class aggregate proceedings end up in federal court on the basis of diversity jurisdiction, there is no state or federal rule addressing the question of the federal court's authority to police a settlement of the proceeding for fairness. The question of whether this authority can be asserted therefore becomes a matter of determining if it falls within the procedural "enclave" of federal common law—directly analogous to the question of whether federal courts may create rules of decision within a substantive enclave of federal common law.[67]

Turning to that analysis, every *Erie* test and the subsequent gloss on those tests counsel in favor of asserting a federal procedural authority to check non-class aggregate settlements for fairness. First, neither of the "twin aims" of *Erie*[68] would be offended by the establishment of such an authority. So long as state substantive law is used to determine the actual fairness of a settlement contract,[69] there would be little risk of forum shopping due to different standards of conduct imposed by state and federal courts. Simply creating the procedural right to review settlements for fairness would create no different standards of conduct between state and federal courts for attorneys or parties drafting settlement terms. For example, if state unconscionability doctrine is the source for analyzing the threshold fairness of the contract, then the only thing that changes is *when* that decision is made—either when the contract is formed, or when enforcement is sought.[70] If it is attorney ethics codes, then those codes were binding on the attorney as a member of that state's bar, regardless of whether or not they are practicing in federal court.[71] In effect,

66 *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 418 (1992) (finding a distinct "defense attorney preference for federal court summary judgment rules and practices" based on survey data).

67 Barrett, *supra* note 22, at 883 ("[F]ederal courts can exercise a common law authority over procedure analogous to their common law authority over substance.").

68 Hanna v. Plumer, 380 U.S. 460, 468 (1965).

69 *See infra* Part II.

70 RESTATEMENT (SECOND) OF CONTS. § 208 cmt. g (AM. L. INST. 1981) (describing the doctrine of unconscionability as a defense for which the remedy is "to deny effect to the unconscionable term").

71 MODEL RULES OF PRO. CONDUCT r. 8.5(b)(1) (AM. BAR ASS'N 2021) ("[F]or conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction *in*

applying state substantive law once a judge asserts the procedural authority to police these settlements means there is no meaningful displacement of state procedural law where none exists. The only thing that would change is *when* that state law is applied—during the contract formation process or after. Nor would it be the case that asserting a federal procedural authority to check non-class settlements for fairness would create an "inequitable administration of the laws"—implicating the second of the twin aims of *Erie*.[72] As stated previously, there exists no state law to offend in this scenario, as seemingly no state provides for a trial court in an aggregate proceeding to check non-class settlements for fairness.[73]

MDL cases comprise a massive portion of the federal docket,[74] perhaps even a clear *majority* of the federal docket.[75] Therefore, the creation of a federal common law procedural rule allowing for the review of non-class settlement agreements would implicate a substantial federal interest in providing an efficient forum for the just resolution of mass tort and aggregate products liability claims. The MDL enabling statute explicitly outlines this unique federal interest.[76] This distinct federal interest in the just resolution of nationwide claims can therefore justify the assertion of a procedural authority, developed on an ad hoc, common law basis, to review non-class aggregate settlements. This is the case even if a court finds that the twin aims of *Erie* are implicated in favor of not creating a federal common law procedural rule providing for federal review of such contracts.[77] As a result, so long as the substantive standards of fairness used by the federal court are derived from state law, we are left with a situation in which "state courts receive[] the benefit of a general rule rendering

which the tribunal sits [shall apply] . . . ." (emphasis added)). While federal district courts can certainly have diverging standards of conduct with respect to the state in which they reside, they cannot prevent a state bar from punishing attorney conduct that takes place within that state's jurisdiction. *See id.*

72 *Hanna*, 380 U.S. at 468.

73 *See supra* note 65 and accompanying text.

74 *See supra* text accompanying note 6.

75 Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019, 10:54 PM EDT), https://www.law360.com/articles/1138928/mdls-surge-tomajority-of-entire-federal-civil-caseload [https://perma.cc/T5US-2GPN].

76 *See* 28 U.S.C. § 1407(a) (2018) (providing that, in addition to providing for the convenience of parties and witnesses, the MDL statute's pretrial consolidation regime is designed to "promote the just and efficient conduct of such [consolidated] actions").

77 *See* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 267 (2008) ("[T]he Court's *Gasperini* decision cited *Byrd* for the notion that the 'outcome-determinat[ion]' test that began with *Guaranty Trust Co. v. York* (and was refined in *Hanna*) must be balanced against 'countervailing federal interests.'" (quoting Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996))).

state common law . . . controlling even in federal courts"[78] while federal courts are free to develop procedure on an ad hoc basis to meet the pressing needs of complex case management, particularly in the context of MDL proceedings.

II. THE SUBSTANTIVE STANDARDS FOR FAIRNESS DETERMINATIONS

A. Background

Now more than eighty-five years old, *Erie's* central command that "[t]here is no federal general common law"[79] still places a strong burden on federal courts in diversity cases to tether substantive law to that of the relevant state. This is because, absent a federal constitutional or statutory rule of decision, "the law to be applied in any case is the law of the State."[80] The bulk of the current MDL docket is centered around products liability claims that sound in state law, do not generally present federal questions, and are present in federal court on the basis of diversity jurisdiction.[81] On questions of substantive products liability and tort law, then, the trial court must look to the law of the forum state. When the JPML transfers a case from one district court to another, the transferee court must apply the law of the state in which the transferor court resides to any disputes arising during pretrial litigation, including settlement.[82]

However, it is quite rare for cases consolidated in an MDL proceeding to be remanded back to the transferor forum,[83] as "[t]rial is often regarded as a failure of the [case] management process."[84] Thus, state law claims aggregated in an MDL proceeding are likely to be resolved—either through dispositive motion rulings or settlement—before they reach a full trial on the merits back in the transferor court. The substantive law of the transferor forum guides the trial court in a few clear ways as it relates to the transferor court's motion rulings. First, it will determine whether or not the plaintiff, facing a Rule 12(b)(6) motion to dismiss, has pled a sufficient claim under state law.[85] Second, it can determine whether there is a "genuine dispute as to any material fact" and whether the moving party is enti-

78 Barrett, *supra* note 22, at 820.

79 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

80 *Id.*

81 *See supra* note 7 and accompanying text.

82 *See* Ferens v. John Deere Co., 494 U.S. 516, 530 (1990) (applying this rule to transfers pursuant to 28 U.S.C. § 1404(a)).

83 *See* Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 772 n.6, 777 n.32 (2019).

84 *See id.* at 780.

85 FED. R. CIV. P. 12(b)(6).

tled to judgment as a matter of state law in diversity cases.[86] In both of these scenarios, the *procedural* exercise of authority, pursuant to the Federal Rules of Civil Procedure, is nevertheless informed by the *substantive* state law at issue in the case.[87] That is, the threshold determination of the strength of the pleadings or a summary judgment motion is determined with reference to the strength of the case under the law of the transferor forum's state. But what role does the relevant state's substantive law have to play in the second main method by which these state law claims are resolved: voluntary aggregate settlement?

B. Defining the Settlement Agreement

The starting point to answering this question is discerning just what settlement agreements actually are. Fundamentally, they are contracts. While some scholars have argued that, as a practical matter, aggregate settlements "deserve more public scrutiny and regulation than individually negotiated contracts, as parties lose individual control over their terms and conditions,"[88] that does not change the current doctrinal approach to settlement agreements at the federal level.

In *Kokkonen v. Guardian Life Insurance Co. of America*,[89] a plaintiff brought a suit in California state court alleging a range of state law claims following the termination of the plaintiff's insurance policy.[90] The defendant removed the case to the Eastern District of California on the basis of diversity jurisdiction.[91] Before the conclusion of the trial, the parties reached a settlement agreement whereby all claims and cross claims would be dismissed with prejudice.[92] The district court trial judge subsequently signed the "Stipulation and Order of Dismissal with Prejudice" but retained no role for the federal district court to enforce the settlement agreement.[93] The parties disputed their respective obligations under the settlement agreement, and the defendant moved for the court to enforce the settlement agreement

86 FED. R. CIV. P. 56.

87 *See, e.g.*, McKay v. Novartis Pharm. Corp., 751 F.3d 694, 698 (5th Cir. 2014) (affirming an MDL transferor court's grant of partial summary judgment on products liability claims that hinged on application of Texas law).

88 David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 596 (2017).

89 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

90 *Id.* at 376.

91 *Id.*

92 *Id.* at 376–77.

93 *Id.* at 377.

against the plaintiff.[94] The district court agreed with the defendant and enforced the agreement against the plaintiff under the court's "inherent power."[95]

Justice Scalia, in a unanimous opinion for the Court, rejected the district court's approach in strong terms. "The short of the matter is this: The suit [to enforce the settlement agreement] involves a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. . . . [E]nforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction."[96] Thus, settlement agreements are private contracts, governed by state law, and not sufficiently related to the underlying suit to be enforced through ancillary jurisdiction (absent a provision in the agreement that retains such a jurisdictional basis for the court).[97] While the practical concerns of treating aggregate settlements in a manner similar to individual settlements are clear,[98] they are mitigated in part by the "opt-in" model of aggregate settlement in non-class proceedings.[99] Specifically, unlike class settlements under Rule 23, non-class aggregate settlements require each plaintiff to voluntarily sign on to the settlement agreement.[100] This framework provides further support for understanding settlement agreements generally, and aggregate settlements specifically, as private contractual agreements arising under state law, as the plaintiff's individual, voluntary dismissal of claims serves as consideration for the compensation they receive in return.[101]

C. Erie *Commands that State Law Govern Settlement Fairness Determinations*

We are then left with a situation in which the parties in a non-class aggregate proceeding decide to negotiate a private contract to settle their state law claims. The trial judge proceeds to assert the procedural authority to police the settlement contract for fairness.

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94 *Id.*

95 *Id.*

96 *Id.* at 381–82 (emphasis added).

97 *Id.* at 381.

98 *See, e.g.*, Jaros & Zimmerman, *supra* note 88, at 560–61 (noting that, among other issues, MDL aggregate settlements can lead to "damage averaging" whereby strong claims are undervalued and weak claims are overvalued relative to their value as an individual suit, divorcing the claim's compensated value from its value on the merits).

99 *See* Grabill, *supra* note 13, at 166.

100 *See* FED. R. CIV. P. 23(e)(2)(A) (explaining that the class as a whole, including unnamed plaintiffs, can only be bound by a class-wide global settlement if "the class representatives and class counsel have adequately represented the class").

101 *See Kokkonen*, 511 U.S. at 381.

There is no federal rule of decision on point, as even a broad construction of Rule 23[102] in an *Erie* analysis cannot reasonably allow for its application in the non-class context.[103] The court is thus in a position where it must make a "relatively unguided *Erie* choice" regarding what standards govern the fairness determination.[104] Now solidly in "*Erie*'s murky waters,"[105] the court faces the question of whether to "follow the state law on that issue, or . . . develop what is essentially a federal common law rule to decide the issue."[106] Trial courts asserting the procedural authority to police a non-class aggregate settlement for fairness must then decide whether to use some source of state substantive law or create what is "essentially a federal common law" of aggregate settlement. In making this choice, the court should consider the implications under the "twin aims" of *Erie*.[107] Specifically, the choice between state and federal common law substantive standards for a fairness determination should be made in a way that discourages (1) forum shopping and (2) the "inequitable administration of the laws."[108]

The first aim of the *Erie* rule counsels in favor of applying state substantive standards when policing non-class aggregate settlement. As stated, these settlement agreements are best understood as voluntary contractual agreements sounding in state law.[109] If federal trial judges were to apply a common law of substantive standards for policing contracts, there would essentially be a separate track of federal law contract formation interpretation that would serve as a bar to settlement and contract formation where one may not exist in state law.[110] While any regime that creates an incentive to forum shop will be hampered following the passage of the Class Action Fairness Act's

102 *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–400 (2010) (holding that the certification requirements of Rule 23(a) apply generally as the sole prerequisites for certifying a class action when it comes into conflict with a state class action prerequisite).

103 *Cf.* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 236–38 (2004) (proposing an amendment to 28 U.S.C. § 1407 so that the authority to police class settlements in Rule 23 can be "extend[ed] to settlements in the non-class aggregated context as well").

104 Hanna v. Plumer, 380 U.S. 460, 471 (1965). The alternative is a situation in which the federal rule is on point, and, therefore, the only remaining question is whether the federal rule is valid under the Rules Enabling Act. *See Shady Grove*, 559 U.S. at 398–400; 28 U.S.C. § 2072 (2018).

105 *Shady Grove*, 559 U.S. at 398.

106 Steinman, *supra* note 77, at 264–65.

107 *Hanna*, 380 U.S. at 468.

108 *Id.*

109 *See supra* Section II.B.

110 *See, e.g.*, *In re* World Trade Ctr. Disaster Site Litig., 124 F. Supp. 3d 281, 283 (S.D.N.Y. 2015).

expansion of federal court jurisdiction in aggregate proceedings,[111] creating mirrored tracks of state and federal substantive contract review would inevitably create differing substantive standards on the same legal subject: the procedural and substantive fairness of contracts sounding in state law. This point will be examined in greater detail in Part III.[112]

The inquiry under the second aim of the *Erie* rule is not as clear. Take, for example, the guidance on this question from the Supreme Court's decision in *Chambers v. NASCO, Inc.*,[113] in which the Court analyzed whether or not to develop a federal standard regarding when to require a defendant to pay the plaintiff's attorney's fees as a sanction for poor conduct.[114] Development of a separate, essentially common law substantive standard was necessary because the sanctioned conduct did not directly fall under the scope of Rule 11.[115] There, the Court reasoned that imposing a federal standard did not create a risk of inequitable administration of the laws because "the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed."[116] On one hand, the fairness determination regarding a non-class settlement contract is not necessarily dictated solely by the parties' conduct—it can also hinge on the substance of the contract.[117] In that way it is dissimilar to the *Chambers* analysis that focuses on the distinction between the

111 *See* 28 U.S.C. §§ 1332(d), 1453 (2018); Steinman, *supra* note 77, at 299–300 ("Congress' expansion of federal jurisdiction was designed to let defendants—who tend to fare better in federal court—win those forum shopping battles." *Id.* at 300 (footnote omitted).).

112 *See infra* Section III.B (arguing that independent federal substantive standards for policing of non-class aggregate settlement contracts may create different standards of conduct for settlement agreements depending on whether the suit was brought in state or federal court).

113 Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

114 *See id.* at 35–42; Steinman, *supra* note 77, at 266.

115 *See Chambers*, 501 U.S. at 41–42; FED. R. CIV. P. 11.

116 *Chambers*, 501 U.S. at 53.

117 *See In re* World Trade Ctr. Disaster Site Litig., 124 F. Supp. 3d 281, 283 (S.D.N.Y. 2015) (Judge Hellerstein rejecting the proposed mass tort settlement because it provided "not enough" compensation to the plaintiffs); *see also* Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 175 (2012) (Judge Hellerstein explaining that he had to "determine whether the proposed settlement agreement was fair to the plaintiffs, *substantively and procedurally*" (emphasis added)). While the 9/11 responders' litigation was based in federal law tort claims, the settlement contract that arose out of the federal question litigation would still arise under state contract law. *See generally* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994). *See also* Pushaw & Silver, *supra* note 13, at 1957 (explaining that the difference between the consolidated actions in the 9/11 responders' litigation and MDL proceedings was "immaterial" for the purposes of analyzing the validity of Judge Hellerstein's assertion of an authority to review the settlement contract).

litigation's outcome and the parties' conduct during the litigation. On the other hand, a trial court employing its own substantive standards for reviewing non-class settlement contracts may contradict *Erie's* guarantee that "if [the litigant] takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court."[118] This would occur any time that a trial court applying its own substantive review, untethered to state law, would reach a different outcome than the relevant state court would reach when reviewing a contract under its law for procedural and substantive fairness.[119]

There is no discernible federal interest in maintaining separate substantive standards for review of settlement contracts that would overcome a finding that such standards would run afoul of *Erie*'s twin aims. Under the standard set forth in *Byrd v. Blue Ridge Rural Electric Cooperative*,[120] federal courts may inquire as to the federal system's interest in maintaining its own standards and practices, even when that practice has the power to cause a federal court to reach a different outcome in the suit than a state court hearing the same claim would.[121] Here, there is no such federal interest in maintaining substantive settlement contract review standards distinct from those found in state law. Unlike the federal interest in maintaining a preference for jury resolution of factual questions, which "is not in any sense a local matter," a distinct federal standard of settlement contract review would directly implicate local and state matters of contract law.[122]

Neither the outcome determinative approach, nor the twin aims of *Erie*, nor the federal interest implications counsel in favor of developing a federal substantive standard of judicial review of private settlement contracts, even in aggregate proceedings such as MDLs. Trial courts asserting a procedural authority to review such contracts for both substantive and procedural fairness[123] must therefore turn to the relevant state's substantive law for guiding standards. Part III

118 NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 706 (5th Cir. 1990) (discussing *Erie*), *aff'd*, *Chambers*, 501 U.S. 32.

119 *See infra* Section III.B (discussing practical differences between the common law of contract unconscionability and how federal judges review settlement contracts for substantive and procedural fairness).

120 Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

121 *See* Steinman, *supra* note 77, at 259; *Byrd*, 356 U.S. at 537–38 ("[W]ere 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice. . . . [T]he inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule . . . .").

122 *Byrd*, 356 U.S. at 539 (quoting Herron v. S. Pac. Co., 283 U.S. 91, 94 (1931)).

123 *See* Hellerstein et al., *supra* note 117, at 175.

turns to address potential sources for substantive standards of settlement contract fairness in state law.

III. POTENTIAL SOURCES OF STATE SUBSTANTIVE LAW FOR JUDGING NON-CLASS SETTLEMENT

A. Background

The conclusion of this framework, whereby a federal court may assert a procedural authority to review non-class aggregate settlements, creates something approaching an "Erie guess."[124] An *Erie* guess is the determination by a federal court of what a state high court would decide on a question of state law when no such decision exists.[125] It is not quite a true guess because states already have certain substantive guidelines for when otherwise valid contracts are voided by unfairness either in their formation or in their substantive terms.[126] However, it is not evident how these state substantive guidelines would be applied in the context of a settlement fairness inquiry. In this instance, courts will likely look initially to primary sources within a state law, such as the constitution, statutes, and regulatory codes, before moving to extrinsic sources such as treatises.[127] Given that this Note does not purport to examine any one state's laws in particular, it will focus on secondary sources of state common and positive law that are broadly applicable across jurisdictions. These sources will not serve as definitive guideposts for the state substantive law that a federal court could employ in its determination of a non-class aggregate settlement's overall fairness. Rather, they will serve as potential starting points for examining state law and its potential applicability to judging aggregate settlements in diversity jurisdiction suits.

B. State Unconscionability and Related Doctrines

Perhaps the most doctrinally clear and practically efficient area of state law that federal courts could turn to when conducting a review of settlement contracts sounding in state law is the relevant state's unconscionability and related doctrines, such as the duty of good faith and fair dealing. This conclusion flows from two main

124 Howe *ex rel.* Howe v. Scottsdale Ins. Co., 204 F.3d 624, 627 (5th Cir. 2000).

125 *See id.*

126 *See infra* Sections III.B–C.

127 *See, e.g.*, Weyerhaeuser Co. v. Burlington Ins. Co., 74 F.4th 275, 284–86 (5th Cir. 2023) (applying this methodology to Louisiana law and finding that, in at least two cases, the Court had turned to treatises to inform its *Erie* guess regarding how a Louisiana court would rule on the issue presented).

premises. First, settlement agreements are contracts almost exclusively governed by state law and enforced primarily by state courts.[128] Second, the inquiry federal courts conduct, either under Rule 23(e) or under their own asserted procedural authority to police non-class aggregate settlements, already heavily resembles an application of general unconscionability and good faith doctrines. To begin with, the doctrine of unconscionability addresses both procedural and substantive fairness. "[T]he policy against unconscionable contracts or terms applies to a wide variety of types of *conduct*. . . . Relevant factors include weaknesses in the contracting *process* . . . ."[129] This includes, but is not limited to, considerations of a possible "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party."[130] This second consideration of the unreasonable terms of a contractual agreement speaks directly to the agreement's substantive fairness or whether a "gross disparity in the values exchanged" necessitates rejection of a term or the contract as a whole in application.[131] The *Restatement (Second) of Contracts* speaks broadly about the role the unconscionability doctrine plays in determining the validity of contractual agreements.[132]

Yet, using state unconscionability doctrine would not provide for a seamless transition for federal courts to mirror a Rule 23(e) analysis in the non-class aggregate context. For one, states differ in their doctrinal requirements for a showing of unconscionability. For instance, "[m]any courts, perhaps a majority, have held that there must be some quantum of both procedural and substantive unconscionability to establish a claim, and take a balancing approach in applying them."[133] Others do not. As stated, courts receiving aggregated claims, particularly trial courts presiding over claims in an MDL proceeding under diversity jurisdiction, are bound by the substantive law

128 *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–82 (1994).

129 RESTATEMENT (SECOND) OF CONTS., *supra* note 70, § 208 cmt. a (emphases added). This language heavily mirrors that employed by Judge Hellerstein while explaining his thought process during the 9/11 responders' litigation. Hellerstein et al., *supra* note 117, at 175 ("I had to determine whether the proposed settlement agreement was fair to the plaintiffs, *substantively and procedurally*." (emphasis added)); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997) ("Rule 23(e) . . . protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives."). The first of those considerations goes to the substantive fairness of the contract's terms. The second goes to the fairness of the formation of the contract—i.e., its procedural fairness.

130 RESTATEMENT (SECOND) OF CONTS., *supra* note 70, § 208 cmt. d.

131 *Id.* § 208 cmt. c.

132 *See id.* § 208 cmt. a ("The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.").

133 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2024) (quoting Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 58 (Ariz. 1995) (emphasis omitted)).

of the forum state in which the federal transferor court resides.[134] This means that when claims arising from different states with different substantive law, particularly different doctrines surrounding unconscionability, are consolidated in one MDL court for pretrial purposes, that MDL court is bound to apply the substantive law of the transferor forum with respect to each individual claim. Plaintiffs whose claims are consolidated in an MDL proceeding are not treated as a class; they retain the individuality of their claims.[135]

Imagine then a not uncommon scenario in which parties to a mass tort or large, consolidated products liability action predicated on diversity jurisdiction, such as the ongoing 3M combat arms earplug litigation,[136] decide to form a settlement contract. The trial court judge validly asserts a common law procedural authority to review that contract for substantive fairness and, as required under *Erie*,[137] looks to state law to discern the substantive standards under which that contract should be reviewed. Because claims transferred from various transferor courts would have varying state law applied to them, the trial court judge would then have to conduct a fairness review under *every state substantive law* that applies to individual claims transferred from their respective district courts. Obviously, this has massive implications for the practicality of conducting a fairness inquiry into a settlement contract. The aforementioned 3M combat earplug litigation maintained hundreds of thousands of claims that would, ultimately, be settled.[138] If the trial court conducted a fairness inquiry into that settlement under a common law procedural authority, it would then be bound to analyze the settlement contract with respect to each state's substantive law from which individual claims were transferred. So, if a case has claimants from Arizona, Florida, and New York, the court would have to analyze the contract under those respective state's contract doctrine with respect to the claims transferred from a federal district court residing in each of those in-

134 *See In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1173–76 (D.C. Cir. 1987), *aff'd sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) (summarizing the law as requiring the transferee court in diversity suits to apply the law of the state in which the transferor court resides, but declining to extend a similar firm rule with respect to the federal circuit court precedent of the transferor district court).

135 *See generally* 28 U.S.C. § 1407 (2018) (providing for no common treatment of claims consolidated for pretrial purposes).

136 *See supra* note 16 (describing that, as of August 2023, there were over 240,000 claims pending before the trial court presiding over the 3M litigation).

137 *See supra* Part I.

138 *See supra* note 16; *cf. In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885 (N.D. Fla. Aug. 29, 2023) (settlement implementation order) (notifying eligible claimants of the requirements under the "Master Settlement Agreement"); *supra* note 75 and accompanying text.

dividual jurisdictions. Such an arduous process puts significant strain on the MDL statute's stated purpose of promoting the "just and *efficient*" resolution of consolidated claims.[139] This same practical concern would apply to differing state attorney ethics codes discussed below.

C. Attorney Ethics Codes

Utilizing state attorney ethics codes for the purpose of determining the fairness of a non-class aggregate settlement would be even more modest in its scope and application than utilizing state unconscionability doctrine. As an initial matter, the ABA's Model Rules of Professional Conduct and similarly adopted state provisions would likely govern only the procedural fairness of the settlement contract's formation, not its substantive terms.[140] Even this limited application to settlement contract formation would apply only if the attorneys, rather than individual or lead litigants in an aggregated proceeding, are the ones negotiating the settlement contract. However, there are at least two important ways in which these conduct rules can mirror the inquiry performed under Rule 23(e) and other settlement fairness inquiries—namely, addressing self-interested dealing by plaintiffs' attorneys. First, Model Rule 1.7(a)(2) effectively prohibits self-interested dealing by attorneys.[141] Namely, it prohibits attorneys from engaging in behavior that, because of their own self-interest, would harm the interests of their client.[142] Second, Model Rule 1.7(a)(1) and (2) also prevent an attorney from representing a client when their representation of another client is directly adverse or materially contrary to the other client's interests.[143] Both of these provisions track the way in which attorney conduct has been regulated under Rule 23(e) at the federal level and could provide some guidance for checking the procedural fairness of non-class aggregate settlements.

In *Ortiz v. Fibreboard Corp.*,[144] the Supreme Court found that a class settlement failed to meet Rule 23(e)'s total fairness burden, in

139 § 1407(a) (emphasis added).

140 *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2021) (governing attorney compensation regimes); *see also* Pushaw & Silver, *supra* note 13, at 1943–52 (treating judicial adjustment of attorney's fees and the judging of settlement fairness as separate inherent powers).

141 *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR. ASS'N 2021) (prohibiting an attorney from representing a client when "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer").

142 *See id.*

143 *See id.* r. 1.7(a)(1)–(2).

144 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

part because class counsel failed to negotiate a settlement that served the interests of some potential claimants they represented.[145] Class counsel negotiated a settlement in which they "agree[d] to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent[ed]."[146] This exclusive settlement was negotiated because, in order to secure a side settlement for roughly 45,000 of the non–class member clients represented by class counsel, the class counsel also had to negotiate a global class settlement with the defendants.[147] As such, the conflict of interest for attorneys representing both non–class members and putative class members—the settlement for the former being contingent on global settlement with the latter—created problems sufficient to vitiate the settlement contract.[148] This approach most clearly tracks Model Rule 1.7(a)'s prohibition on representing multiple clients with divergent interests. However, considering that class counsel's fees were likely contingent on creating a global settlement that excluded many individuals they purported to represent, it can also be plausibly construed as a violation of 1.7(a)'s effective prohibition on attorney self-dealing. These model rules, as adopted by various jurisdictions, could then serve as a primary source of substantive state law to make an *Erie* guess as to how a state would approach judging non-class aggregate settlement agreements.

One flaw with using this source of state law for establishing substantive guidelines for a settlement fairness inquiry is that the remedy for attorney conflicts of interests is not typically to void the settlement. Rather, it is to disqualify the attorney who violates the applicable rules of conduct.[149] It is therefore unclear, absent authorization analogous to Rule 23, whether attorney misconduct could be used to vitiate an aggregate settlement instead of simply disqualifying the offending attorney.

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145 *See id.* at 854–55.

146 *Id.* at 854.

147 *See id.* at 852–53.

148 *See id.* at 858–59. While this case was resolved primarily under Rules 23(b)(1)(B) and 23(c)(4)(B), the analysis that conflicts of interest created the need for subclasses directly supports a finding that any settlement created without subclasses would be unfair under Rule 23(e).

149 *See, e.g.*, City and County of San Francisco v. Cobra Sols., Inc., 135 P.3d 20, 30 (Cal. 2006) (disqualifying an entire city attorney's office from a case based on an individual attorney's conflict of interest being imputed to the city); Cal Pak Delivery, Inc. v. United Parcel Serv., Inc., 60 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997) (disqualifying class counsel for soliciting personal payments in exchange for dismissing client's cause of action).

D. Federally Implemented Substantive Standards

It is worth mentioning briefly that any congressional action to give MDL transferee courts the authority to engage in a non-class aggregate settlement fairness inquiry would obviate the need for using state substantive law for these purposes. It would not be necessary for Congress to specify a substantive law of settlement contract fairness to eliminate the need for turning to state contract law, ethics rules, or some other source of state substantive law.

Take 15 U.S.C. § 77c(a)(10) as an example. This provision mandates a fairness hearing before an unregistered security is exchanged as consideration for an outstanding legal claim.[150] This provision does not require turning to state substantive law for two main reasons. First, it can be understood as a grant by Congress for courts to create an enclave of federal substantive common law that displaces any contrary state law.[151] Second, and much more simply, it can be understood as simply delegating to the trial court judge to determine, within permissible bounds of discretion, whether the "fairness of such terms and conditions" is sufficient.[152] This understanding is consistent with many other areas of federal law that call on trial judges to exercise their discretion to determine whether some judicial action would be fair, reasonable, or prejudiced—without any reference to the state law of the relevant forum.[153] A simple amendment to the MDL enabling statute,[154] analogous to Rule 23(e) or 15 U.S.C. § 77(c)(a)(10), would be enough to avoid the perils of the *Erie* guess and the potentially unworkable situation in which the diverging law of various transferor courts is applied on a case-by-case basis to individual parties to a non-class aggregate settlement.

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150 *See* 15 U.S.C. § 77c(a)(10) (2018) (providing for a "hearing upon the fairness of such terms and conditions" of any exchange in which a security is exchanged for "claims or property interests"). This statute and its application will be discussed further *infra* Part IV.

151 *Cf.* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States . . . .").

152 § 77c(a)(10).

153 *See, e.g.*, FED. R. EVID. 403 (permitting the trial court, without reference to state evidence law, to exclude otherwise relevant evidence if its probative value is outweighed by the danger that it will be unfairly prejudicial to a party).

154 *See* 28 U.S.C. § 1407 (2018).

IV. THE 3M LITIGATION APPROACH TO SECURITY-FUNDED COMMON SETTLEMENTS

Finally, the particularly innovative approach to a particular type of settlement in which corporate defendants engage in aggregate settlement of claims deserves attention. Corporations have the option of placing their own stock holdings in the overall settlement fund from which valid claimants may draw. 3M was permitted to issue stock that was not registered with the SEC and did not comply with certain disclosure requirements typically required by the Securities Act of 1933[155] after a hearing on the fairness of such issuance.[156] After holding a fairness hearing, the trial court determined that the issuance of the new corporate stock was fair to settlement claimants under a totality of the circumstances test.[157] Most importantly, the court found that the settlement agreement was both procedurally *and* substantively fair, mirroring the approach already taken in other instances of judges asserting the authority to review non-class aggregate settlements.[158]

The court determined the issuance of stock for settlement to be procedurally fair for multiple reasons. First, it was negotiated at arm's length "as part of a mediation spanning multiple months under the supervision of mediators appointed by the Court."[159] Furthermore, claimants who may receive proceeds from the fund derived from the issuance of unregistered stock were put on adequate notice and provided with adequate opportunity to appear at the fairness hearing.[160] There are other considerations mentioned by the court in its opinion, but the fundamental idea is that the settlement negotiations produced an arm's-length agreement that adequately provided for input from all claimants in this MDL proceeding that would potentially draw from the value of the issued stock to satisfy their claims.

The issuance of the stock for settlement purposes was similarly determined to be substantively fair. The trial court drew on its extensive experience managing the pretrial proceedings to determine the

155 Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77bbbb).

156 *See In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885, 2023 WL 9034299, at *1–3 (N.D. Fla. Dec. 31, 2023) (interpreting the application of 15 U.S.C. § 77c(a)(10)).

157 *See id.* at *1.

158 *See id.* at *7 ("[T]he terms and conditions of the Agreements . . . are fair both *procedurally and substantively* to all persons and entities on behalf of whom the shares of 3M common stock will be issued . . . ." (emphasis added)); Hellerstein et al., *supra* note 117, at 175 (mirroring this language directly).

159 *In re 3M*, 2023 WL 9034299, at *5.

160 *See id.* at *3.

value of individual claims against 3M.[161] It then balanced the admittedly speculative value of the unregistered stock against the value of those claims.[162] Of particular concern was the uncertainty in valuing unregistered stock against the value of individual plaintiffs' claims and the potential dilution of the 3M stock's value after large issuances to cover over a billion dollars of the total settlement figure.[163] The court called primarily on expert testimony[164] in determining that the value of the issued stock would not be diluted and that the value of the unregistered 3M stock could be accurately ascertained.[165] In this way the court sufficiently ensured that the overall value of the unregistered stock, once issued and placed into the settlement fund, would be adequate to cover the claims to which it would be paid. While 3M ultimately elected to pay out the entirety of the six-billion-dollar settlement in cash,[166] the trial court's fairness proceeding nevertheless provided an important backstop to ensure that the use of unregistered stock to partially fund the settlement was both procedurally and substantively fair to plaintiffs. As such, it can provide a useful, if limited, model for policing the fairness of MDL and other non-class aggregate settlements.[167]

CONCLUSION

Federal common law and the *Erie* framework are a dense web of legal guidelines that can often point to different conclusions. However, this Note lays out a potential justification for trial court judges to make a good faith assertion of a procedural power to review non-class aggregate settlements for their overall fairness. Once that procedural power is asserted, *Erie* and its progeny counsel strongly in favor of applying state substantive law in determining whether or not an aggregate settlement contract is indeed fair—both by its terms and

161 *See id.* at *4.

162 *See id.* at *5.

163 *See id.*

164 *Id.* at *4 ("[A]s the Parties' expert witness, Robert Jackson testified, three considerations substantially weigh in favor of a fairness finding in connection with this exchange.").

165 *See id.* at *5.

166 *See* Martina Barash, *3M to Pay $1 Billion in Cash Instead of Stock in Earplug Deal*, BLOOMBERG L. (Jan. 29, 2024, 3:46 PM EST), https://www.bloomberglaw.com/product/blaw/bloombergterminalnews/bloomberg-terminal-news/S81J1RDWLU68 [https://perma.cc/C8B8-TT6G].

167 Engaging in such a formally authorized inquiry is conditional on the corporate defendant deciding to fund settlement, at least in part, through the issuance of unregistered stock. Additionally, nothing in the court's settlement fairness opinion suggests that 15 U.S.C. § 77c(a)(10) authorized the court to police the substantive and procedural fairness of the portions of the settlement funded by cash rather than 3M stock.

in its formation. The practical difficulties in applying differing and often speculative substantive standards derived from what is essentially an *"Erie* guess" across thousands of claims arising from different transferor forums are not to be taken lightly. However, MDL judges are at least somewhat used to such challenges, as the state law of the transferor forums informs all pretrial substantive decisions, such as the strength of the claims and their ability to pass summary judgment. The easiest solution to the difficulties of judging non-class aggregate settlements would be either for Congress to amend 28 U.S.C. § 1407 or for the Supreme Court to adopt a new rule addressing the issue. Such an amendment or rule change could both provide the procedural authority to conduct a fairness inquiry and supply substantive standards for that inquiry. In the absence of such an intervention, the federal courts should be free to use their procedural common law–making authority to adapt their own internal practices to meet the challenges of our day, just as they did with other procedural developments such as forum non conveniens. Congress remains free to abrogate such an innovation should it so choose.