Administrative Conference of the United States

AGGREGATE AGENCY ADJUDICATION

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ABSTRACT

Federal agencies in the United States adjudicate hundreds of thousands of cases each year. Yet even with this high volume of cases, agencies have not widely deployed tools used in federal court to efficiently resolve large groups of claims, such as class actions and other complex litigation procedures.

A handful of federal administrative programs, however, have quietly bucked this trend—employing class action rules, collective claim handling, and even the kinds of "trials by statistics" once embraced by federal judges around the United States. The Equal Employment Opportunity Commission, for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal employees before administrative judges. Since the early 1990s, the National Vaccine Injury Compensation Program has used "Omnibus Proceedings," which resemble federal multidistrict litigation, to pool together common claims that allege a vaccine injured large groups of children. And facing a backlog of hundreds of thousands of claims, recently the Office of Medicare Hearings and Appeals announced a new "Statistical Sampling Initiative"—a pilot program that will use trained and experienced experts to resolve hundreds of common medical claims at a time by statistically extrapolating the results of a few hearing outcomes.

These efforts to employ the tools of aggregation in administrative proceedings have received little examination. Consequently, very little is known about: (1) how agencies choose cases or claims appropriate for aggregation, (2) which aggregation tools these agencies use, (3) how often they used different types of tools, (4) the successes and failures of these programs, and (5) the other types of proceedings in which different aggregation tools might facilitate more expeditious, consistent, and fair handling of large groups of claims.

After examining recent efforts by federal agencies to aggregate administrative proceedings and interviewing the key policymakers involved, we identify the types of agency adjudications in which aggregate procedures have the greatest potential, the challenges and obstacles to greater use of aggregation, and broader lessons about what aggregation procedures mean for adjudications conducted by federal agencies.

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AGGREGATE AGENCY ADJUDICATION

Michael Sant'Ambrogio* and Adam Zimmerman†

INTRODUCTION

Federal agencies in the United States adjudicate hundreds of thousands of cases each year—more than our federal court system. But unlike other large adjudicative systems, federal agencies have long avoided tools used by courts to efficiently resolve large groups of claims: class actions and other complex litigation procedures. Consequently, in a wide variety of cases, agencies risk wasting resources in repetitive adjudication, reaching inconsistent outcomes for the same kinds of claims, and denying individuals access to the affordable representation that aggregate procedures promise. Today, the number of claims languishing on administrative dockets has become a "crisis," as disabled employees, coal miners, wounded soldiers, and even medical providers sit on endless waitlists to appeal similar administrative decisions that frequently result in reversal. [1]

Existing tools in administrative law often ignore concerns raised by large groups of people in agency adjudication. Part of the reason for this

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[1] Over the past several years, problems in many different administrative courts have been described as "a crisis." *See* Anthony Brino, *Medicare Claims Crisis Pits Hospitals Against Feds, Auditors,* Healthcare Finance (May 27, 2014), http://www. healthcarefinancenews. com/news/growing-claims-appeal-crisis; *see also* Veterans for Common Sense v. Shinseki, 644 F.3d 845, 878 (9th Cir. 2011) ("The current delays therefore constitute a deprivation of Veteran's mental health care without due process, in violation of the Fifth Amendment."), *vac'd on reh'g en banc* 678 F.3d 1013 (9th Cir. 2012); *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hr'g Before the S. Comm. on the Judiciary,* 112th Cong. 1 (2011) [hereinafter *Ensuring Justice in Immigration*] (statement of Karen T. Grisez, Chair of the Am. Bar Ass'n Comm'n on Immigration) (arguing that "our immigration court system is in crisis"); Erik Eckholm, *Disability Cases Last Longer as Backlog Rises*, N.Y. TIMES, Dec. 10, 2007, at A1 (describing 500 day waiting periods for social security claims as "purgatory"); Press Release, Jay Rockefeller, Senator Rockefeller Releases GAO Report on Black Lung Benefits (Oct. 30, 2009), http://rockefeller.senate.gov/press/record.cfm?id=319537 (finding Black Lung Benefits Program "shameful"); JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLDTZ, & PHILIP G. SCHRAG, REFUGEE ROULETTE, DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 6 (2009) (describing asylum applications as "a spin of the wheel of fate").

goes back to the Administrative Procedure Act (APA) itself,[2] which, as far back as 1946, established rules for individualized administrative hearings.[3] Before the APA, agencies combined investigation, policymaking, and adjudication in the same department.[4] Following a political battle over the implementation of New Deal programs, the APA separated the practice of "adjudication" from the agencies' broad policymaking powers using rulemaking and enforcement, establishing distinct rules for each type of agency activity.[5] Moreover, certain formal adjudications would be conducted by independent administrative law judges (ALJs) insulated from agency policymakers. Few rules existed in the APA, however, for ALJs to resolve cases that fell in between the formal categories of rulemaking and adjudication—such as when agency proceedings systematically affected groups of people in the same way.

A handful of federal administrative programs, however, have quietly bucked this trend—employing class action rules, collective claims handling and even the kinds of "trials by statistics" embraced by innovative federal judges around the United States.[6] The Equal Employment Opportunity Commission (EEOC), for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal

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[2] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701-706, and other sections of Title 5).

[3] *See id.*

[4] *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219–20 (1986) (describing ABA Special Committee on Administrative Law's desire to transfer agency judicial power to independent tribunals).

[5] George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680-81 (1996).

[6] See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev'd in part*, 151 F.3d 297 (5th Cir. 1998); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 247–62 (E.D.N.Y. 2001), *rev'd in part on other grounds and questions certified*sub nom. Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc., 344 F.3d 211 (2d Cir. 2003) certified question accepted, 801 N.E.2d 417 (N.Y. 2003) and certified question answered sub nom. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 818 N.E.2d 1140 (N.Y. 2004) and rev'd sub nom. Empire Healthchoice, Inc. v. Philip Morris USA, Inc., 393 F.3d 312 (2d Cir. 2004). *See also* MANUAL FOR COMPLEX LITIGATION, THIRD, § 33.28 (1995) (endorsing trial-by-statistics plan in *Marcos*). *But see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (casting doubts on "Trial by Formula"); MANUAL FOR COMPLEX Litigation, Fourth, § 21.5 (2004) (revising its position to observe that a trial-by-statistics plan was possible, "[a]lthough not accepted as mainstream.").

employees before federal administrative judges (AJs).[7] Since the early 1990s, the National Vaccine Injury Compensation Program (NVICP) has used "Omnibus Proceedings," which resemble federal multidistrict litigation, to pool together common claims that allege a vaccine injured large groups of children.[8] And, facing a backlog of hundreds of thousands of claims, the Office of Medicare Hearings and Appeals (OMHA) recently began two pilot programs utilizing aggregation tools: (1) a "Statistical Sampling Initiative" that will use trained and experienced experts to resolve thousands of common medical claims at a time by statistically extrapolating the results of a few hearing outcomes; and (2) a Settlement Conference Facilitation program that provides a formal framework for encouraging the settlement of large numbers of similar cases.[9]

To date, no study has examined these nascent efforts to employ the tools of aggregation in administrative proceedings. Indeed, there has been little attention to how agencies may draw upon the lessons of the federal courts in adjudicating claims by large groups of people.[10] Consequently, very little is known about: (1) which cases are appropriate for aggregation, (2) which aggregation tools these agencies use, (3) the successes and failures of these programs, and (4) the other types of proceedings in which

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[7] *See* 29 C.F.R. § 1614.204 (2012) (establishing class complaint procedures). Administrative Judges (AJs) preside over adjudicatory hearings but are not entitled to the same statutory job protections and insulation from agency pressure as the ALJs who preside over adjudicatory hearings conducted pursuant to sections 554, 556, and 557 of the APA. Nevertheless, the "functional independence accorded to AJs varies with the particular agency and type of adjudication." ACUS Recommendation 92-7, The Federal Administrative Judiciary (1992), at 2.

[8] *See, e.g.*, Capizzano v. Sec'y, HHS, 440 F.3d 1317 (Fed. Cir. 2006); Snyder v. Sec'y, HHS, No. 01-162V, (Ct. Fed. Cl. Spec. Mstr., February 12, 2009), http://www.uscfc.uscourts.gov/sites/default/files/vaccine_files/Vowell. Snyder.pdf; Ahern v. Sec'y, HHS, No. 90-1435V, 1993 U.S. Claims LEXIS 51 (Fed. Cl. Spec. Mstr. Jan. 11, 1993).

[9] Office of Medicare Hearings and Appeals, *Statistical Sampling Initiative*, http://www.hhs.gov/omha/OMHA%20Statistical%20Sampling/statistical_sampling_initiative.html (last visited February 19, 2016). The program allows hospitals, medical services and other contractors with large groups of similar claims for reimbursement to use statistical sampling in Medicare hearings. An "experienced statistical expert" draws a random sample from a universe of the appellant's common claims, the sample is tried in front of an administrative law judge, and then the sample's results are extrapolated to the entire universe of the appellant's claims. *Id.*

[10] *But see* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012) (proposing that agencies employ aggregation to adjudicate large groups of cases with common issues of law or fact).

different aggregation tools might facilitate more expeditious and fair handling of large groups of claims.

Our project begins to fill this gap by taking a look inside some of the few agencies that experiment with aggregate adjudication. After examining recent efforts by federal agencies to aggregate administrative proceedings and interviewing the key policymakers involved, we identify the types of agency adjudications in which aggregate procedures have the greatest potential, the challenges and obstacles to greater use of aggregation, and broader lessons about what aggregation procedures mean for adjudication by federal agencies.

This Report proceeds in three parts. Part I sets out the legal framework for adopting aggregate litigation procedures in federal courts and administrative agencies. Federal courts have long enjoyed authority to aggregate large groups of similar cases in one of two ways. First, courts may *formally aggregate* claims by, for example, permitting one party to represent many others in a single lawsuit. Second, courts may *informally aggregate* claims. In informal aggregation, different claimants with very similar claims each retain separate counsel and advance a separate lawsuit, but in front of the same adjudicator or on the same docket in an effort to expedite cases, conserve resources, and assure consistent outcomes.[11]

Agencies similarly enjoy broad authority to aggregate common cases, formally and informally. Administrative agencies often enjoy broad discretion to craft procedures they deem "necessary and appropriate" to adjudicate the cases and claims that come before them. As a result, agencies have adopted formal rules that permit joinder, consolidation, and class actions. And, even in the absence of a specific rule, administrative agencies

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[11] The American Law Institute's *Principles of the Law of Aggregation* defines proceedings that coordinate separate lawsuits in this way as "administrative aggregations," which are distinct from joinder actions (which join multiple parties in the same proceeding) or representative actions (in which a party represents a class in the same proceeding). See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2010) [hereinafter ALI REPORT] (describing different types of aggregate proceedings.). Others have used the words "institutional systematization" to describe various forms of "administrative aggregation" phenomena in criminal law. *See* Brandon Garrett, *Aggregation in Criminal Law*, 95 Cal. L. Rev. 383, 388 n.17, 393 (2007). For convenience, we call such proceedings "informal aggregation." For other discussions of this phenomenon, *see* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 465-66 (2000); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991).

have aggregated particular cases and claims before the same adjudicator or in specialized programs.

Part II describes different approaches to formal and informal aggregate adjudication with a focus on three federal programs—EEOC's use of class actions, the NVICP's use of "omnibus proceedings," which centralize many individual cases raising similar claims before the same adjudicator, and OMHA's use of consolidation, statistical sampling, and mediation to resolve thousands of similar cases in the same proceeding. Those case studies illustrate that aggregate adjudication techniques raise unique challenges. The sheer number of claims in aggregate agency adjudication may: (1) create "diseconomies of scale"—inviting even more claims that stretch adjudicators' capacity to administer justice to many people; (2) impact the perceived "legitimacy" of the process and challenge due process; and (3) increase the consequence of error. In other words, just like many kinds of administrative systems, aggregate adjudication struggles to deal with many different kinds of constituencies feasibly, legitimately, and accurately.

But, as we detail below, each program has sought to ameliorate these concerns by adopting aggregate procedures cautiously and responsibly. Among other things, they have responded to challenges of aggregation by (1) slowly rolling out aggregate procedures to avoid replacing old backlogs with new ones; (2) relying on panels of adjudicators to reduce allegations of bias or illegitimacy or providing additional opportunities for individuals to meaningfully participate in the process; and (3) allowing cases raising scientific and novel factual questions to "mature"[12]—that is, putting off aggregation until the agency has the benefit of several opinions and conclusions from different adjudicators about how a case may be handled expeditiously. As a result, aggregate adjudication has permitted agencies to take advantage of the benefits of aggregation— pooling information about recurring problems, achieving greater equality in outcomes than individual litigation, and securing expert assistance at a critical stage in its own decisionmaking process.—while minimizing their potential dangers.

Part III offers recommendations for agencies considering the use of aggregation to resolve large groups of common claims. Agencies considering the use of such procedures should methodically weigh whether aggregation is optimal under the circumstances and determine what forms

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[12] *Cf.* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843 (1995) (defining "maturity" in which both sides' litigation strategies are clear, expected outcomes reach an "equilibrium," and global resolutions or settlements may be sought).

of aggregate adjudication are best suited for their own unique statutory missions. First, agencies should develop ways to identify whether the agency even hears sufficient numbers of common claims and issues in adjudication to warrant adopting aggregate procedures. Second, agencies should give careful consideration to the form of aggregation they plan to adopt. Sometimes informal aggregation, which involves coordination among separately represented parties or claims, may accomplish the same goals of legal access, efficiency, and consistency as formal aggregation. In other cases, particularly those seeking declaratory, injunctive, or other forms of "indivisible" relief, formal aggregation may afford more efficiency, process, and consistency than piecemeal litigation. Third, agencies should consider how aggregate adjudication interacts with other tools agencies use to hear from and respond to large groups of stakeholders, like informal rulemaking and policy guidance.

Although only a handful of agencies use administrative aggregation, many more agencies enjoy formal and informal authority to consolidate cases with common questions of law or fact. Accordingly, the lessons learned from these recent efforts are a rich source of guidance for other agencies that might avail themselves of the benefits of aggregate adjudication in the service of their statutory mandates.

I. BACKGROUND

A. The Legal Framework for Aggregation in Federal Court

Civil and administrative proceedings begin with the premise that every person deserves her or his own "day in court." Plaintiffs in civil court receive personalized hearings to sort out private disputes with others.[13] Agencies similarly must provide citizens with "some kind of hearing"[14] to challenge government acts that threaten their lives, property, or liberty.[15]

Both systems, however, have exceptions—grouping together and resolving large groups of similar claims, or what we call "aggregation."[16] In some ways, a central tenet of all legal systems is to aggregate. Policymakers and judges create and interpret substantive rules to account for recurring problems and treat "like cases in a like manner." It's the reason why common law judges must consider the precedential impact of their decisions on similar cases[17] and why legislators create agencies with specific missions to create rules for, and adjudicate, particular kinds of cases.[18] One theory posits that administrative agencies represent a public

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[13] Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999); Martin v. Wilks, 490 U.S. 755, 762 (1989) (observing it is "our 'deep-rooted historic tradition that everyone should have his own day in court") (quoting 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)); JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 16 (2001) (arguing that tort law's "structural core" is represented by "case-by-case adjudication in which particular victims seek redress" from particular defendants, each of whom "who must make good her 'own' victim's compensable losses").

[14] Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring pre-termination hearing procedures for welfare benefit recipients).

[15] Heckler v. Campbell, 461 U.S. 453, 467 (1983) (observing that, in past decisions, people received "ample opportunity" to present evidence relating to their own claims and to show that an agency's "general guidelines" for resolving common cases "do not apply to them"); Londoner v. Denver, 210 U.S. 373 (1908); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).

[16] Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784-95 (2005).

[17] In tort law, for example, special "no duty" rules limit liability for government entities, charitable enterprises, employers, pure economic or emotional distress cases. *See* Robert Rabin, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L.REV. 1571 (2004); .

[18] 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. 101, 110-12 (2011) (describing alternative theories of agency delegation). Of

counterpart to class action lawsuits—another form of aggregation—because Congress delegates them authority to pursue ends that benefit broadly defined interest groups against those who violate the law.[19]

But federal courts use other procedures to group together large numbers of cases. As noted above, the most famous kind of "aggregate lawsuit" is the class action—a single lawsuit that includes claims or defenses held by many different people. Other kinds of formal aggregations include derivative lawsuits by a shareholder on behalf of a corporate organization,[20] lawsuits by and against organizations in bankruptcy, trustee actions commenced on behalf of many beneficiaries,[21] and *parens patriae* actions by state attorneys general.[22] What all formal aggregations have in common is that a single person, or a single proceeding, may bind others to the outcome, even if those others never directly participate.

Courts also group together civil claims in far more informal ways.[23] Courts frequently "informally aggregate" cases—channeling individually represented parties into the same courthouse, before the same judge, or onto a specialized docket. In civil litigation, the most well-known form of administrative aggregation is the multidistrict litigation,[24] where a panel of

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course, administrative agencies themselves may adopt rules to ensure people are treated consistently in adjudication. *See* Heckler v. Campbell, 461 U.S. 458, 467 (1983); United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956).

[19] Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) ("Administrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation.").

[20] FED. R. CIV. P. 23.1; *see also* Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981).

[21] Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (observing that a judgment that "is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust").

[22] Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923); Pennsylvania v. Kleppe, 533 F.2d 668, 675 (D.C. Cir. 1976) ("[I]njury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, can five rise to a quasi-sovereign interest in relief as will justify a representative action by the state."); *see also* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

[23] *See* ALI REPORT, *supra* note 11, § 1.02 (describing informal aggregation); Erichson, *supra* note 16, at 386; Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991).

[24] Emery G. Lee III, Catherine R. Borden, Margaret S. Williams, Kevin M. Scott, *Multidistrict Centralization: A*n *Empirical Analysis*, 12 J. EMP. L. J. STUD. 211, 222 (2015).

judges may assign a large number of similar claims filed around the country to the same judge to streamline discovery, manage motion practice, coordinate counsel and, in many cases, expedite settlement.[25] Since its creation in 1968, the Judicial Panel on Multidistrict Litigation has centralized almost half a million civil actions for pretrial proceedings.[26] Other forms of administrative aggregation in civil law include specialized dockets—like those designed to expedite patent claims filed in the Eastern Districts of Virginia and Texas[27]—or inter-district rules designed to ensure that a single judge hears all "related claims" in the same district.

B. The Costs and Benefits of Aggregate Adjudication in Court

Aggregate procedures in federal court seek to provide more access, efficiency, and consistency than individualized litigation. Aggregate litigation in federal and state courts has long sought to provide more *legal access* by enabling the resolution of claims that otherwise would not be brought individually. Formal aggregate procedures are thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.[28] Informal aggregation also streamlines large-scale litigation, while encouraging parties to participate, through bellwether trials, steering committees of plaintiff that collect and manage claimant input, and judicial oversight of attorney conduct. In both cases, large cases

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[25] 28 U.S.C. § 1407 (1976); *see also* Myriam Gilles, *Tribal Rituals of the MDL*, 5 J. TORT L. 173, 176 (2012); Andrew Bradt, *The Multidistrict Litigation Act of 1968*, (July 2015), http://www.law.seattleu.edu/Documents/CivProWorkshop/Bradt_MDL.pdf.

[26] Lee, et al., *supra* note 24, at 24. By the end of 2013, 13,432 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 359,548 had been terminated in the transferee courts, and 89,123 were pending throughout the district courts. Judicial Business 2013: Judicial Panel on Multidistrict Litigation, Admin. Off. U.S. Courts (2013), http:// www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrictlitigation.aspx.

[27] Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015); Daniel Klerman & Greg Reilly, *Forum Selling*, S. CAL. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538857; Dana D. McDaniel, *Patent Litigation on the Rocket Docket After Markman v. Westview Instruments, Inc.*, Va. Law., Apr. 2002, 20, 20 (describing the increase of patent filings in the late 1990s); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 207 (2007).

[28] *See* Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115-20 (2010) (describing alternative goals of class action litigation); Amchem Prods., Inc. 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)).

hold defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation.[29]

Aggregate procedures also seek more *efficient* resolutions than piecemeal individual adjudication. Aggregation hopes to avoid the duplicative expenditure of time and money associated with traditional one-on-one adjudications,[30] which otherwise may involve months or years of the "same witnesses, exhibits and issues from trial to trial."[31]

Finally, aggregate procedures seek more *uniform* application of law. At bottom, aggregate proceedings and settlements seek consistency and distributive fairness—to treat like parties in a like manner.[32] Otherwise, in cases seeking injunctions or declaratory relief, a court may never hear from plaintiffs with competing interests in the final outcome, or over time, subject defendants to impossibly conflicting demands.[33] And, in cases seeking monetary relief, the first claimants to bring lawsuits might receive astronomical awards, while other victims receive nothing.

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[29] Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 174 (2008) (observing that the procedural benefits include a substantial reduction in costs of "discovery, retention of experts, legal research and legal fees"); *see also* THOMAS E. WILLGING, FED. JUDICIAL CTR., APPX. C: MASS TORTS PROBLEMS AND PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP 20 (1999); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393-94 (2000).

[30] *See* In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859 (6th Cir. 2013) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013); 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 9 (5th ed. 2015) ("Class actions are particularly efficient when many similarly situated individuals have claims sufficiently large that they would each pursue their own individual cases. In these situations, the courts are flooded with repetitive claims involving common issues.").

[31] Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (quoting lower court opinion) (granting certification of a class action involving asbestos). *See generally* WEINSTEIN, *supra* note 29, at 135-36 (noting that economies of scale reduce discovery and expert fees); William 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).

[32] *See* 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10 (5th 2015) (Class actions "reduce[] the risk of inconsistent adjudications. Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[33] *See* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. _ (forthcoming 2015), http://goo.gl/nMEQev (Aggregation procedures "enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies . . . .").

But large cases also create new risks. Class actions require judicial review, for example, to ensure class counsel faithfully represent absent class members, to provide a forum to hear from dissenting interest groups, and to ensure that the final settlement adequately reflects the underlying merits and the public interest. Thus, even as they aspire to promote more efficiency, consistency, and legal access, class action lawsuits struggle to (1) promote *efficiency* when processing large volumes of cases; (2) ensure *legitimacy* when clients lack input and control over the outcome and when attorneys serve disparate interests (or their own); and (3) achieve *accuracy* when group-wide outcomes or settlements blur characteristics or overlook the merits of many different kinds of cases.

Informally aggregated cases may also complicate legitimacy and accuracy. First, lawyers experience conflicts when they settle individual cases in informal aggregations, particularly because the success of any one case often depends on the same lawyer or judge resolving hundreds of similar claims.[34] Informally aggregated civil cases may also compromise individual parties' control over the outcome, as a small number of lawyers, special masters, or magistrates, make decisions about common questions of discovery, motion practice, or other "common benefit work." According to the American Law Institute's *Principles of Aggregate Litigation*, informal aggregations "afford participants some important powers, but deny them others":

> For example, they continue to be represented by their own attorneys, and they can accept settlement offers or reject them. But, in important respects they are also at the mercy of others. They cannot escape aggregation, even when it occurs against their wishes, and … they must accept services from and pay fees to lawyers and other persons they have little power to control.[35]

Second, informal aggregation can compromise accuracy—particularly when the same plaintiff and defense counsel settle large groups of cases in bulk. This is sometimes a result of perverse incentives created

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[34] *See* ALI REPORT, *supra* note 11, § 3.16 cmts. a-c; .Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784-95 (2005) (characterizing such conflicts as problems of claim "conditionality.").

[35] *See id.*, § 1.05 cmts. b; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 465-66 (2000) ("Given the powerful drive to coordinate, evidence by both plaintiffs and defendants in a wide variety of litigation, true litigant autonomy may be unattainable in many situations involving multiple related claims . . . .").

by the ways parties must organize themselves to process large volumes of claims. For example, plaintiffs and defendants have complained that multidistrict litigation favors volume over knowledge: attorneys often receive coveted and lucrative positions on steering committees based on the sheer number of clients they retain in the litigation.[36] Those incentives may, in turn, delay and discourage lawyers from investing limited resources to develop the facts of individual cases before reaching a global settlement.[37]

In other words, like many kinds of bureaucratic systems, formal and informal aggregate litigation struggles to govern many different kinds of constituencies feasibly, legitimately, and accurately. As set forth below, agencies also enjoy power to formally and informally aggregate claims. When they have exercised this power, they have sought to adopt tools that take advantage of the benefits of aggregation while minimizing the potential dangers.

C. The Legal Framework for Aggregation in Agency Adjudications

1. Congress Generally Grants Agencies Broad Discretion to Adopt Procedures to Manage Administrative Adjudications

Congress regularly creates administrative courts in which the adjudicators do not enjoy the life tenure and salary protections provided to federal judges by Article III of the Constitution. When Congress vests adjudicatory power in such "non-Article III courts," it usually employs one of its enumerated powers in Article I, in combination with the Necessary and Proper Clause.[38] Such non-Article III courts include both administrative agencies that adjudicate cases and what are sometimes called "Article I" or "legislative courts."[39]

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[36] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 231 (2007).

[37] Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 351 (2014) (observing that "the financial incentive is to invest as little as possible in the individual case, as any time invested will not impact their ultimate payout—as only time spent on developing generic assets, and not individual cases, is compensable as common-benefit work" in multidistrict litigation).

[38] U.S. CONST., art. I, § 8.

[39] Some non-Article III judges, like bankruptcy and magistrate judges, are appointed by Article III judges and work inside the Article III branch. *See, e.g.*, 28 U.S.C. § 151 *et seq*.; § 631 *et seq*. *See generally*, Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002). Other non-Article III adjudicators work outside Article III, in bodies sometimes termed "legislative courts" and in administrative agencies. *See, e.g.*, 26 U.S.C. § 7441 *et seq*. (establishing the United States Tax Court as a stand-

The line between legislative courts and administrative agencies that adjudicate cases is far from clear.[40] Functionally, legislative courts tend to be more independent from Executive Branch policymakers and solely charged with adjudicating cases, while administrative agencies typically "use adjudication along with rulemaking and enforcement processes as tools for the articulation of policy as well as its application to particular parties."[41] But there are many exceptions to these rough distinctions. For example, Congress sometimes creates "split enforcement" regimes, whereby one agency is responsible for bringing enforcement actions and another agency is responsible for adjudicating the dispute between the enforcement agency and the regulated party.[42] Moreover, ALJs who preside over the reception of evidence in formal agency adjudications are insulated from ex parte communications and supervision by agency personnel involved in investigation and prosecution.[43] Indeed, ALJs enjoy job protections similar to those of judges that serve on Article I courts, such as the U.S. Court of Federal Claims.[44] Moreover, even some agency

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alone court); 29 U.S.C. §§ 153, 160 (establishing the National Labor Relations Board as an independent regulatory agency and granting it authority, *inter alia*, to hear complaints regarding unfair labor practices).

[40] From the standpoint of Article III, there is no constitutional difference. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 342-43 (1991) ("[T]he Constitution knows two categories, the life-tenured and everyone else, no matter the legal or practical protections available to the unanointed."). But the Supreme Court has been notoriously inconsistent in defining the outer limits of Congress's power to create courts outside Article III. *Compare, e.g.*, Wellness Int'l Network v. Sharif, 135 S.Ct. 1932 (2015) (approving the bankruptcy courts' jurisdiction to hear common law claims with the parties' consent) *with* Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) (recognizing limits on Congress's power to withdraw from the Article III courts "any matter which, from its nature, is the subject of a suit at common law, or in equity, or in admiralty") (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)). Under current doctrine, Congress may vest administrative courts with the power to adjudicate "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern*, 131 S. Ct. at 2613.

[41] Bruff, *supra* note 40, at 345.

[42] *Id.* at 346-347.

[43] 5 U.S.C. § 554(d) (2012) (ALJs "may not (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.").

[44] *Compare* 5 U.S.C. § 7521 (2012) (ALJs may only be removed "for good cause established … on the record after opportunity for hearing"), *with* 28 U.S.C. § 176 (2012) (Judges of the Court of Federal Claims may be removed by a majority of the judges of the Court of Appeals for the Federal Circuit, but "only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability" and only after "an

adjudicators who are not categorized as ALJs, such as administrative judges or immigration judges, and do not enjoy the same structural protections of ALJs, nevertheless think of themselves as independent from agency policymakers.[45]

When Congress creates non-Article III courts, it both defines their jurisdiction and typically grants them substantial discretion to prescribe rules of practice and procedure to carry out their statutory mandates.[46] For example, in *CFTC v. Schor*,[47] the Supreme Court rejected the lower court's conclusion that the Commodity Futures Trading Commission (CFTC) lacked the power to join counterclaims.[48] The Supreme Court based its holding, in part, on the "the sweeping authority Congress delegated to the CFTC."[49] In particular, the Supreme Court relied on statutory language that permits the CFTC to "make and promulgate such rules and regulations as,

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opportunity to be heard on the charges."). Nevertheless, ALJ decisions are typically reviewed by the heads of the agency, who interpret the law in pursuit of their policy goals. Thus, separation of functions in administrative agencies does not extend to the final agency decision. Agencies remain overt policymaking institutions, while legislative courts only make policy in the way that Article III or common law courts do as an incident to deciding cases.

[45] Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278 (1994) (reporting that "[n]inety-one percent of the AJs described themselves as independent[; a]bout 70% reported that threats to independent judgment were not a problem, with 18% reporting that this was occasionally a problem and 10% reporting that it was frequently a problem[; and a]bout 80% reported that pressure for different decisions was not a problem and most of the remainder reported that it was only occasionally a problem[, and o]nly 2% reported that it was frequently a problem.").

[46] *See, e.g.*, 7 U.S.C. § 12a (2012) (authorizing the CFTC "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the Commodity Exchange Act); 26 U.S.C § 7453 (2006) ("[T]he proceedings of the Tax Court . . . shall be conducted in accordance with such rules of practice and procedure . . . as the Tax Court may prescribe," but consistent with the Federal Rules of Evidence for bench trials in the United States District Courts for the District of Columbia.), *amended by* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 425, 129 Stat 2242, (2015) ("inserting 'the Federal Rules of Evidence'."); 38 U.S.C. § 501(a) (2012) ("The Secretary [of Veterans Affairs] has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department . . . including . . . the manner and form of adjudications and awards."); 47 U.S.C. § 154(j) (2012) ("The [Federal Communications] Commission may conduct its [hearing] proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

[47] 478 U.S. 833 (1985).

[48] *Id.* at 842.

[49] *Id.*

in the judgment of the Commission, are reasonably necessary" to accomplish the purposes of the statute authorizing its existence.[50]

Where an agency's organic statute does not set forth any specific procedural requirements, the Administrative Procedure Act (APA) provides certain minimum procedural requirements for different types of agency action. But the Supreme Court has repeatedly prohibited courts from imposing additional procedural requirements on agencies,[51] reasoning that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[52]

For this reason, in *FCC v. Pottsville*, the Supreme Court rejected a challenge to the FCC's authority to consolidate three licensing applications for the same facility in a single hearing so as to consider the applications "on a comparative basis."[53] The Court held that when Congress gave the Commission authority to grant, modify, or revoke broadcast licenses as "public convenience, interest, or necessity" require:

> the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising.[54]

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[50] *Id.* (citing 7 U.S.C. § 12a).

[51] *See, e.g.*, Perez v. Mortgage Brokers Assoc., 135 S.Ct. 1199, 1207 (2015) ("Time and again, we have reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'") (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009)); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

[52] FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940).

[53] *Id.* at 140.

[54] *Id.* at 138.

Accordingly, the Court recognized that the Commission possessed this discretion regardless of whether it chose to promulgate a rule of procedure or created an ad hoc rule tailored to a specific case.[55]

Similarly, there is nothing in the APA that would prevent an agency from using aggregation in adjudicatory proceedings in appropriate cases. Indeed, prohibiting aggregation mechanisms under the APA would be at odds with the substantial flexibility the Supreme Court has granted agencies when choosing the best procedural format for decisions that affect large groups of people.[56]

In some ways, federal agencies enjoy more power to develop procedural rules than Article III courts. The Rules Enabling Act stipulates that Article III courts may only "prescribe general rules of practice and procedure" that do not "abridge, enlarge or modify any substantive right."[57] By contrast, administrative agencies generally have no such limitation because Congress creates most administrative agencies precisely because Congress wants them to make substantive law.[58] Even legislative courts that most closely resemble the Article III courts generally are not subject to the same restrictions under the Rules Enabling Act.[59]

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[55] *See* FCC v. Schreiber, 381 U.S. 279, 289 (1965) ("The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings; it also delegates broad discretion to prescribe rules for specific investigations and to make ad hoc procedural rulings in specific instances[.]" (citations omitted)).

[56] For example, the Supreme Court has upheld the power of agencies to announce new policies in adjudications rather than using notice and comment rulemaking. NLRB v. Bell Aerospace, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."). And conversely, agencies are permitted to use rulemaking to resolve common factual issues that repeatedly arise in individual adjudications. Heckler v. Campbell, 461 U.S. 458, 467 (1983) ("[E]ven where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.").

[57] 28 U.S.C. §§ 2071-72 (1988).

[58] *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 907 (1999).

[59] *See, e.g.*, 26 U.S.C. § 7453 (1997) (the Tax Court may adopt any procedural rule "as the Tax Court may prescribe," so long as it conducts its proceedings in accordance with the rules of evidence for bench trials in the United States District Courts for the District of Columbia); Lemire v. Sec'y of Health & Hum. Servs., No. 01-0647V, 2008 WL 2490654, at *6 (Fed. Cl. June 3, 2008) ("A plain-word reading of 28 U.S.C. § 2072, noting the omission of the Court of Federal Claims from mention, leads the Court to conclude that neither § 2072, nor the second sentence of 28 U.S.C. § 2071(a), which requires that court rules maintain consistency with federal statutes and § 2072 in particular," govern the

The recognition by federal courts that Congress generally vests administrative agencies with considerable procedural flexibility reflects a basic feature of administrative law: agencies must have the authority to shape their own rules and, when appropriate, to adapt those rules to the types of cases and claims that they hear. This means that absent an express statutory prohibition or other clear indication of congressional intent to the contrary, administrative agencies may use aggregate procedures to handle their cases more expeditiously, consistently, and fairly than would be possible with individual, case-by-case adjudication.

2. Many Administrative Agencies Have Concluded They Enjoy Power to Aggregate Cases Using Formal Rules

Relying on general grants of authority to adopt their own procedures, we have identified more than forty administrative agencies and other non-Article III courts that have promulgated rules permitting the consolidation of cases to hear claims. The complete list is included in Appendix A. Some of these non-Article III tribunals have promulgated formal class actions rules. Examples include the Bankruptcy Courts, EEOC, the Consumer Product Safety Commission (CPSC), and the Personnel Appeals Board.[60]

The EEOC's experience, discussed more fully below in Section II.A., is illustrative. Congress vested the EEOC with the power to hear discrimination claims brought by federal employees and "to issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."[61] Relying on that language, in 1992, the EEOC adopted a class action procedure.[62]

In 2004, the Postal Service challenged EEOC's class action rule. The Office of Legal Counsel (OLC) for the Department of Justice (DOJ) rejected that challenge and confirmed the EEOC's broad authority to use

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validity of the rules promulgated by the Court of Federal Claims for the Special Masters of the Vaccine Court.).

[60] *See* Fed. R. Bankr. P. 7023 (providing that Federal Rule of Civil Procedure 23 applies in adversary proceedings in the Bankruptcy Courts); 29 C.F.R. § 1614.204 (2012) (permitting the EEOC to hear class action claims involving federal employees); 16 C.F.R. § 1025.18 (providing for the CPSC to pursue violations as a class action); 4 C.F.R. § 28.97 (providing employees power to pursue class action with Personnel Appeals Board).

[61] 42 U.S.C. § 2000e-16(b) (2012).

[62] *See* 29 CFR § 1614 (2015); *see also* 64 Fed. Reg. 37,644 (July 12, 1999); 57 Fed. Reg. 12,634 (Apr. 10, 1992).

class actions to aggregate claims.[63] Observing that class actions were "procedural in nature," the OLC concluded that the EEOC could properly adopt class action rules under its congressional directive to issue "such rules . . . as it deems necessary and appropriate to carry out its responsibilities."[64]

Indeed, just as class actions fall "within the Supreme Court's mandate to adopt rules of 'practice and procedure' for the district courts, . . . [t]here is no reason why [administrative agencies] cannot use the same device, if it is appropriate."[65] A part of the explanation stems from the function of class actions, which are "procedural technique[s] for resolving the claims of many individuals at one time . . . , comparable to joinder of multiple parties and intervention."[66]

In sum, given the broad discretion that Congress grants administrative agencies to fashion their own rules of practice and procedure, there is no reason to doubt the authority of agencies to aggregate cases and claims when it serves their statutory mandates.

3. Administrative Agencies Also Enjoy Power to Aggregate Using Informal Tools.

Like Article III courts, which aggregate with different levels of formality, many Article I courts and administrative agencies also aggregate claims and cases without adopting a formal procedure to do so.

For example, the Office of Special Masters (OSM) in the NVICP has not promulgated a rule on aggregation. But, for some two decades, the OSM has relied instead on its general authority to "determine the format for taking evidence [and] . . . hearing argument[,]" and to "apply [its] expertise"

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[63] When two or more Executive agencies cannot resolve a dispute between themselves, OLC may resolve the dispute. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979).

[64] Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service, 28 Op. O.L.C. 254, 261 n.3 (2004), http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-v028-p0254.pdf.

[65] Quinault Allottee Ass'n & Individual Allottees v. United States, 453 F.2d 1272, 1274 (Ct. Cl. 1972) (holding the Court of Claims may certify class actions in appropriate cases).

[66] *Id*.; *accord* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) ("Rule 23 . . . falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.").

from one case to another.[67] Thus, as discussed more fully below in Section II.B, when faced with large numbers of claims for compensation, the OSM developed "omnibus proceedings" to more efficiently process claims involving the same alleged vaccine-related injury.[68] In an "omnibus proceeding," a single special master hears evidence and makes a decision on a theory of general causation—for example, whether a rubella vaccine can cause chronic arthropathy and, if so, under what circumstances.[69] The "general causation" evidence is then available for application in individual cases.[70]

Another example comes from OMHA, which hears Medicare disputes. As discussed in more detail in Section II.C, OMHA has long relied on its implied authority to aggregate thousands of similar cases raised by health care providers against the federal government.[71] OMHA ALJs assert the power to identify, process, consolidate and sometimes sample large numbers of similar cases; when doing so, OMHA relies on grants of authority akin to those of many other non-Article III courts.[72]

D. Due Process

When neither an agency's organic statute nor the APA requires or prohibits specific procedures, the discretion of federal agencies to craft their procedural rules is limited only by the procedural requirements of the Due Process Clause of the Fifth Amendment. There are two ways in which the Due Process Clause places limits on the procedures that an agency may use.

First, due process generally requires a hearing before a neutral decisionmaker before the government may deprive an individual of a

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[67] Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *2 (Fed. Cl. Feb. 12, 2009).

[68] Cedillo v. Sec'y of Health & Hum. Servs., No. 98-916V, 2009 WL 331968 at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010).

[69] *Id.* at *12.

[70] *Id.*

[71] *See* In re Apogee Health Serv., Inc., No. 769 (Medicare App. Council Mar. 15, 1999); *cf.* Chaves County Home Health Servs. v. Sullivan, 931 F.2d 914, 919-22 (D.C. Cir. 1991) (finding that mass consolidation and other actuarial tools in Medicare adjudication comports with due process).

[72] 42 C.F.R. § 405.1044 (2015) (providing for consolidation of two or more cases where the issues "are the same issues that are involved in another request for hearing" for purposes of "administrative efficiency").

property or liberty interest.[73] In the context of agency adjudications, however, the Court has accepted decisionmaking by agencies that combine executive, legislative, and judicial functions: an agency's interest in using adjudication to implement policy does not, in and of itself, offend due process.[74] Due process may be offended when "a scheme's particular characteristics . . . present unacceptable dangers of bias or interest."[75] But "[t]he Court . . . tolerates some loss of neutrality as the cost of obtaining the policymaking advantages of combined functions at the top of the agency."[76] Thus, there is no reason to believe that aggregate agency adjudication would offend this aspect of due process merely because it may result in policymaking by the agency.

When the parties do not allege bias, the Supreme Court has held that the procedures required by due process depend on a balancing of three factors: (1) the "private interest that will be affected by official action"; (2) the "risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards"; and (3) the "government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail."[77] This is a fact-based inquiry and the outcome will depend on the specific adjudicatory regime under review.[78]

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[73] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that citizen-detainees are entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

[74] Withrow v. Larkin, 421 U.S. 35, 53 (1975) (Due process does not prohibit an agency from investigating facts, instituting enforcement proceedings, and then making the necessary adjudications).

[75] *Id*. For example, the Supreme Court has held that it "deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." Tumey v. State of Ohio, 273 U.S. 510, 534 (1927); *see also* Ward v. Vill. of Monroeville, Ohio, 409 U.S. 57, 58 (1972) (holding that a trial before a mayor who also had responsibilities for revenue production and law enforcement denied petitioner a "trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment").

[76] Bruff, *supra* note 41, at 346.

[77] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[78] *Compare* Goldberg v. Kelly, 397 U.S. 254, 268 (1970) (due process requires that recipients of welfare be given an oral hearing prior to the termination of their benefits), *with Mathews*, 424 U.S. at 349 (due process does not requires that recipients of disability benefits be given an oral hearing prior to the termination of their benefits).

Aggregation of common issues of fact or law by both courts and administrative agencies has long withstood due process challenges. For example, the Supreme Court has held that due process permits the use of class actions that bind absent plaintiff class members so long as the absent class members are provided with sufficient notice and an opportunity to either participate in the litigation or "opt out" of the class.[79] The Court has suggested that due process raises different concerns in the context of class actions that seek to bind absent plaintiffs without their consent.[80] But "the debate over due process as it relates to class actions pertains to the rights of absent class members" rather than parties that are in fact before the court.[81]

Although due process questions may vary from case to case, no court has suggested that due process imposes additional limits on agencies' authority to aggregate cases. Courts have long recognized that agencies may bind parties to common findings of law or fact without an individualized hearing consistent with due process.[82] In fact, courts have also approved the use of aggregation tools in the context of agency adjudications. For example, the U.S. Court of Appeals for the District of Columbia Circuit approved the Medicare program's use of statistical sampling on post-payment review of providers suspected of overbilling the

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[79] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

[80] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (holding that applicants for class certification on the rationale of a limited fund must show that "the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members").

[81] Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1057-58 (2002) (explaining that the debate over due process as it relates to class actions pertains to the rights of absent class members). *See, e.g.*, *Phillips Petroleum Co.*, 472 U.S. at 812-13 (1985) (holding that Kansas's procedure, "where a fully descriptive notice [was] sent first-class mail to each class member, with an explanation of the right to 'opt out,'" satisfied the minimum requirements of due process).

[82] *Compare, e.g.*, Heckler v. Campbell, 461 U.S. 458 (1983) (rejecting due process challenge because "the Secretary [must] determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy"), *and* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (rejecting due process challenge to because "where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption."), *with* Londoner v. Denver, 210 U.S. 373 (1908) (for individual tax assessment "due process of law requires that at some stage of the proceedings… the taxpayer shall have an opportunity to be heard … however informal.").

government, explaining that if a sample is representative and statistically significant, the risk of error to a provider is fairly low.[83]

[83] Chaves County Home Health Servs. v. Sullivan, 931 F.2d 914, 919-22 (D.C. Cir. 1991); *see also* Georgia *ex rel.* Dept. of Hum. Res. v. Califano, 446 F. Supp. 404, 409-10 (N.D. Ga. 1977) ("[A]udit on an individual claim-by-claim basis of the many thousands of claims submitted each month by each state would be a practical impossibility as well as unnecessary.").

II. AGGREGATE AGENCY ADJUDICATION

Agencies not only have power, but on occasion, have used a wide variety of tools to aggregate cases formally and informally.[84] In addition to the techniques described above, some have used their formal power to consolidate enforcement actions against large groups of defendants to efficiently dispose of common claims.[85] Agencies have also sought restitution, injunctive relief, and other remedies on behalf of large groups of stakeholders.[86]

In other cases administrative agencies have coordinated enforcement actions for settlement. Medicare and the EPA have entered what some call "industry-wide" settlements,[87] brokering coordinated individual deals as part of a systemic response to an ongoing policy or problem. For example, facing an estimated backlog of over 800,000 appeals from medical providers, hospitals, doctors, and Medicare beneficiaries, in October 2014, Medicare offered to resolve hundreds of thousands of billing disputes by globally offering to pay hospitals with pending claims 68% of their value.[88]

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[84] EEOC, for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal employees. *See* 29 C.F.R. § 1614.204 (2012) (establishing class complaint procedures); 42 C.F.R. § 431.222 (2011) (providing "group hearings" for Medicaid-related claims); 45 C.F.R. § 205.10(a)(5)(iv) (2011) (providing "group hearing" to applicants who request hearing because financial assistance was denied).

[85] *See, e.g.*, Press Release, National Labor Relations Board, *NLRB Office of the Gen. Counsel Issues Consolidated Complaints Against McDonald's Franchisees & their Franchisor McDonald's, USA, LLC as Joint Employers*, Dec. 19, 2014 (consolidating cases against McDonald's franchisees around the country who allegedly violated the rights of employees based on their participation in nationwide protests against the terms and conditions of their employment), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.

[86] Urska Velikonja, *Pub. Comp. for Private Harm: Evidence from SEC Fair Fund Distributions*, 67 STAN. L. REV. 331 (2014); Verity Winship, *Fair Funds and the SEC's Comp. of Injured Inv'rs*, 60 FLA. L. REV. 1103, 1134-41 (2008); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011).

[87] Ass'n of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007); Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 813-16 (2010) (describing industry-wide settlements).

[88] Reed Abelson, *Medicare Will Settle Short-Term Care Bills*, N.Y. Times (August 29, 2014), http://www.nytimes.com/2014/08/30/business/medicare-will-settle-appeals-of-short-term-care-bills.html; Press Release, Centers for Medicare and Medicaid Services, Inpatient Hosp. Reviews, (last checked August 12, 2015), https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/InpatientHospitalReviews.html.

By June 2015, Medicare executed serial settlements with more than 1,900 hospitals, representing approximately 300,000 claims, for over $1.3 billion.[89] In another case, the EPA in 2005 offered qualified animal feeding operations (AFOs)—over 2,500 agribusinesses that produce pork, dairy, turkey and eggs across the country—to enter into a global settlement to resolve their liability under the Clean Water Act.[90] Much like a private aggregation, each individual AFO would enter into a separate, but otherwise identical, agreement with the EPA. Each AFO would agree to pay a civil fine (categorically based only on the size of the AFO) to fund a nationwide study on monitoring AFO emissions and, if requested, help the EPA to monitor emissions from the AFO. In return, the EPA agreed not to sue the participating AFOs for past and ongoing violations while the study was undertaken.[91]

Agencies also may employ many different forms of informal aggregation to streamline certain categories of claims. The Executive Office for Immigration Review—which hears all cases involving detained aliens, criminal aliens, and aliens seeking asylum—offers one example of this kind of informal aggregation. In the past year, it has created special "surge courts" to respond to over 2,000 Central American asylum cases pending in West Texas.[92] More recently, after the for-profit Corinthian Colleges collapsed under allegations of consumer fraud, the Department of Education appointed a special master to aggregate common questions and findings for over 5,000 former students to ease their burdens in seeking debt relief:

> Wherever possible, the Department will rely on evidence established by appropriate authorities in considering whether whole groups of students (for example, an entire academic program at a specific campus during a certain time

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[89] *Id.*

[90] *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40,016, 40,017 (July 12, 2005) ("July 12 Notice").

[91] The settlement was viewed favorably by industry, as well as the EPA, which had long claimed that it lacked a precise methodology for calculating the amount of pollutants emitted by AFOs. Citizens who lived downstream from the AFOs, however, complained that they too deserved a chance to comment on what seemed to be, in effect, an entirely new regime for taxing and regulating major farming operations. Ass'n of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007) (rejecting plaintiffs arguments).

[92] *See, e.g.*, Press Release, *EOIR Announces Change to Immigration Judges Hearing Cases out of Dilley*, Apr. 15, 2015 (assigning over 2,000 cases in Dilley, Texas to Miami Immigration Court to conduct hearings by teleconference); Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG., Feb. 4, 2015.

> frame) are eligible for borrower defense relief. This will simplify and expedite the relief process, reducing the burden on borrowers.[93]

Although we do not address all of these forms of aggregation, the three case studies below illustrate a wide range of aggregate techniques agencies have used to resolve large groups of cases, the challenges each has faced, and potential lessons for the future. The EEOC has adopted a formal aggregation rule, modeled largely on Rule 23 of the Federal Rules of Civil Procedure, to adjudicate cases of workplace discrimination in government offices. The NVICP permits special masters to use "Omnibus Proceedings," which often rely on informal aggregation and "test cases," to help parties streamline common, but otherwise complex questions of science for large volumes of claims involving children's vaccines. And OMHA, facing a deluge of appeals from hospitals and medical equipment suppliers, relies increasingly on informal aggregation, statistical sampling, and unique mediation programs to resolve large groups of common claims.

A. The Equal Employment Opportunity Commission (EEOC)

1. Background on the EEOC

EEOC is the nation's lead government enforcer of employment anti-discrimination laws. The agency is a bipartisan body composed of five Commissioners appointed by the President and confirmed by the Senate. Commissioners may be removed from office by the President only "for cause."

The EEOC has responsibilities for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008. These laws prohibit discrimination based on race, color, sex, religion, national origin, age, disability, and genetic information, as well as reprisal for protected activity.

The EEOC investigates charges of discrimination against private and state and local government employers who are covered by the anti-discrimination laws. If the EEOC finds that discrimination has occurred, it

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[93] Dept. of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges, *Administration Outlines New Debt Relief Process for Corinthian Colleges' Students,* http://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges (last visited Feb. 25, 2016).

will try to settle the charge. If the EEOC is unable to settle the charge, the next step depends on the nature of the employer involved. In the case of private employers, the EEOC has authority to file a lawsuit in federal court to protect the rights of individuals and the interests of the public. Alternatively, if the EEOC finds there is no discrimination or finds there is discrimination, is unable to settle the charge, and decides not to file a lawsuit, the EEOC will issue the employee a Notice of Right to Sue, which allows the complainant to sue the private employer in federal court. In the case of state and local employers, the EEOC refers the matter to DOJ, which has authority to file a lawsuit in federal court.

The process is somewhat different for federal government employees. Federal employees must first file a complaint with the EEO Office of their federal employer. When the agency's investigation is completed, the employee may then either ask for a final decision from the agency or request a hearing before an EEOC AJ.[94]

More than 100 AJs work in EEOC regional offices around the country in order to adjudicate disputes between federal employees and their federal employers.[95] After conducting an evidentiary hearing on the record, the AJ issues a decision and may order appropriate relief. Once the AJ hands down a decision, the agency has 40 days to issue a final order, which either accepts or rejects the decision of the AJ. If the agency does not accept the decision or disagrees with any part of the decision, the agency may file an appeal with the EEOC's Office of Federal Operations. Similarly, an employee who is unhappy with an agency's final order may appeal the order to the Office of Federal Operations.

Although federal employees must generally go through the administrative complaint process, there are several different points during the process at which the employee may quit the process and file a lawsuit in federal court, including after the agency's decision on the employee's complaint, so long as no appeal has been filed with the EEOC, and after the EEOC's decision on an employee's appeal from a final order.

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[94] If the employee asks the agency to issue a decision and no discrimination is found, or if the employee disagrees with some part of the decision, the employee can appeal the decision to EEOC or challenge it in federal district court.

[95] AJs lack the same formal job protections that ALJs enjoy under the APA, but it does not seem to impact their sense of independence from the agencies for which they adjudicate cases. *See* Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278 (1994).

2. EEOC Class Actions in Administrative Proceedings

The EEOC's regulations grant EEOC AJs the power to certify and hear class actions against federal employers in administrative proceedings.[96] Even though Congress never explicitly conferred power on the EEOC to create a class action rule, the EEOC has long asserted authority to create a class action procedure based on its jurisdiction to hear discrimination claims against federal employers. As noted above in Section I.C.2, the Office of Legal Counsel accepted the EEOC's argument, finding the EEOC's decision to create the procedure was entitled to *Chevron* deference.

The EEOC's use of class action procedures—which are loosely modeled after Rule 23 of the Federal Rules of Civil Procedure—makes the EEOC something of an outlier in our federal administrative state.[97] Some agencies are specifically empowered to hear class actions in cases involving workplace disputes—like the Merit Systems Protections Board and the Personnel Appeals Board—where employees claim a government employer's "pattern and practice" violates their rights.[98] And a number of other agencies have promulgated rules permitting the certification of class actions in their administrative proceedings, but they almost never use the power. For example, the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau both theoretically may pursue class actions in their own administrative proceedings against financial businesses that violate the Equal Credit Opportunity Act,[99] but according to our correspondence with both agencies, neither has invoked that authority.[100]

A number of other agencies have formally considered, and rejected, class action procedures, reasoning that they lack the capacity, authority, or good reason to do so. For example, just last year, the Federal Communications Commission (FCC) considered and then rejected a proposal to hear class actions in its own adjudications for alleged violations

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[96] *See* 29 C.F.R § 1614.204 (2012); 57 Fed. Reg. 12,634 (Apr. 10, 1992).

[97] *See generally* Sant'Ambrogio & Zimmerman, *supra* note 10.

[98] *See, e.g.*, 4 C.F.R. § 28.97 (authorizing GAO employees to file class actions with the Personnel Appeals Board); 5 C.F.R. § 1201.27 (2012) (authorizing federal employees to file class action claims with the MSPB).

[99] *See* 12 C.F.R. §§ 202.16 (2007), 1002.16 (2011).

[100] *See also* 16 C.F.R. § 1025.18 (1980) (authorizing the Consumer Product Safety Commission to commence class actions in enforcement proceedings, which it also reports, it has not done).

of the Federal Communications Act.[101] Among other things, the FCC worried that the procedure would "needlessly divert" the resources of its lone ALJ to adjudicating extremely "fact-intensive and complex" cases, that can just as easily be filed in federal court.[102] The FCC also believed that it could more efficiently complement federal court class action practice by resolving any outstanding legal questions referred to the FCC by invoking the doctrine of an agency's "primary jurisdiction" to settle a contested interpretation of federal statutes or regulations.[103]

The CFTC similarly considered and rejected the use of class actions for its own adjudication process involving broker-dealer disputes.[104] It likewise questioned whether its adjudicators could handle complex class action cases, as well as whether it need do so, given that parties could always pursue class actions in federal court.[105]

Finally, the Court of Appeals for Veterans Claims (CAVC) recognized the value of consolidating similar disability claims by veterans, but rejected class actions without more explicit authority to do so.[106] The CAVC is the only non-Article III court we are aware of that has said it expressly *lacks* authority to hear class actions under its general powers to craft rules of procedure.[107]

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[101] Solvable Frustrations, Inc., 29 FCC Rcd. 4205, (2014), http://digital.library.unt.edu/ark:/67531/metadc407841.

[102] *Id.* at 4205.

[103] *Id.* at 4206; *see also* Gilmore v. Sw. Bell Mobile Sys., L.L.C., 20 FCC Rcd. 15079, 15081–82 (2005), http://digital.library.unt.edu/ark:/67531/metadc4091/.

[104] *Compare* Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 224, 106 Stat. 3590, 3617 (codified at 7 U.S.C. § 18(a)(2)(A)) (granting CFTC power to create rule allowing for class action administrative procedures) *with* Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631 (Mar. 1, 1994) (rejecting the rule).

[105] Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631, (Mar. 1, 1994) ("The parties consider class actions out of place in the reparation forum because it was designed for quick and inexpensive resolution of disputes whereas class action litigation must be conducted with formality and strict attention to procedural issues and is often lengthy . . . . The [CFTC] finds that . . . its resources would be used more effectively elsewhere.").

[106] *See, e.g.*, Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991) (per curiam) (rejecting contention that court had authority to adjudicate class actions); *see also* S. REP. NO. 111-265, at 35 (2009) (statement of Professor Michael P. Allen) ("[O]ne cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication.").

[107] As of this writing, the CAVC's position on class actions is less than clear. In a recent unreported decision, the CAVC reaffirmed its "long-standing declaration that it does not have the authority to entertain class actions." Monk v. McDonald, No. 15-1280, 2015 WL

In contrast, the EEOC has heard petitions for class actions for over three decades. Even in the four years following the Supreme Court's decision in *Walmart v. Dukes*[108]—which some argue severely limits class actions in federal court—federal employees have filed over 125 class action claims with the EEOC. And the EEOC has kept up its practice of hearing class action claims even though, like the FCC and CFTC, federal employees may also pursue class action claims in federal court.[109]

Based on our review of EEOC class actions filed over the past four years, they most commonly involve workplace discrimination claims based on race (28), sex (26), disability (24), and age (18). Of those cases, many follow the same pattern that class actions follow in federal court. A majority of cases were dismissed or remanded as untimely filed or on the merits. Twenty-two cases have settled. Of twenty-five actions where adjudicators considered whether or not to certify them as class actions, adjudicators rejected eighteen and certified seven for trial.[110]

3. EEOC Class Action Procedures: Similarities and Differences from Federal Rules

EEOC class action procedures mostly track Rule 23(a) of the Federal Rules of Civil Procedure, with one important difference. Like federal courts, EEOC AJs hear class actions based on a petition, typically filed by lawyers from a highly specialized bar, demonstrating (1) that the proposed class is so numerous that a consolidated complaint of the members

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3407451 at *3 (Vet. App. May 27, 2015). In papers filed on January 14, 2016 with the Federal Circuit, however, the government characterized the CAVC's opinion as "inartful" and asserted that the CAVC may indeed hear class actions in appropriate cases. If accepted, this interpretation of the CAVC's power would be consistent with the American Bar Association Section on Administrative Law and Regulatory Practice's 2003 Report. That report concluded that, notwithstanding the CAVC's longstanding position, Congress did not intend to prevent the CAVC from hearing class actions. *See* Neil Eisner, 2003 A.B.A. SEC. ADMIN, L. & REGULATORY PRACTICE REP. 9-10 (2003). The Federal Circuit will hear arguments in *Monk v. McDonald* later this spring. *Cf.* Corrected Brief of Amici Curiae Former General Counsels of the Department of Veterans Affairs at 1, Monk v. McDonald, 2015 WL 9311513 (Fed. Cir. 2016) (No. 15-1280).

[108] 564 U.S. 338 (2011).

[109] *See, e.g.*, 42 U.S.C. § 2000e-16(c) (2014) (permitting employees to file after 180 days); 29 U.S.C. §§ 1614.401(c), 1614.407 (1992) (permitting employees, but not employers, to file in federal court after an adverse decision by the EEOC).

[110] *Compare with* Thomas Willging & Emery Lee III, *Class Certification and Class Settlement: Findings from Fed. Question Cases, 2003-2007*, 80 U. CIN. L. REV. (2012) (identifying similar patterns of dismissal, settlement, and certification of class actions in federal court); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

of the class is impractical; (2) that there are questions of fact common to the class; (3) that the claims of the agent of the proposed class are typical of the claims of the class; and (4) that the class or representative will fairly and adequately protect the interests of the class.[111] As a result, EEOC AJs, like their federal counterparts, may require class wide discovery; appoint liaison counsel or certify class actions on the condition that parties obtain more experienced counsel; hear complex statistical evidence involving company-wide practices; and sometimes, sub-class to ensure parties with distinct interests are adequately represented at trial, or more commonly settlement.[112]

But EEOC class actions have no equivalent to Rule 23(b) of the Federal Rules of Civil Procedure.[113] That has at least two important consequences. First, unlike federal damage class actions, federal employees cannot "opt out" of an EEOC class action.[114] After the EEOC certifies a class, and renders a class wide decision, employees only retain an individual

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[111] 29 C.F.R. § 1614.204 (2012).

[112] *Id.* (permitting class members to file written petitions challenging settlements "not fair, adequate and reasonable to the class as a whole.").

[113] FED. R. CIV. P. 23(b) provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

[114] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, MGMT. DIRECTIVE 110, ch. 8, § V.C (Aug. 5, 2015) ("The class members may not 'opt out' of the defined class"), http://www.eeoc.gov/federal/directives/md110.cfm.

right to challenge damages in "mini-trials" required by federal regulations.[115]

Second, unlike some federal class actions, *see* Fed. R. Civ. P. 23(b)(3), EEOC class actions do not require that common questions "predominate" over individual issues before certifying a class action. This "predominance" requirement is often a difficult hurdle for parties to meet in federal court. Among other things, federal courts have rejected class actions that raise too many questions of law, vexing causation questions, and in rare cases, highly individualized damages because of a fear that individual issues among class members will overwhelm the common ones.[116] As one influential scholar has described the 23(b)(3) "predominance" requirement:

> [w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[117]

Other EEOC class action regulations resemble federal class actions under Rule 23(b)(2), which permit class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class."[118] EEOC cases involving

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[115] 29 C.F.R. § 1614.204(l).

[116] John C. Coffee & Alexandra Lahav, *The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics* (2012) (exhaustively collecting cases documenting class action trends in the United States), http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2182035; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2012) (observing that "several of the class certification requirements (class definition, numerosity, commonality, adequacy of representation, Rule 23(b)(2), and Rule 23(b)(3)), are now considerably more difficult to establish").

[117] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (cited in Walmart v. Dukes, 564 U.S. 338 (2011)).

[118] *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.") (citing FED. RULE CIV. P. 23(b)(2) advisory committee's notes); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) ("subdivision (b)(2) 'build[s] on experience mainly, but not exclusively, in the civil rights field'").

structural reforms or declaratory relief tend to be less controversial because an injunction usually impacts all class members in the same way.[119]

4. Values Served by EEOC Class Actions

In our conversations with EEOC AJs, they described two important values associated with the EEOC class action procedure. First, class actions permit the EEOC to consistently apply decisions to groups of claimants working for the same employer. Second, AJs saw the class action procedure as a way to pool information about employers' policies and assess their lawfulness—to identify patterns that otherwise might escape detection in an individual proceeding. In some cases, the scale and visibility of an EEOC class action itself attracts the attention of government agencies, leading to workplace reforms. For example, after an EEOC class of disabled applicants challenged the State Department's "world-wide" availability requirement for foreign-service workers—a policy that rejected candidates for promotion unless they could work without accommodation—the State Department was alerted to a systematic problem in its hiring practices.[120]

Indeed, the design of the EEOC class action process appears to promote collaborative reform. Following an EEOC AJ's decision on the merits, the federal employer is given time to "accept, reject, or modify" the AJ's recommendations and final report.[121] The employee then decides whether to appeal to the EEOC's Office of Federal Operations from the final agency decision.

Class actions before the EEOC rarely encourage the filing of what some call "negative value" claims—claims where the cost of litigation itself outweighs any potential award.[122] There appears to be no shortage of claims

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[119] *Amchem Products, Inc.* at 614 (describing the 1966 amendments providing for Rule 23(b)(3) class actions as "'the most adventuresome' innovation" (citing Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969)).

[120] Press Release, *U.S. Equal Employment Opportunity Commission Affirms Class Action to Open State Department to Disabled Foreign Service Officers*, MARKETWATCH, (June 14, 2014), http://goo.gl/GXdHOK.

[121] 29 C.F.R. § 1614.204(j)(1) (giving the government employer sixty days to issue a "final decision" stating whether it will "accept, reject, or modify the [AJ's] findings"). *See also* 29 C.F.R. § 1614.204(d)(7) (giving agencies forty days to decide whether or not to "accept" the class action determination).

[122] ALI REPORT, *supra* note 11, § 2.02; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1861 (2006) ("It is well understood that aggregation is the key to the viability of many claims routinely brought as class actions, particularly what are termed the negative

filed against federal employers—and some of them are filed pro bono. The AJs we interviewed recognized that class actions can be time-consuming—observing that some class actions they had overseen had lasted for several years. However, they viewed their ability to hear class actions as important (1) to afford legal access to many similarly affected parties, (2) to enhance the EEOC's capacity to identify discriminatory policies by federal employers and consistently enforce substantive law, and (3) to assure the EEOC's continued ability to implement anti-discrimination policy in the wake of Supreme Court decisions that have limited employment class actions in federal court.[123]

5. Challenges of EEOC Class Actions

Despite the AJ's generally positive view of EEOC class actions, they also identified some of the same challenges associated with complex litigation in state and federal courts, including concerns with diseconomies of scale, accuracy, and participation. First, EEOC class action proceedings are time-intensive. They may take years of motion practice, class discovery, appeals, and fairness hearings to determine the reasonableness of settlements. This means that before certifying a class AJs must ensure that a class action is feasible and likely to resolve the claims more efficiently than individual adjudications.

Second, AJs cited accuracy concerns associated with managing complex statistical evidence and other expert testimony. As a result, EEOC AJs may rely on procedures like *Daubert* hearings to screen out unreliable expert testimony and hold workshops in which they share insights on handling complex expert testimony.

Third, some AJs expressed concern about meaningful participation, given the fact that class members cannot opt-out of the class proceeding. They worried about the due process rights of absent class members who could not directly participate in or exit the action, and accordingly, felt additional pressure to assure that counsel adequately represented their interests before certifying the class action. The EEOC AJs have addressed this challenge by making extra efforts to ensure that attorneys representing

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value claims, in which the transaction costs of prosecuting individual actions make enforcement impossible absent aggregation.").

[123] *Cf.* 64 Fed. Reg. 37,644, 37,651 (July 12, 1999) (observing that "class actions . . . are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices").

a class with absent class members have sufficient experience, resources, and skill to adequately represent large groups of similar claims.[124]

B. The National Vaccine Injury Compensation Program (NVICP)

1. Background on the NVICP

Congress created the NVICP in 1986 to provide people injured by vaccines with a "no-fault" alternative to lawsuits in federal court.[125] Under the program, claimants first file a claim for compensation with the Department of Health and Human Services (HHS) and the newly-formed "Office of Special Master (OSM).[126] Claimants are then entitled to a decision within 240 days based on a showing that the vaccine caused the injury.[127] By mandating that people first file their vaccine injury claims with the NVICP, Congress hoped to reduce lawsuits against physicians and manufacturers, while providing those claiming vaccine injuries an expedited claim process and a reduced burden of proof. Claimants under the NVICP, unlike those who sue, do not have to prove negligence, failure to warn, or other tort causes of action; they must only prove that a covered vaccine caused their injury.[128] A seventy-five cent excise tax for each dose of vaccine sold goes to a trust, which in turn, funds awards and the administrative costs of the Program.[129]

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[124] For example, the EEOC AJs we interviewed reported requiring purported class counsel without experience with class actions to bring in experienced counsel and allowing intervention by a third party to challenge the adequacy of purported class counsel. T/c with EEOC AJs Enechi Modu, David Norken, & Erin Stilp (Jul. 31, 2015); t/c with EEOC AJ David Norken (Apr. 29, 2016).

[125] *See* National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, sec. 311(a), §§ 2101–2106, 100 Stat. 3755, 3756-58 (codified as amended at 42 U.S.C. §§ 300aa-1 to -6 (2012)). *See also* Wendy K. Mariner, *Innovation and Challenge: The First Year of the National Vaccine Injury Compensation Program*, Report for ACUS Recommendation 91-4 (1991)

[126] For more information about the NVICP's personnel, see MOLLY TREADWAY JOHNSON ET AL. FEDERAL JUDICIAL CENTER, USE OF EXPERT TESTIMONY, SPECIALIZED DECISION MAKERS, AND CASE-MANAGEMENT INNOVATIONS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM 11-12 (1998).

[127] 42 U.S.C. § 300aa-12(d)(3)(A)(ii) (2012). *But see* Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1361 (2015) (finding, among other things, that many cases exceed the 240 day window).

[128] *National Childhood Vaccine-Injury Compensation Act: Hearing on S. 2117 Before the S. Comm. on Labor & Hum. Res.*, 98th Cong. 290-91 (1984) [hereinafter 1984 Senate Hearing] (statement of Sen. Paula Hawkins) ("[T]hese children have an urgent need and deserve simple justice quickly.").

[129] 42 U.S.C. § 300aa-12(c)(1), (d)(2)(A) (2012).

Generally a petitioner can get compensation under the vaccine injury program in two ways. In a "table" case, the petitioner has an initial burden to prove an injury listed in the Vaccine Injury Table.[130] Upon satisfying this initial burden, the petitioner earns a "presumption" that the vaccine caused his or her injury. The burden then shifts to HHS to prove that a factor unrelated to the vaccination actually caused the illness, disability, injury, or condition.[131] Petitioners can also get compensation for "off-table" cases. The petitioner in an off-table case has the burden to prove the vaccination in question "caused" a particular illness, disability, injury, or condition.[132] The NVICP originally covered vaccines against seven diseases - diphtheria, tetanus, pertussis, measles, mumps, rubella (German measles), and polio. Congress has since extended coverage to a total of sixteen vaccines.

OSM adjudicators possess an interesting mix of powers—falling somewhere in between Article I judges and agency adjudicators. On the one hand, Congress expressly considered—and then rejected—creating a new department within HHS to hear claims arising out of the vaccine program.[133] Moreover, the OSM sits in the U.S. Court of Federal Claims, and parties may appeal their decisions to the court. On the other hand, the OSM must follow special procedures created specifically for the vaccine program, lacks formal authority to hear class actions or use other multi-party procedures, and receives as much weight and deference for the medical and scientific findings as other agency adjudicators—their decisions may only be set aside on appeal if found "arbitrary and capricious."[134]

Since its founding, like most benefit programs, many vaccine claims proceeded one at a time. However, sometimes, this small office of eight adjudicators has had little alternative but to find ways to streamline the disposition of large groups of cases—particularly those raising similar scientific questions. Relying on its inherent authority to use "specialized knowledge" to resolve common scientific questions in a consistent and informed way, the OSM has relied upon combinations of procedures that

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[130] *See* 42 U.S.C. § 300aa-14(a) (1993); Capizzano v. Sec'y of Health & Hum. Servs., 440 F.3d 1317, 1319 (Fed. Cir.2006) (citations omitted).

[131] 42 U.S.C. §§ 300aa-13(a)(1)(A)-(B).

[132] 42 U.S.C. §§ 300aa-13(a)(1) to -11(c)(1)(C)(ii)(I).

[133] Munn v. Sec'y of Health & Hum. Servs., 970 F.2d 863, 871 (Fed. Cir. 1992) (describing legislative history of Vaccine Act).

[134] Hodges v. Sec'y of Health & Hum. Servs., 9 F.3d 958, 961 (Fed. Cir. 1993).

loosely resemble multidistrict litigation, bellwether hearing procedures, and creative case-management techniques to efficiently resolve cases that raise common scientific questions, in ways designed to increase public participation and input.

2. The Origins of the Omnibus Proceeding

One way that the OSM has handled large groups of claims raising similar scientific questions is through the "omnibus proceeding." In an omnibus proceeding, a single adjudicator or set of adjudicators will hear claims that raise the same general scientific question of causation. Even though the Act that created the vaccine program contains no provision for class action suits (or anything like it), special masters developed the concept of the omnibus proceeding because the "same vaccine and injury often involve the same body of medical expertise."[135] Counsel representing large groups of individual claimants often use an omnibus proceeding to answer questions of "general causation," like whether a particular vaccine is capable of causing a specific injury. The hope is that the issue of whether a vaccine did so in a specific case can then be resolved more expeditiously.

Special Masters have pointed to two sources of informal authority to justify this procedure. First, they point to the broad discretion afforded Special Masters in the adjudication of claims that arise out of the program. Among other things, the Vaccine Act permits special masters to make evidentiary findings without following the formal rules of evidence, and gives them broad license "to determine the format for taking evidence and hearing argument."[136] Second, the OSM has pointed to their expertise as a rationale to democratize and open up the hearing process when the same cases raise similar questions of scientific causation. As Chief Special Master Vowell observed:

> The Court of Federal Claims has noted that "instead of being passive recipients of information, such as jurors, special masters are given an active role in determining the facts relevant to Vaccine Act petitions," and that "the special masters have the expertise and experience to know the type of information that is most probative of a claim." The U.S. Court of Appeals for the Federal Circuit has commented on the "virtually unlimited" scope of the Special Master's

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[135] Ahern v. Sec'y of Dep't of Health & Hum. Servs., No. 90-1435V, 1993 WL 179430 (Fed. Cl. Spec. Mstr. Jan. 11, 1993).

[136] VACCINE ACT R. 8(a).

> authority to inquire into matters relevant to causation, and the deference properly accorded to their fact-finding. Notably, federal district court judges have similarly relied on their discretion to control evidence and their familiarity with complex scientific questions to justify similar forms of procedural innovation.[137]

The use of omnibus proceedings dates back to 1992, when Special Master Hastings decided an omnibus proceeding involving 130 cases that alleged a rubella vaccine chronic arthropathy that should be compensated under the Vaccine Program.[138] In that case, he observed early on that a large number of similar claims presented the general question over whether or not rubella could cause chronic arthopathy, and *sua sponte*, encouraged plaintiffs' attorneys who had filed such claims to form a steering committee to coordinate the presentation of expert evidence on the condition. Special Master Hastings found that "each case has an issue in common with the other cases, i.e., whether it can be said that it is 'more probable than not' that a rubella vaccination can cause chronic or persistent [arthropathy]."[139] The Special Master thus conducted an inquiry into this "general" question for the benefit of each of the related cases "with the hope that knowledge and conclusions concerning the general causation issue . . . could be applied to each individual case."[140]

At the time, there was "only a very, very limited amount of data directly applicable" because "this issue really ha[d] not been scientifically studied."[141] Accordingly, the Special Master gave petitioners a great deal of time to develop general causation evidence. At the general causation hearing, Special Master Hastings then evaluated a range of evidence that applied to this "general causation" question—including several isolated cases of chronic arthritis following the rubella vaccination, a study that discussed several cases of chronic joint pain, certain evidence of pathological markers, and formal expert testimony. At the end of the hearing, Special Master Hastings conceded that the evidence, while "not overwhelming" generally supported a causal link between the rubella

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[137] Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *2 (Fed. Cl. Feb. 12, 2009) (citations omitted).

[138] *Ahern*, 1993 WL 179430 at *3. "Arthropathy" broadly includes both swelling, stiffness, and pain in the joints. It encompasses both "arthritis," where objective evidence of the condition exists, and "arthralgia," which involves only subjective pain.

[139] *Id.*

[140] *Id.*

[141] *Id.* at *4.

vaccine and chronic arthritis. He then entered a case management order requiring individual parties to put forward evidence consistent with his findings—acute onset of arthritis, no history of pre-existing conditions, as well as other evidence—to qualify for compensation.

The general proceeding helped not only expedite the evaluation of a common, as well as still-evolving scientific question of general causation, but also made otherwise "small dollar" claims for joint pain worthwhile. "Following the 1993 Decision, over 130 related cases were either resolved or voluntarily dismissed based upon the Special Master's findings."[142] Moreover, by forcing the parties to pool together common scientific evidence on the issue, he raised the attention of an issue that, up to that time, had escaped the attention of HHS as well as Congress. Shortly after the decision, the Vaccine Injury Table was administratively modified, consistent with Special Master Hastings' decision, to include "chronic arthritis" as a Table injury associated with the rubella vaccine.[143] As a condition of establishing a table injury for chronic arthritis, a petitioner must demonstrate that a physician observed actual arthritis (joint swelling) in both the acute and chronic stages.[144]

The Vaccine Program uses two types of omnibus proceedings. The first involves hearing evidence on a general theory of causation—like whether or not, as Special Master Hastings' considered, a rubella vaccine causes chronic arthritis or other categories of joint problems. The Special Master makes findings based on that evidence and orders the parties to file papers establishing the extent to which the facts of individual cases fit within the court's general findings.[145] For example, counsel representing a large number of petitioners and counsel for respondent may file expert reports and medical journal articles to support the theory that the rubella vaccine is associated with chronic arthritis. The special master then (1) conducts a hearing in which the medical experts testify, (2) publishes an order setting forth the conclusions, and (3) files it in each of the rubella cases. If he or she finds sufficient evidence that the rubella vaccination could cause chronic arthropathy under certain conditions, the Special Master may order individual petitioners seeking compensation to establish those conditions in a separate filing.

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[142] Moreno v. Sec'y of Dep't of Health & Hum. Servs., 65 Fed. Cl. 13, 17 (2005) (Dec. 16, 2003) (citing Moreno, No. 95–706V at 5 (Dec. 16, 2003)).

[143] *See* 60 Fed. Reg. 7678 (1995), revised 62 Fed. Reg. 7685, 7688 (1997).

[144] 42 C.F.R. § 100.3(b)(6)(A)-(B) (1997).

[145] *See, e.g.*, *Ahern*, 1993 WL 179430.

The second type of omnibus proceeding involves common vaccines and injuries—applying evidence developed in the context of one individual case to other cases involving the same vaccine and the same or similar injury,[146] much like an issue class action.[147]

According to Chief Special Master Vowell, however, most omnibus proceedings work like bellwether trials in federal district court—organizing individual cases that raise similar issues in front of the same adjudicator, in the hopes that the outcome in one or a few cases will help other similarly situated parties understand the strengths and weaknesses of their cases, thereby facilitating the settlement of the remaining cases:

> Most omnibus proceedings . . . have involved hearing evidence and issuing an opinion in the context of a specific case or cases. Then, by the agreement of the parties, the evidence adduced in the omnibus proceeding is applied to other cases, along with any additional evidence adduced in those particular cases. The parties are thus not bound by the results in the test case, only agreeing that the expert opinions and evidence forming the basis for those opinions could be considered in additional cases presenting the same theory of causation.[148]

Even though the omnibus proceeding is thus less binding than the "all-or-nothing" approach of the class action, omnibus proceedings may similarly conserve resources in cases that involve overlapping scientific evidence.

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[146] *See, e.g.*, Capizzano v. Sec'y of Dep't of Health & Hum. Servs., 440 F.3d 1317 (Fed. Cir. 2006).

[147] *See* Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 414 n.254 (2011) (stating that "omnibus proceeding[s]" in the NVICP are "treated like a class action"). "Issue class actions" allow parties to achieve the economies of class actions for a part of the case—like whether a defendant lied to investors—even if courts could not manageably try the remaining individual issues of causation and damages as a class. Elizabeth C. Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1894 (2015) ("[C]ourts have properly separated eligibility components such as plaintiffs' specific and proximate causation, reliance, and damages to facilitate issue classes in employment-discrimination, environmental-contamination, and consumer-fraud litigation." (collecting cases)), http://ssrn.com/abstract= 2600219.

[148] Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *4 (Fed. Cl. Feb. 12, 2009) (citations omitted).

Special Masters adopted this approach in the "Omnibus Autism Proceeding," which was established in order to determine whether a causal link existed between childhood vaccines and autism. Between 2005 and 2006, over 5,000 cases alleging an association between autism and either the MMR vaccine (which does not contain thimerosal) or vaccines containing the preservative thimerosal, or both, have been filed with the NVICP.[149] Three special masters structured discovery, motion practice, and expert testimony to hear three separate "test cases" on this theory of general causation.

In so doing, the special masters in each case considered a wealth of scientific evidence common to every case. As Chief Special Master Vowell observed: "The evidentiary record in this case . . . encompasses, inter alia, nearly four weeks of testimony, including that offered in the Cedillo and Hazlehurst cases; over 900 medical and scientific journal articles; 50 expert reports (including several reports of witnesses who did not testify); supplemental expert reports filed by both parties post-hearing, [and] the testimony of fact witnesses on behalf of [the injured child and his] medical records."[150] Although non-binding, the findings in those three cases—which found no causal connection between vaccines and autism—would help the remaining claimants evaluate the strength and merits of their claims in the vaccine program.

3. Challenges of Omnibus Proceedings

There are drawbacks associated with omnibus proceedings. First, some agencies use ALJs who are assigned randomly to each individual case to reduce allegations of bias or gamesmanship.[151] Such agencies would have to take greater care to ensure that ALJs were randomly assigned as much as possible.

Second, omnibus proceedings raise interesting questions about the legitimacy of using an adjudication process to settle complex scientific questions. Many plaintiffs in the Omnibus Autism Proceeding were anxious about commencing cases together, as were members of the public health community, who "found it unsettling that the safety of vaccines must be put on trial before three "special masters" in an obscure vaccine court.

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[149] *See* HEALTH RESOURCES AND SERVICES ADMINISTRATION, OMNIBUS AUTISM PROCEEDING, http://www.hrsa.gov/vaccinecompensation.

[150] *Snyder*, 2009 WL 332044, at *8.

[151] 5 U.S.C. § 3105 ("Administrative law judges shall be assigned to cases in rotation so far as practicable.").

Said one: "the truth about scientific and medical facts is not, ultimately, something than can be decided either by the whims of judges or the will of the masses."[152] Others, however, found that the ability to hear common cases together led to deliberations that represented a "comparatively neutral exhaustive examination of the available evidence."[153]

Finally, Special Masters and staff had to invest substantial resources tracking, assessing attorney's fees for, and closing individual cases still pending long after the court resolves common questions involving the Omnibus Autism Proceeding. To alleviate these problems, the Special Master's office may require those who agree to participate in future omnibus proceedings to be bound by the outcome of such "test cases."

C. Office of Medicare Hearings and Appeals (OMHA)

1. Background on OMHA

The OMHA operates in the HHS and hears appeals involving Medicare benefits. OMHA currently comprises five field offices in addition to its headquarters. OMHA is organizationally and functionally separate from the Centers for Medicare and Medicaid Services (CMS).

OMHA was created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 931, 117 Stat. 2066 (the Medicare Modernization Act). Before 2003, ALJs in the Social Security Administration (SSA) heard Medicare appeals under a Memorandum of Understanding between SSA and HHS. The Medicare Modernization Act transferred responsibility for ALJ hearings to OMHA to address concerns that SSA ALJs lacked guidance to handle the distinct issues raised in Medicare appeals.[154]

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[152] Gilbert Ross, *Science is not a Democracy*, Wash. Times. June 14, 2007, http://www.washingtontimes.com/news/2007/jun/14/20070614-085519-8098r; Paul Offit, *Inoculated Against Facts*, N.Y. TIMES. Mar. 31, 2008, http://www.nytimes.com/2008/03/31/opinion/31offit.html?_r=1&scp=3&sq=vaccination. *See also* ACUS Statement # 11: Hearing Procedures for the Resolution of Scientific Issues (1985) (recommending hearing procedures for agencies to evaluate scientific studies).

[153] Jennifer Keelan & Kumanan Wilson, *Balancing Vaccine Science and National Policy Objectives: Lessons From the National Vaccine Injury Compensation Program Omnibus Autism Proceedings*, 101 Am. J. Pub. Health 2016 (2011).

[154] Memorandum of ALJ Holt (citing 67 F.R. §§ 69312, 69316 (November 15, 2002) ("The need for the Medicare program to establish its own regulations for these upper level appeals has been recognized by many parties.")).

OMHA is the third of four levels of administrative appeals available in the Medicare health insurance program—Medicare Parts A, B, C, and D.[155] Medicare Parts A & B (or "Original Medicare") include Hospital Insurance (Part A) and Supplementary Medical Insurance (Part B). Part A helps pay for inpatient care in a hospital or skilled nursing facility (following a hospital stay) and some home health care and hospice care. Part B helps pay for doctors' services and other medical services, equipment, and supplies that are not covered by hospital insurance.[156]

The Medicare appeals process varies depending on which Part is involved, but Medicare Parts A and B are most relevant to OMHA's use of aggregation. Under Medicare Parts A and B, the reimbursement process generally begins with a provider or supplier submitting a bill to Medicare for a service they performed for a covered beneficiary.[157] In order to validate payment of the claim, Medicare uses private contractors called Medicare Administrative Contractors (MACs) to determine that the claim is covered or reimbursable and the amount that is payable by Medicare.[158] These contractors then notify the claimant of the amount recoverable and administer payment. If the claimant disagrees with the decision, the claimant can request a redetermination by the MAC. The redetermination

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[155] In addition, OMHA provides the second level of review for certain Medicare decisions made by SSA. First, OMHA hears appeals of decisions from the SSA that an applicant is not entitled to be a beneficiary of the Medicare program. The local SSA office makes the initial decision about whether an applicant is entitled to Medicare benefits and on what terms. SSA may then conduct a reconsideration of that decision. *Medicare Entitlement Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/Entitlement%20 Appeals/entitlement_appeals.html (last visited Feb. 26, 2016). Second, OMHA hears appeals of SSA's determination of a beneficiary's Income Related Monthly Adjustment Amount, which determines a Medicare beneficiary's total month Part B and Part D insurance. *Medicare Part B Premium Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www. hhs.gov/omha/Part%20B%20Premium%20Appeals/partb_appeals.html (last visited Feb. 26, 2016).

[156] Part C is the Medicare Advantage Plan program. Beneficiaries with Medicare Parts A and B can choose to receive all of their health care coverage through one of these Medicare Advantage plans under Part C. Finally, Part D is the Medicare Prescription Drug program, which helps pay for certain medications prescribed by doctors. *Appeals Process by Medicare Type*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/process/ Appeals%20Process%20by%20Medicare%20Type/appeals_process.html (last visited Feb. 26, 2016).

[157] *Level 3 Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/ omha/process/level3/index.html (last visited Feb. 26, 2016).

[158] Don Romano & Jennifer Colagiovanni, *The Alphabet Soup of Medicare and Medicaid Contractors*, 27 HEALTH LAW. 1, 5 (2015).

is processed by the same MAC, but by a different individual in the MAC than the person who processed the original claim.[159]

If the claimant is not satisfied with the redetermination by the MAC, it can initiate a Level 2 appeal, which will be reviewed by a Qualified Independent Contractor (QIC) retained by CMS, who reconsiders the medical necessity of the services provided to the covered beneficiary.[160] If the claimant is not satisfied with the QIC's decision, the claimant may appeal the QIC's determination to OMHA.[161]

Parties may appeal the decision of OMHA under any Part to the Medicare Appeals Council, which is part of the Departmental Appeals Board of HHS and independent of OMHA and its ALJs. The decisions of the Medicare Appeals Council are themselves subject to review in federal district court if the amount in controversy is at least $1,350.[162]

2. The Backlog in OMHA Appeals

The OMHA appeals process began to experience significant backlogs in FY 2012. The number of appeals received by OMHA grew from 59,600 in FY 2011 to 117,068 in FY 2012, 384,151 in FY 2013, and 473,563 in FY 2014. Put differently, the number of claims increased 800% from 2006 to 2014. Meanwhile, the number of appeals decided by OMHA only grew from 53,864 in FY 2011 to 61,528 in FY 2012, 79,377 in FY 2013, and 87,270 in FY 2014. Thus, despite the increased productivity of OMHA's ALJs and the total number of appeals decided each year, OMHA could not keep pace with the huge number of new cases coming in the door. Total sustainable annual adjudicatory capacity of OMHA ALJs, absent aggregation, is currently approximately 75,000 appeals. As a result, average wait times for the processing of appeals grew from 121 days in 2011 to 603 days in 2015.[163]

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[159] *Level 3 Appeals*, OFF. OF MEDICARE HR'GS & APPS., *supra* note 157.

[160] *Level 1 Appeal: Original Medicare (Parts A & B)*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/process/level1/l1_ab.html (last visited Feb. 26, 2016).

[161] 42 C.F.R. § 405.1004 (2015) (requiring that "[t]he party files a written request for ALJ review within 60 calendar days after receipt of the notice of the QIC's dismissal. [And T]he party meets the amount in controversy requirements. . .").

[162] *Level 5 Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/process/level5/index.html (last visited Feb. 26, 2016).

[163] Nancy J. Griswold, Chief ALJ, OFF. OF MEDICARE HR'GS & APPS., APPELLANT FORUM – UPDATE FROM OMHA (June 25, 2015).

Most of the increased number of appeals involved claims under Medicare Part A and Part B. The dramatic surge in these appeals was caused primarily by stepped up efforts to recover excess billing under several post-payment audit programs conducted by MACs, Recovery Auditor Contractors RACs, Zone Program Integrity Contractors, Supplemental Medical Review Contractors, and more active Medicaid State Agencies. In addition, there was a larger beneficiary population during this period.

It is important to note, however, that appeals by individual beneficiaries receive priority processing. Thus, most of the parties suffering from the delays caused by the backlogs were businesses—often service providers or medical suppliers—with sometimes hundreds or thousands of similar appeals on behalf of different Medicare beneficiaries.

Faced with an existential crisis, OMHA began to explore ways to reduce the backlog and process a much larger number of appeals without adding more ALJs. Among several initiatives, OMHA introduced two pilot programs using aggregation mechanisms to resolve large groups of claims in a single proceeding: (1) the Statistical Sampling Initiative; and (2) the Settlement Conference Facilitation.

3. OMHA's Power to Aggregate Appeals

Section 931 of the Medicare Modernization Act directs the Secretary of HHS to establish "specific regulations to govern the appeals process." The Secretary has utilized her broad discretion to develop administrative procedures to promulgate regulations authorizing OMHA ALJs to consolidate two or more cases in one hearing at the request of the appellant or on "his or her own motion," "if one or more of the issues to be considered at the hearing are the same issues that are involved in another hearing or hearings pending before the same ALJ."[164] The purpose, as described in the regulations, is "administrative efficiency."[165] After the hearing, the ALJ may issue either a consolidated decision and record or separate decisions and records for each claim.[166]

Although OMHA ALJs rarely formally consolidate or combine appeals, ALJs often informally combine appeals to be heard in the same proceeding even without a formal consolidation order or process, when the

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[164] 42 C.F.R. § 405.1044.

[165] *Id.*

[166] *Id.*

appeals involve the same organization, issues of law or fact, or the same representative. For example:

> (1) ***Same appellant and related issues.*** A large durable medical equipment provider appeals claims for oxygen, continuous positive airway pressure supplies, and inhaled medications. Although an ALJ may hear separate fact specific arguments on each case, "there are efficiencies in having one proceeding, with procedural statements, witness introductions, oaths, and waiver of counsel done once at the beginning."[167] Also, there are common arguments that can be made at the start of the hearing or in the first case with that particular issue and not repeated. The documents are often common and can be explained once if there are any questions.
>
> (2) ***Same appellant and common issues of law and fact.*** When a lab provides DNA testing of cancer cells to determine appropriate chemotherapy treatment, there may be a question about whether the procedure is "investigational" or "experimental" (and therefore not covered by Medicare). The case will often involve the review of medical literature and physician testimony. The entire group of appeals assigned to the ALJ can be heard together. The ALJ may review the records in a few files, but there are typically no individualized factual determinations. In such cases, an ALJ may still offer the appellant the right to present on all of the cases, but the parties "typically rest on the more general arguments and waive the right to separate hearings in each case."
>
> (3) ***Same representative appearing on behalf of multiple appellants with no testimony or participation by the appellant's employees***. A law firm or other organization represents hospitals in cases in which overpayments were assessed after a RAC review. The issue in all of the cases is whether the services should have been billed as inpatient (Part A) or outpatient/observation (Part B, which generally have a lower payment). The RAC will often appear as a party (they are paid a contingent fee based on the recovery), and other Medicare contractors may also appear as participants or parties. OMHA would typically schedule these cases in groups by representative and RAC.

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[167] T/c with ALJs Fisher & Holt (Oct. 21, 2015).

4. OMHA's Statistical Sampling Initiative

(a) Background on Statistical Sampling in the Medicare Program

The Medicare program has used statistical sampling since 1972 as an accepted method for estimating Medicare overpayments in light of the enormous administrative burden of auditing on an individual claim-by-claim basis. Currently, CMS's statistical sampling and extrapolation methodology guidelines for overpayments appear in its Medicare Program Integrity Manual (MPIM), Pub. 100-08.

In *Chaves County Home Health Servs. v. Sullivan*,[168] the U.S. Court of Appeals for the District of Columbia Circuit approved the use of statistical sampling to determine Medicare overpayments, reasoning that even though the Medicare Act did not expressly authorize its use, the D.C. Circuit would defer to the Medicare program's adoption of statistical sampling as a "judicially approved procedure that can be reconciled with existing requirements" under the principles set forth in *Chevron U.S.A. Inc. v. NRDC*.[169] In so doing, the D.C. Circuit also pointed to longstanding uses of statistical sampling in other contexts.[170] Nevertheless, the D.C. Circuit distinguished the use of statistical sampling in post-payment review from individualized pre-payment claim review.[171]

Courts have also consistently rejected claims that statistical sampling in the Medicare and Medicaid programs violates due process under the *Mathews v. Eldridge* balancing test, discussed above in Section I.D, reasoning that the private interest "at stake is easily outweighed by the government interest in minimizing administrative burdens."[172]

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[168] 931 F.2d 914 (D.C. Cir. 1991).

[169] 467 U.S. 837 (1984) (directing courts to defer to agencies' reasonable interpretations of ambiguous statutes).

[170] *See, e.g.*, Illinois Physicians Union v. Miller, 675 F.2d 151 (7th Cir. 1982) (use of statistical sampling in Medicaid); Michigan Dept. of Educ. v. United States, 875 F.2d 1196 (6th Cir. 1989) (use of statistical sampling in vocational rehabilitation programs).

[171] *Chaves*, 931 F.2d at 919.

[172] *Id.* at 922 ("In light of the 'fairly low risk of error so long as the extrapolation is made from a representative sample and is statistically significant, the government interest predominates.'"); Ratanasen v. Cal. Dept. of Health Servs., 11 F.3d 1467 (9th Cir. 1993); *Illinois Physicians Union*, 675 F.2d at 157 ("[I]n view of the enormous logistical problems of Medicaid enforcement, statistical sampling is the only feasible method available."); Bend v. Sebelius, 2010 WL 4852230 (C.D. Cal. Nov. 19, 2010). *But see* Daytona Beach General Hosp., Inc. v. Weinberger, 435 F. Supp. 891 (M.D. Fla. 1977) (sampling method that included less than ten percent of the total cases denied plaintiff due process).

The use of statistical sampling and other aggregation techniques in Medicare appeals, as opposed to the CMS auditing program,emerged "organically" in the late 1990s.[173] SSA ALJs began using them to manage Medicare disputes that involved large numbers of similar claims before the same adjudicator. Both ALJs and the parties themselves would propose the use of statistical sampling to expedite such claims. Statistical sampling was advantageous to providers who did not want to spend the significant time necessary to produce documentation for every claim for which they sought reimbursement.[174]

As a matter of policy, OMHA requires that parties consent before performing statistical sampling, reasoning that the use of statistics could save time and resources from re-litigating similar issues at OMHA. Those cases tended to involve appeals from a lower level decisionmaker who rejected a claim because it was (a) not covered by Medicare or (b) covered, but not payable. These are the same kinds of cases that are generally being appealed in OMHA's new Statistical Sampling Initiative.

(b) Statistical Sampling Pilot Program

As the number of Medicare Part A and Part B appeals spiked, OMHA formally adopted the Statistical Sampling Initiative (SSI) as a way to formalize and systematize the process that had begun with individual ALJs. OHMA proceeded cautiously in designing the pilot program, concerned that its backlog elimination efforts might create new backlogs. OHMA also had to address concerns of DOJ and CMS about allowing companies with a history of fraud or wrongdoing to participate in the pilot program.

OMHA attorneys, ALJs, and statisticians developed criteria for piloting the new program on a limited basis. Appellants with Part A or Part B claims are eligible for statistical sampling if they meet the following criteria:

1. They have at least 250 claims on appeal, all of which fall into only one of the following categories: (i) pre-payment claim denials; (ii) post-payment (overpayment) non-RAC claim denials; or (iii) post-payment (overpayment) RAC claim denials from one RAC.

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[173] *In re Apogee Health Serv., Inc.*, No. 769 (Medicare Appeals Council Mar. 15, 1999)

[174] T/c with ALJs Fisher & Holt (Oct. 21, 2015).

2. The claims must be currently assigned to an ALJ or filed between April 1, 2013 and June 30, 2013, but no hearing on the claims has been scheduled or conducted.

3. The appellant must be a single Medicare provider or supplier, but providers or suppliers with multiple National Provider Identifiers (NPIs) owned by a single entity may proceed under one provider number by agreement of the appellant's corporate office.

4. There can be no outstanding request for Settlement Conference Facilitation for the same claims.

Although appellants may request statistical sampling of their own accord, none have done so to date. Rather, OMHA has invited certain appellants to participate in the program. In order to identify claims appropriate for statistical sampling, OMHA used its database to identify large numbers of appeals from the same provider using the same Healthcare Common Procedure Coding System (HCPCS) billing code. Providers use the HCPCS code to identify the specific items or services for which they are seeking reimbursement under Medicare (e.g., durable medical equipment, wheelchairs). Based on these "data runs," OMHA made offers to eight providers to participate in the sampling program. Seven parties agreed to participate in the program and one party declined.

Most of the eligible participants in the program to date are providers of medical supplies and equipment. Notably, a single diabetic supplies proceeding would account for 17,134 claims, dwarfing the other statistical trials, which only resolve caseloads of 400 to 600 cases at a time. Our interviewees suggested that these cases lend themselves to sampling because the claims involved are more similar than inpatient provider care, which is more varied and individualized.

Currently, one person oversees the Statistical Sampling Initiative, although OHMA has trained a number of ALJs to be prepared for the program in addition to their regular duties. Although ALJs rotate randomly, a small number of ALJs have committed to be randomly selected within the statistical sampling program. This allows OMHA to take advantage of their expertise in handling such matters.

OMHA is guided by CMS policies on statistical sampling, as set forth in the MPIM (CMS Pub. 100-08, Ch. 8). In short, a statistician selects the sample from the universe of claims, the ALJ makes decisions based on the sample units, and the statistician then extrapolates the results to the universe of claims.

(c) Challenges of the Statistical Sampling Initiative

Although OHMA plans to expand the statistical sampling program, OMHA identified a number of challenges. First, OMHA adjudicators and staff were mindful that aggregation risks creating diseconomies of scale—they strongly hoped to avoid aggravating backlogs and claims by creating an unmanageable aggregate litigation process, particularly given limited staff and large caseloads.[175] Second, OMHA sought to ensure adjudicators possessed sufficient expertise to hear large complex disputes, given that ALJs ordinarily hear individual cases. Third, service providers and other appellants expressed legitimacy concerns; they worried that aggregate proceedings in front of the wrong adjudicator or with the wrong methodology could jeopardize their day in court.[176] Finally, some worried that there was not enough information about the statistical sampling methodology that would be used in the SSI.[177]

OMHA addressed the question of efficiency by taking a very conservative approach to the pilot program so as not to create a new backlog while attempting to deal with its existing backlog. As noted above, the pilot program was initially confined to appeals already assigned to ALJs or filed during a single quarter of 2013. In addition, the ALJs participating in the pilot did so on a voluntary basis, and their work in the pilot program is in addition to their regular workload. Nine ALJs volunteered to participate in the program.

The pilot program addressed the challenge of expertise by selecting ALJs to participate who had some experience with statistical sampling. This, of course, is in some tension with the random assignment of ALJs, as it creates a smaller pool from which an ALJ is drawn.

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[175] Some providers expressed similar concerns. Letter from Paul E. Prusakowsky, President, National Association for the Advancement of Orthotics and Prosthetics, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals (Dec. 5, 2014) (supporting the SSI program, but expressing its concern that the program may "divert OMHA's resources away from deciding appeals not involved in the pilot."), http://www.oandp.org/assets/PDF/OP_Alliance_comment_ltr_OMHA-1401-NC (D0574905).pdf.

[176] T/c with Amanda Axeen, Jason Green, & Anne Lloyd, OMHA (July 20, 2015).

[177] Letter from Raja Sekeran, Vice President and Associate General Counsel – Regulatory, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals (Dec. 5, 2014) (expressing concerns with the lack of published information about the "relationship between CMS and the statistical experts used to develop the sampling methodology"), http://www.regulations.gov/#!documentDetail; D=HHS-OMHA-2014-0007-0093.

OMHA undertook some outreach efforts in connection with the pilot program to address concerns that appellants had with legitimacy, but it plans to do more on this front in the future. Providers have expressed concern with having one ALJ hear all of their claims. If OMHA expands the program and the universe of cases becomes larger, this concern will grow.

(d) Expansion of the Statistical Sampling Initiative

OHMA is currently considering expanding the program beyond the limited universe of appeals eligible to participate in the pilot program.[178] In connection with the expansion, OHMA is weighing additional outreach efforts, increased staffing levels, and restructuring the adjudication process to make the program more appealing to medical providers who are otherwise unfamiliar with the use of sampling.

An expanded statistical sampling program may use multiple ALJs to hear different parts of a sample of claims. For example, instead of a single ALJ hearing a sample of 100 cases, ten ALJs might each hear ten cases from the sample. This would help to allay appellants' concern that statistical sampling before a single ALJ risks a bad decision being extrapolated across the entire universe of claims. Many Medicare claims appellants are repeat players who have positive or negative opinions about particular ALJs. Indeed, our interviewees suggested that some appellants already try to exploit the power of ALJs to consolidate appeals to "ALJ shop." For example, an appellant with multiple appeals pending before different ALJs might request that all its cases be consolidated with the ALJ the appellant believes will provide it with the most favorable decision. Spreading the sample among more than one randomly selected ALJ will help alleviate the concern that the entire universe of claims will be decided by an ALJ that the party hopes to either avoid or obtain.

In addition to addressing the "all eggs in one basket" concern, OMHA may want to be mindful of other challenges as it expands the program. First, OMHA should consider continuing to avoid procedures that risk diseconomies of scale. For example, removing appeals from ALJs who may have already done work on the case risks creating new inefficiencies.

Second, allowing some appeals to jump ahead of others in the backlog queue may raise fairness concerns. At this point, only beneficiary appeals are subject to preferential or expedited assignment. But there may

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[178] Congress is also currently considering expanding funding for the statistical sampling program under the proposed 2015 Audit & Appeal Fairness, Integrity, and Reforms in Medicare (AFIRM) Act. *See* S. REP. NO. 114-177 (2015).

be providers that have compelling financial hardships caused by Medicare non-payment or overpayment recovery. They may complain about waiting longer for a hearing because another appellant's cases are moved up in line to be consolidated for assignment and adjudication.

Finally, it is difficult to see how the program can expand significantly while relying on ALJs to voluntarily adjudicate statistical samples on top of their regular workload. There must be some accounting for the work of the ALJs involved in statistical sampling as part of their regular work product. In addition, a sufficiently large cadre of ALJs must be properly trained in adjudicating appeals using statistical sampling.

Expanding the statistical sampling program may also help overcome some of the challenges faced by many mass government benefits programs. First, there will always be challenges with consistency in a dynamic environment in which appellants continually file appeals involving similar legal and factual issues, and even on the same issue for the same beneficiary with a different service date. It is impossible to consolidate all these cases as new cases continually enter the system. In addition, our interviewees reported that OMHA's current information infrastructure sometimes makes it difficult for ALJs to know about prior decisions involving the same issues. However, consolidating large numbers of appeals in a smaller number of proceedings using statistical sampling may make it easier to track these decisions.

Second, the relationship between CMS and OMHA can make it difficult to implement uniform policy. OMHA's decisions have no binding effect on CMS in non-adjudicated decisions. OMHA may approve a payment on appeal and the next day CMS can deny the same provider's claim on behalf of the same beneficiary for the same DME, with only a different date of service. Indeed, even the Medicare Appeals Council, which issues the Secretary of HHS's final decision in these appeals, does not bind OMHA and CMS beyond the appeals that it reviews. Aggregating large numbers of appeals in a smaller number of proceedings using statistical sampling may make it easier for the Secretary to coordinate the work of CMS and OMHA.

5. OMHA's Settlement Conference Facilitation Initiative

(a) Phase I of the Pilot Project

CMS has always had discretion to settle disputes with Medicare providers and suppliers, but the Settlement Conference Facilitation (SCF) Pilot represents an effort by OMHA to provide a formal framework for encouraging the settlement of large numbers of cases.

Before launching the pilot program, OHMA met with CMS and DOJ to discuss a number of issues related to the program. First, it sought their expertise on avoiding "nuisance settlements"—i.e., encouraging medical providers to file a large number of meritless appeals in the hopes of simply getting a discounted settlement. Second, OMHA wanted to avoid settling cases with a supplier or provider only to later discover that the party was the subject of a criminal investigation. Third, OMHA did not want to interfere with the CMS Part A hospital administrative agreement settlement in which a large group of hospitals settled certain Part A claims for 68 cents on the dollar.

The SCF Pilot began in June 2014. Once again mindful of avoiding the creation of new backlogs, the SCF Pilot was limited to:

1. groups of at least 20 appeals or appeals comprising $10,000 in aggregate claims;

2. filed by a Part B provider or supplier in 2013;

3. under the same NPI;

4. that have not yet been assigned to an ALJ for a hearing; and

5. are not the subject of an outstanding request for statistical sampling.

To qualify for the program, claims must be part of the Medicare Part B program, which usually involves durable medical equipment (DME), but also can involve outpatient therapy, physical services, and other more individualized forms of treatment. Appeals run the gamut of Part B DME claims (e.g., prosthetics, robotics), skilled nursing services (these are usually under Part A, but appellants can get a reduced amount under Part B), outpatient rehabilitation services (Part B or Part A), and even some drugs and biologicals.

The claims must be for the "same" or sufficiently "similar" items or services to qualify for the SCF pilot program. OMHA takes a "common sense" approach to the meaning of "same" or "similar." For example, all wheelchairs, whether electronic or manual, or nutritional supplies for people with digestive troubles, including both the nutritional supplements and the device to deliver them, would be the "same" or "similar" items. But wheelchairs and diabetes test strips are not related, even if stemming from the same illness, and would not be the "same" or "similar."

Under the pilot program, OMHA facilitates a discussion between CMS and the appellant regarding potential resolution through settlement.

OMHA devoted one attorney trained in facilitation, working full-time along with four other trained facilitators working on a rotating basis. This attorney and a second mediator attend each settlement conference as a team. If the parties reach an agreement, a settlement agreement is drafted by OMHA and signed by the parties. OMHA then dismisses the appeals. If no agreement is reached, the appeals return to their prior status and positions in the appeals queue.

OHMA has found that many appellants are more comfortable with mediation, particularly given the plethora of courthouse programs designed to promote alternative dispute resolution. OMHA received twenty-five requests for settlement conferences in connection with the pilot project. OMHA did not itself invite any parties to participate in the pilot program (in contrast to the statistical sampling initiative) because enough parties applied on their own, and OMHA has limited resources to devote to the pilot.

Of the twenty-five requests to participate in the SCF Pilot, five appellants were deemed ineligible because they did not meet the criteria for the program. Another five appellants were rejected due to objections by CMS. Fourteen cases went to settlement conferences. Of these, ten cases were settled and four did not. One request to participate in the program was still pending at the time of our interviews.

Phase I resolved 2,400 appeals. Most of the settlements resolved something in the range of 200 appeals. A few resolved 500 to 700 appeals. This is equal to the number of cases typically resolved by two ALJ teams working for one year. Each ALJ team is composed of four to six people, including the ALJ, attorneys, paralegals, and other staff assistants. Phase I of the SCF Pilot was staffed by the attorney trained in facilitation, a program analyst, a management assistant, and five facilitators.

(b) Challenges of the Settlement Conference Facilitation Initiative

The biggest challenge during Phase I of the SCF pilot program has been helping providers identify and quickly process information needed to make threshold determinations about their eligibility. Remarkably, our interviewees reported that appellants often did not know what claims they were appealing. The process for mediation often hinges on the medical providers' record keeping. Going forward, OMHA is thinking about ways to help the appellant identify eligible claims earlier in the process.

Another impediment was the industry-wide settlement offer that CMS made with a number of hospitals to pay 68 cents on the dollar for pending appeals of certain claims denied based on improper inpatient status.

This caused OMHA to limit the SCF Pilot to Part B because OMHA did not want to compete with the existing Part A settlement program for hospitals.

(c) Phase II Expansion

OMHA utilized what it learned from Phase I of the SCF Pilot in designing Phase II. Accordingly, even as it revised the eligibility criteria to include all appeals requesting an ALJ hearing that were filed before September 30, 2015, thus enlarging the overall pool of appeals eligible for the SCF program, OMHA sought to eliminate the types of appeals that risk making aggregation unmanageable.

First, OMHA revised the process to better identify appeals that can be settled and avoid spending time and resources on appeals that are unlikely to settle. Appellants must now submit an expression of interest asking OMHA for a preliminary report on their appeals. OMHA runs a report using the NPI and does its own preliminary analysis of the appeals to determine the number of claims that might be eligible. Then OMHA asks CMS if it would be willing to participate in the settlement process with the appellant. Only after determining that the appellant has appeals appropriate for the SCF program based on their similarity and approved dollar reimbursement amounts (discussed next), and securing CMS's consent, does OMHA invite the appellant to apply to participate in the program. Appellants may not request a settlement conference until they receive an OMHA SCF Preliminary Notification stating that the appellant may request SCF for the claims identified in the SCF spreadsheet.

Second, the claims appealed may not involve items or services billed under unlisted, unspecified, unclassified, or miscellaneous healthcare codes. These claims are difficult to settle because they do not have an approved reimbursement amount.

Third, the amount of each individual claim must be $100,000 or less. For the purposes of an extrapolated statistical sample, the extrapolated amount must be $100,000 or less.

Fourth, the request must include all of the party's pending appeals for the same items or services that are eligible for SCF. For example, if an appellant has fifty wheelchair appeals pending that meet the SCF requirements, the appellant must request SCF for all fifty wheelchair appeals. In addition, appellants may not request SCF for some but not all of the items or services included in a single appeal. For example, if an individual appeal has at issue 10 diagnostic tests and 10 drugs/biologicals, an appellant may not request that the diagnostic tests go to SCF and the

drugs/biologicals go to hearing.[179] This prevents parties from submitting their weakest appeals to the settlement process and going to hearings with their strongest appeals.

The minimum number of appeals remains twenty unless the aggregate amount in controversy is at least $10,000. Phase II of the Pilot also remains limited to Part B appeals. But OMHA is planning to include Part A appeals during Phase III, which is expected to begin in 2016.

In Phase III, OMHA may include Part A appeals. Some Part A appeals are more difficult to settle because there are more parties involved and their interests are not always aligned. For example, in the home health-care context, State Medicaid agencies want Medicare to reimburse providers, but the providers may want to be paid under the State Medicaid programs if they reimburse at a higher rate. OMHA will have to confront these feasibility challenges as it designs the further expansion of the SCF program.

D. Challenges and Benefits of Aggregate Agency Adjudication

Each case study illustrates the unique benefits and challenges offered by aggregate agency adjudication. Like federal courts, each tribunal has used aggregate adjudication to pool information about common and recurring problems, as well as to eliminate the duplicative expenditure of time and money associated with traditional one-on-one adjudication.[180] They have also sought more consistent outcomes in similar cases than possible with case-by-case adjudications. Finally, aggregation has proved to be an important method to improve access to legal and expert assistance by parties with limited resources, so that individuals can pursue claims that otherwise would be difficult to pursue on an individual basis.[181]

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[179] *Settlement Conference Facilitation*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/OMHA%20Settlement%20Conference%20Facilitation/settlement_conference_facilitation.html (last visited March 3, 2016).

[180] *See* In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859 (6th Cir. 2013) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013)); 1 WILLIAM B. RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS § 9 (5th ed. 2015) ("Class actions are particularly efficient when many similarly situated individuals have claims sufficiently large that they would each pursue their own individual cases. In these situations, the courts are flooded with repetitive claims involving common issues.").

[181] *See, e.g.*, Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30" (emphasis in original) (citation omitted)), cert. denied, 134 S. Ct. 1277 (2014).

But, as also illustrated above, aggregate agency adjudication raises unique challenges and costs of its own by: (1) potentially creating "diseconomies of scale"–inviting even more claims that stretch courts' capacity to administer justice to many people; (2) impacting the perceived "legitimacy" of the process and challenging due process; and (3) increasing the consequence of error. In other words, just like many kinds of administrative systems, aggregate adjudication struggles to deal with many different kinds of constituencies feasibly, legitimately, and accurately.

Nevertheless, each program has responded to these concerns by adopting aggregate procedures responsibly. They have cautiously piloted aggregate procedures to avoid replacing new backlogs with old ones. Where appropriate, they have also relied on panels of adjudicators to reduce allegations of bias and provided additional opportunities to assure individuals voluntarily participate in the process. Finally, some have developed guidance to standardize the use of statistical evidence, while others require cases raising novel factual or scientific questions to mature before centralizing claims before a single decisionmaker. This part summarizes the benefits of aggregation and the ways that these agencies have attempted to respond to their challenges.

1. Aggregate Adjudication Can Pool Information, Reach Consistent and Efficient Outcomes, and Improve Legal Access

As set out above, when used effectively, aggregate agency adjudication may fulfill important goals of efficiency, consistency and access in adjudication.

Promoting Efficiency. The efficiencies afforded by aggregation can be especially helpful in the administration and review of large benefit programs, such as those reviewed by the NVICP and OMHA.[182] For example, when over 5,000 parents claimed that a vaccine additive called thimerosal caused autism in children, the NVICP used a national Autism Omnibus Proceeding to pool all the individual claims that raised the same highly contested scientific questions.[183] In the words of one Special Master, omnibus proceedings have "turned out to be a highly successful procedural

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[182] S*ee* S. REP. NO. 111-265, at 35 (2009) (statement of Professor Michael P. Allen) ("[O]ne cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication."); *see also* Neil Eisner, 2003 A.B.A. SEC. ADMIN, L. & REGULATORY PRACTICE REP. 9-10 (2003) (recommending the use of class actions by the CAVC to address system-wide problems in veteran's cases).

[183] Cedillo v. Sec'y of Health & Hum. Servs., No. 98-916V, 2009 WL 331968, at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010).

device," facilitating settlement of individual cases and allowing those cases that proceed to a hearing to be resolved "*far more efficiently* than if we had needed a full blown trial, with multiple expert witnesses, in each case."[184] Similarly, both of OMHA's programs have been so successful that medical providers are urging OMHA to expand opportunities to aggregate and settle large numbers of claims.[185]

Promoting Consistency. Aggregate procedures can provide uniform and consistent application of the law,[186] particularly in cases seeking indivisible relief, like injunctions or declaratory relief. Absent a class action, a court may never hear from plaintiffs with competing interests in the final outcome, or over time, subject defendants to impossibly conflicting demands.[187] The EEOC, for example, has long claimed its class action procedure was important to consistently resolve "pattern and practice" claims of discrimination by federal employees.[188] The EEOC deems the process important in light of the volume of claims it processes each year, the potential for inefficient and inconsistent judgments, and the otherwise limited access to counsel.[189] OMHA adjudicators have similarly observed that aggregate procedures have been vital to ensure hospitals and

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[184] *Id.* (emphasis in original).

[185] *See, e.g.*, Letter to Nancy J. Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals, from Medical Association of Georgia (Dec. 5, 2014) (calling for an expansion of OMHA's Statistical Sampling Initiative), http://goo.gl/U5NJIS; Letter to Nancy J. Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals, from American Academy of Home Care Medicine (same), https://goo.gl/OeqE9n; Letter from Mark D. Polston, Partner, King & Spalding, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings & Appeals (Dec. 5, 2014) (calling for expansion of settlement conference initiative for a wider range of claims beyond Medicare Part B), http://goo.gl/bC8G2t; Letter from Robert Sowislo, Chair, Public Policy Committee, American Academy of Home Care Medicine, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals (Dec. 5, 2014) (observing that the SCF program "provides a more expedient and in some ways straightforward process for [certain providers]").

[186] 1 WILLIAM B. RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS § 10 (5th ed. 2015) (Class actions "reduce[] the risk of inconsistent adjudications. Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[187] *See* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. _ (forthcoming 2016), http://goo.gl/nMEQev ("Class action procedure enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies . . .").

[188] *See* 29 C.F.R. § 1614.204 (2012).

[189] *See, e.g.*, 57 Fed. Reg. 12,634, 12,639 (Apr. 10, 1992) (describing inconsistent judgments that result in the absence of class actions).

medical suppliers with hundreds of the same claims, sometimes for the same beneficiary, were reimbursed consistently.

Promoting Legal Access and Generating Information. Finally, aggregate agency adjudications illustrate how aggregate proceedings can foster legal access, while pooling information about policies and patterns that otherwise might escape detection in individualized trials.[190] The EEOC, for example, observed its "class actions . . . are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices."[191] In some cases, the scale and visibility of an EEOC class action itself attracts the attention of government agencies, leading to workplace reforms. [192]

Similarly, the NVICP's omnibus proceedings allow any party alleging a vaccine-related injury to benefit from the record developed in test cases and general causation hearings by the most qualified experts and experienced legal counsel.[193] In one of the NVICP's first omnibus proceedings, the parties pooled common scientific evidence on the issue of whether a rubella vaccine caused chronic arthritis. As a result, the proceeding raised the profile of an issue that, up to that time, had not been in focus for the HHS as well as Congress.[194] As noted above, shortly after the decision, the Vaccine Injury Table was administratively modified, consistent with the decision, to include chronic arthritis as an injury generally associated with the rubella vaccine.[195]

As these examples illustrate, aggregation procedures may offer agencies another way to efficiently and consistently expand access to

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[190] ALI REPORT, *supra* note 11, § 1.04 (describing the central "object of aggregate proceedings" as "enabling claimants to voice their concerns and facilitating the rendition of further relief that protects the rights of affected persons").

[191] *See* 64 Fed. Reg. 37,644, 37,651 (July 12, 1999).

[192] Press Release, U.S. Equal Employment Opportunity Commission Affirms Class Action to Open State Department to Disabled Foreign Service Officers (June 14, 2014), http://goo.gl/GXdHOK.

[193] Cedillo v. Sec'y of Health & Hum. Servs., No. 98-916V, 2009 WL 331968, at *8 (Fed. Cl. Feb. 12, 2009) (noting how a select group of petitioners' counsel is charged with obtaining and presenting evidence in the omnibus proceedings).

[194] Ahern v. Sec'y of the Dep't of Health and Hum. Servs., No. 90-1435V, 1993 WL 179430 at *3 (Fed. Cl. Spec. Mstr. Jan. 11, 1993).

[195] *See* 60 Fed. Reg. 7678 (Feb. 8, 1995), revised 62 Fed. Reg. 7685, 7688 (Feb. 20, 1997).

agency tribunals, while improving the caliber of representation and information provided to them.

2. Addressing Concerns of Efficiency, Legitimacy, and Accuracy in Aggregate Agency Adjudication

Even as agencies adopt aggregate procedures, they confront long acknowledged concerns about aggregation in federal court, including fears of inefficiency, legitimacy and accuracy.

Efficiency. First, agency adjudicators and staff observed that aggregating claims raises the possibility of diseconomies of scale—inviting more backlogs and claims difficult to manage with limited staff and large caseloads. OMHA adjudicators and personnel acknowledged they hoped to avoid creating "a backlog to another backlog" when it developed a formal program to use statistical evidence to resolve large groups of common claims commenced by a single provider or supplier. AJs with the EEOC, all with decades of experience hearing class actions, observed that class action proceedings involved substantial time and resources, sometimes requiring extensive motion practice and complex statistical proofs to establish unlawful patterns of discrimination. Even more informal aggregation, like the NVICP's Omnibus Proceedings, has required adjudicators to invest resources tracking and closing individual cases still pending long after the court resolves common questions involving a particular vaccine.

In each case, however, adjudicators have responded to concerns about inefficiency by using aggregate tools cautiously, through active case management; relying on experienced counsel and special masters to avoid duplicative motions; and where appropriate, by encouraging settlement. OMHA, for example, rolled out its pilot statistical sampling program for a very limited category of claims, those filed before 2013; actively identified cases, using its database, to find appellants with large volumes of identical claims; and proceeded on a voluntary basis, with the consent of the parties. Special Masters in NVICP rely on steering committees of private lawyers to organize and manage common discovery. They also often allow evolving scientific and novel factual questions to "mature"—putting off centralizing novel cases involving a single vaccine until receiving the benefit of several opinions and conclusions from different Special Masters about how a case should be handled expeditiously. EEOC AJs similarly rely on experienced bar and active judicial management to expedite cases for trial and, in many cases, settlement.

Still, an overly cautious approach can also limit the full value of agency aggregation. For example, OMHA's Statistical Sampling Initiative

is hindered in what it can achieve by both the limited pool of eligible claims and its decision to require the parties' affirmative consent to participate in the program.[196] At this point, not enough parties have been willing to consent to statistical sampling for it to make a significant dent in the backlog. As long as it remains an entirely voluntary program, OMHA will need to build greater trust among appellants to realize the program's full potential as an aggregation mechanism.

Legitimacy. Adjudicators and staff also highlighted concerns about legitimacy—particularly given that the model for administrative adjudication typically imagines individualized hearings in which each claim has its day in court before a neutral decisionmaker. EEOC AJs, for example, noted that the inability of parties to opt-out of class actions seeking damages was an additional source of "pressure" for adjudicators to make appropriate decisions. Some hospitals and medical suppliers reported that they resisted OMHA's statistical sampling program out of a fear that a single adjudicator's view about the medical necessity of a small sampling of claims would be extrapolated to thousands of others. Even omnibus proceedings raise interesting questions about the legitimacy of using an adjudication process to settle complex scientific questions. Many plaintiffs in the Autism Omnibus Proceedings were anxious about commencing cases together, as were members of the public health community, who as noted above "found it unsettling that the safety of vaccines must be put on trial before three 'special masters'" in an obscure vaccine court. [197]

Each of these systems have responded to these concerns by diversifying decisionmaking bodies, assuring adequate representation, and increasing opportunities for individual participation and control in the aggregate proceeding. Special Masters in the Vaccine Program, for example, relied on a panel of three adjudicators in the Autism Omnibus

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[196] We take no position about whether due process would require consent—a much-debated topic in literature discussing the use of such actuarial tools. *See generally* Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79 (2015) (arguing that OMHA's sampling initiative does not require affirmative consent under the Due Process Clause); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. 1459 (2015) (collecting cases and literature involving whether statistical sampling offends due process); Laurens Walker & John Monahan, *Essay, Sampling Liability*, 85 VA. L. REV. 329, 345-50 (1999); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

[197] Gilbert Ross, *Science is not a Democracy*, Washington Times. June 14, 2007, http://www.washingtontimes.com/news/2007/jun/14/20070614-085519-8098r; Paul Offit, *Inoculated Against Facts*, N.Y. TIMES. March 31, 2008, http://www.nytimes.com/2008/03/31/opinion/31offit.html?_r=1&scp=3&sq=vaccination&st=nyt&oref=slogin.

Proceeding to allay concerns about bias. As OMHA considers expanding its statistical sampling initiative, some of its members have said they will consider permitting multiple adjudicators to hear sampled cases. Finally, the EEOC relies on many rules adopted from the Federal Rules of Civil Procedure to increase legitimacy and participation, scrutinizing and screening class counsel to ensure they adequately represent class members; holding "fairness hearings" where class members can voice their concerns with any proposed resolution or settlement; and, in a departure from the federal rules, requiring mini-trials to test individual claims and defenses remaining in adjudications involving damages.

Accuracy. Finally, each case study illustrates how the efficiency with which aggregation resolves large numbers of claims puts pressure on the ability of adjudicators to achieve accurate decisions, when concentrating many cases before the same judge. As noted, many appellants before OMHA worried about the accuracy of any final statistical extrapolation. EEOC AJs observed that unlike federal judges, who benefit from the Reference Manual of Scientific Evidence, no similar guidance exists for EEOC judges tasked with deciding statistical or other technical evidentiary questions frequently raised in EEOC proceedings. Special Masters in the NVICP exist precisely because Congress assumed that over time they would develop expertise in the complex medical and scientific questions frequently raised in the program; and yet, in proceedings where groups allege new theories of general causation for large numbers of vaccines, decisionmakers warned of the importance of getting the science right in a single adjudication.

Agencies have responded to these concerns, as well, by requiring that aggregated claims are sufficiently similar to avoid distorting outcomes and by developing guidelines and screens to address complex statistical evidence. OMHA, for example, relies on its database of billing codes to ensure that claims are sufficiently similar to warrant aggregation, and uses statistical experts along with detailed guidelines for statistical evidence. Special Masters in NVICP wait for cases to mature before treating them in groups, which helps assure that hasty decisions do not adversely impact other related claims; adjudicators also afford attorneys additional time to assure their experts have time to develop and understand the relationship between a vaccine and a new disease. EEOC AJs, like the federal courts, still carefully screen complex evidentiary issues common to the class, relying on guidelines long-established in federal court under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[198]

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[198] 509 U.S. 579 (1993).

III. RECOMMENDATIONS

This report has highlighted different forms, advantages, obstacles, and responses to the challenges of aggregate agency adjudication. Agencies adopting the practices described above have found aggregation to be a useful tool to expedite and resolve large volumes of common claims, even as aggregation itself presents unique challenges.

In addition to considering the ways agencies have responded to the challenges described above, agencies contemplating the use of similar procedures should methodically weigh whether and what forms of aggregate adjudication are best suited for their own unique statutory missions. To that end, we offer the following recommendations to policymakers considering the adoption of such procedures.

A. Congress Should Continue to Grant Agencies Broad Discretion to Develop Procedures Tailored to the Cases and Claims They Adjudicate.

Our study demonstrates the wisdom of Congress in granting agencies broad discretion to develop appropriate procedures to manage the cases and claims that they adjudicate. Agencies have been good stewards of the authority invested in them, experimenting with a range of procedures designed to meet their statutory mandates more efficiently, consistently, and fairly. Congress should continue, as much as possible, to leave rules of procedure and practice to agency discretion.

B. Agencies Should Consider Using A Variety of Techniques to Resolve Claims With Common Issues of Fact or Law, Especially in High Volume Cases.

Agencies have a variety of tools to improve the efficiency, consistency, and fairness of adjudications involving common questions of law and fact, and they should consider using all of them, particularly when confronted with high volume caseloads.[199]

The most common tool used by agencies to resolve "issues of general applicability" efficiently and consistently is rulemaking. Rulemaking can resolve common issues of law or fact that arise in adjudications uniformly and definitively in a single proceeding, relieving

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[199] *See, e.g.*, M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1386-90 (2004) (describing a range of policy-making tools that are generally available to an agency).

adjudicators of the burden of repeatedly addressing the same issues in individual cases.[200]

Nevertheless, rulemaking is not an effective tool for resolving all common issues of law or fact in agency adjudications. First, the law generally disfavors retroactive rulemaking.[201] Therefore, it is less effective for addressing administrative backlogs or high volumes of filed claims such as those faced by OMHA or the NVICP discussed above.

Second, as the Supreme Court has observed, "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant rule."[202] Just as legislation leaves gaps for agencies to fill with rules, rules leave gaps that agency adjudicators must fill. For example, the Social Security Administration's medical-vocation guidelines—an example of rulemaking used to address inefficiency and inconsistency in repeated fact finding concerning the same issues in SSA adjudications—does not address claimants with mental or psychiatric conditions.[203]

Third, the beneficiaries of many administrative programs most impacted by agency adjudications often have the least access to the rulemaking process.[204] While rulemaking is often a "top-down" proceeding, initiated and managed by the agency's political leaders and influenced by organized interests with significant resources,[205] aggregation can provide a "bottom-up" remedy, in which the individuals most impacted

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[200] Sant'Ambrogio and Zimmerman, *supra* note 10, at 2017.

[201] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

[202] SEC v. Chenery, 332 U.S. 194, 202 (1947).

[203] See 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, 942-44 (2010).

[204] Sant'Ambrogio & Zimmerman, *supra* note 10, at 2019.

[205] See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 53-65 (7th prtg. 1977) (explaining how small, organized groups are usually more effective than larger groups in shaping policy); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1684-85 (arguing that small groups with large stakes in an agency's decision can overwhelm larger groups' abilities to influence agency action).

by adjudications play a role in crafting discrete, retrospective forms of relief.[206]

Another tool used by agencies to enhance consistency and improve efficiency in adjudications is precedential decisions with stare decisis effect. Stare decisis for precedential decisions enhances consistency and improves efficiency by requiring adjudicators to defer to the resolution of common issues by other adjudicators in the same or a higher level tribunal.[207] Nevertheless, stare decisis alone is not always effective at resolving large numbers of common cases or claims. First, in large volume programs it may be difficult for agency adjudicators to issue well-reasoned, precedential decisions in individual cases, and other overworked adjudicators may have difficulty following them in subsequent cases.[208]

Second, stare decisis can suffer from many of the same drawbacks as individual adjudication. It may establish a rule based on the unique characteristics of an individual case without input from all the parties that might be affected.[209] It may not be based on the fullest record, the best experts, or the most skilled lawyers.[210]

Finally, stare decisis generally does not improve access to representation. To the contrary, it creates more work for lawyers to find relevant precedents, interpret their significance, and advocate their application to the case at hand.[211] But experienced lawyers may be hard to come by in high volume programs.

In sum, aggregation can provide an important addition to an agency's arsenal to complement rulemaking and stare decisis. In particular,

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[206] Sant'Ambrogio & Zimmerman, *supra* note 10, at 2022.

[207] *Id.* See, e.g., Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911-12 (2010) (citations omitted); Helvering v. Hallock, 309 U.S. 106, 119 (1940).

[208] *Id.* at 2023. During the 2010 fiscal year, for example, the Social Security Appeals Council received 128,703 requests for review, processed 102,062 requests for review, and still had 106,664 requests for review pending at the end of the year. Social Security Online, General Appeals Counsel Statistics, Sept. 2010, http://www.ssa.gov/appeals/ac_statistics.html. The average processing time was approximately one year. *Id.*

[209] *See* Magill *supra* note 199, at 1396 (suggesting how the facts of individual cases may distort the evaluation of broader policy questions).

[210] *See* Magill *supra* note 199, at 1396 (noting how adjudicatory decisions lack the broad public input necessary for the development of sound rules).

[211] *See, e.g.*, Charles H. Koch, Jr., 2 Admin. L. & Prac. § 5:67 (3d ed.) (explaining how stare decisis disadvantages unsophisticated claimants who lack the resources to be informed of individual decisions in a mass justice adjudicatory system).

agencies may prefer aggregate adjudication to rulemaking when the relief sought is (1) retroactive, (2) responds to backlogs of already filed claims, (3) involves discrete problems, and (4) where parties' concerns may not be easily heard or represented by sophisticated representatives or counsel. Agencies may also prefer aggregate adjudication to stare decisis in (1) high volume adjudication systems, (2) where sophisticated counsel may be hard to come by, while (3) taking into account other factors long considered by federal courts, which are described in Part E.

C. Agencies with Authority to Aggregate Should Develop Means to Identify Whether They Have a Sufficient Number of Common Claims and Issues to Justify Adopting Rules Governing Aggregation By:

- ***Developing the information infrastructure to identify and track cases with common issues of fact or law;***
- ***Encouraging adjudicators to identify related claims with common issues of fact or law;***
- ***Asking parties to identify related claims with common issues of fact or law; and***
- ***Piloting programs to test the reliability of an approach to aggregation before implementing the program broadly.***

Most agencies lack tools for parties, and the agency itself, to identify common claims and issues. As a result, many lack the ability to know how many, and when, there are sufficiently similar claims that might be better handled through some kind of aggregated proceeding. To the extent aggregate agency adjudication has developed, it has often done so on the fly—often in response to perceived crises of high claim volumes. Below, we describe ways agencies could develop tools to learn more about the nature of claims asserted in adjudication before crises arise.

1. Developing the information infrastructure to identify and track cases with common issues of fact or law.

First, agencies could adopt case handling or docketing techniques that permit the agency to identify and evaluate common claims. This requires an information infrastructure that codes cases before the agencies in such a way that the agency can develop a database to identify cases that raise common issues of law or fact. Such a process builds on case handling techniques used by the NVICP and OMHA, which both have databases and coding techniques that invite claimants to sort and identify cases raising

common legal questions for the purpose of expedited claim handling before the same adjudicator. A centralized process for handling such claims would also improve existing schemes, by ensuring that a centralized docket exists to handle repeat claims and avoid inconsistent outcomes involving the same petitioner.

2. Encouraging adjudicators to identify related claims with common issues of fact or law;

Second, agencies should encourage their own adjudicators to identify related claims involving common issues of fact or law that might benefit from some form of aggregation. Experienced adjudicators have a wealth of knowledge concerning the issues that repeatedly appear on their dockets. In addition, they can utilize the information infrastructure developed by agencies to track similar cases.

3. Asking parties to identify related claims with common issues of fact or law.

Third, agencies could collect information from the parties themselves—permitting parties to identify "related" claims, similar to the way parties may identify "related to" claims under the local rules of most federal district courts.[212] Under these rules, when parties file a civil action in district court they can identify the case as "related to" another filed case.[213] If the court agrees with the party's characterization of the case as related, it may be assigned to a judge familiar with the facts or legal questions involved in the related case, enabling more efficient and consistent handling of similar claims.[214] At a minimum, permitting parties to identify claims as related to each other may provide agencies with important information about the nature and identity of filed claims, as well as whether sufficient numbers of claims are sufficiently related to adopt

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[212] *See, e.g.,* S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 13 (amended Jan. 1, 2014) [hereinafter "SDNY Division of Business Rule"]

[213] S.D.N.Y. CIVIL RULE 13(c)(i).

[214] In determining relatedness, a judge considers whether: "(1) A substantial saving of judicial resources would result; or (2) The just efficient and economical conduct of the litigations would be advanced; or (3) The convenience of the parties or witnesses would be served." *Id*. at Rule 13(a)(i)–(iii). *See also* Richard G. Kopf, *A cheap shot*, HERCULES AND THE UMPIRE (Nov. 3, 2013), http://herculesandtheumpire.com/2013/11/03/a-cheap-shot/ ("The reason we have relatedness rules in the district courts is to avoid treating similar cases dissimilarly and because it wastes judicial resources by duplicating effort when two judges deal with similar issues. The failure to enforce relatedness rules can cause a huge problem for the lawyers, the trial judge and the appeals court").

general aggregate adjudication procedures. Piloting programs that offer aggregate procedures for parties with large numbers of related claims.

Third, outreach efforts, negotiated rulemakings, and alternative dispute resolution pilots, like OMHA's Settlement Facilitation Program, that invite claimants to resolve groups of similar claims in alternative proceedings may provide a rich source of information about other cases pending with the agency. For example, after special master, and former state Attorney General, Tom Smith, resolved several thousand claims for student debt relief arising out of the collapse of the Corinthian Colleges, the Department of Education convened a negotiated rulemaking.[215] The rulemaking that is currently under way will determine "procedures that the Department will use to determine the liability of the institution for amounts based on borrower defenses" in future cases.[216] Pilot programs permit agencies to test the potential of aggregate adjudication before committing resources to a full-blown program that might create diseconomies of scale.

Taking steps to identify common claims in these ways could be implemented in many adjudication systems under existing law. As detailed above in Part I.C., agency adjudicators have inherent authority to manage their dockets, and many hearing officers already enjoy power to hear multiple related cases. Few limits exist on the authority of mediators to hear multiple cases raising similar issues.

4. Piloting programs to test the reliability of an approach to aggregation before implementing the program broadly.

Fourth, outreach efforts, negotiated rulemakings, and alternative dispute resolution pilots, like OMHA's Settlement Facilitation Program, that invite claimants to resolve groups of similar claims in alternative proceedings may provide a rich source of information about other cases pending with the agency. For example, after special master, and former state Attorney General, Tom Smith, resolved several thousand claims for student debt relief arising out of the collapse of the Corinthian Colleges, the Department of Education convened a negotiated rulemaking. The rulemaking that is currently under way will determine "procedures that the Department will use to determine the liability of the institution for amounts

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[215] Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1004 (2008) (the Department of Education is statutorily required to use negotiated rulemaking for higher education rulemaking).

[216] Intent To Establish Negotiated Rulemaking Committee, 80 Fed. Reg. 50588 (Aug. 20, 2015).

based on borrower defenses" in future cases.[217] Pilot programs permit agencies to test the potential of aggregate adjudication before committing resources to a full-blown program that might create diseconomies of scale.

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D. Agencies Should Develop Procedures and Protocols To Assign Similar Cases to the Same Adjudicator.

Agencies should develop procedures and protocols to assign similar cases to the same adjudicator or panel of adjudicators. As our study has shown, even informal aggregation can improve efficiency and consistency in agency adjudications. To this end, an agency with a large adjudicatory program might create a panel or process to assess the merits of informally aggregating particular groups of cases or claims. The administrative panel would determine whether to centralize claims by considering: (1) whether coordination would avoid duplication of discovery, (2) whether it would prevent inconsistent evidentiary or other pre-hearing rulings, and (3) whether it would conserve the resources of the parties, their counsel, and the agency.[218] In such coordinated proceedings, no representative plaintiff acts on behalf of others. The agency simply aggregates individual cases into a single forum for the sake of convenience and efficiency.

Any party—plaintiffs, defendants, or adjudicators themselves—would be able to petition the panel to make a threshold decision: that common issues of law or fact require "coordinated or consolidated" pre-hearing proceedings. Similar to multidistrict litigation in federal court, the parties could file their petition after a threshold number of people file common claims.[219] Assuming the petitioner meets the threshold

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[217] Intent To Establish Negotiated Rulemaking Committee, 80 Fed. Reg. 50588 (Aug. 20, 2015).

[218] 28 U.S.C. § 1407 (2004). MANUAL FOR COMPLEX LITIGATION, *supra* note 63, § 20.13 & 20.131 (2004).

[219] Those advocating transfer bear a higher burden of persuasion when there are only a small number of actions. MANUAL FOR COMPLEX LITIGATION, *supra* note 63, § 20.131 (2004). *See also* In re: Air Crash At Las Vegas, Nevada, On August 28, 2008, 716 F. Supp. 2d 1366, 1367 (J.P.M.L 2010). Subsequently filed cases raising the same common factual

requirements for a "coordinated" action, the agency would then appoint an experienced adjudicator to preside over a consolidated or aggregated proceeding. Among other things, the adjudicator could require parties to jointly file a case management order ("CMO"), calling for streamlined management of discovery, including expert reports and depositions of common witnesses, scheduling of overlapping motions, as well as other common issues.[220] In addition, the adjudicator could determine whether a formal aggregation, like an EEOC class action or OMHA consolidation, is warranted.

E. Agencies Should Develop Procedures and Protocols To Determine Whether to Formally Aggregate Similar Cases in a Single Proceeding:

As the our study has illustrated, agencies may aggregate claims in many different ways—from relying on representatives in a formal class action in a single proceeding to informally coordinating many different individual cases in front of the same adjudicator. To ensure aggregate adjudication complements—and doesn't conflict with—other forms of agency decisionmaking, agencies can adopt threshold rules from complex litigation in federal courts to sort the cases suitable for class treatment from those that are not.

Like federal courts, agencies should consider a number of factors to determine whether formal or informal aggregation is "superior" to individual adjudication, including: (1) whether the number of cases or claims are sufficiently numerous to justify formal aggregation; (2) the comparative benefits of individual or collective control over the shape of the litigation; (3) the progress of any existing individual litigation; (4) the "maturity" of the litigation and whether the novelty or complexity of the issues being adjudicated would benefit from the input of different adjudicators; (5) whether the aggregate proceeding is manageable and materially advances the resolution of those cases.[221] In addition, agencies should consider other factors that account for agencies' limited resources and their unique policymaking functions, like whether (6) a superior forum

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question, also known as "tag along" cases, are also automatically centralized before the same ALJ. *See, e.g.*, J.P.M.L Rule 7.2(I) & 7.5(e).

[220] MANUAL FOR COMPLEX LITIGATION, *supra* note 63, § 20.132 (advising, among other things, that judges deem rulings on some limited, but common issues, like statutes of limitations to apply to other cases and make available discovery already taken to newly filed cases to streamline cases).

[221] *See, e.g.*, FED. R. CIV. P. 23(b)(3)(A)-(D) (describing factors in class litigation).

exists in federal court to aggregate claims and (7) whether the agency can accomplish similar goals through informal rulemaking or stare decisis.

First, like federal courts and the EEOC when deciding whether to certify a class action, agencies considering formal aggregation should first address whether the cases or claims are sufficiently numerous to justify aggregating them into a single proceeding.[222] Agencies should consider formal aggregation where joining or consolidating multiple claims is "impractical."[223] There is no threshold minimum number of cases or claims required to aggregate, but federal courts generally consider the numerosity requirement of Rule 23(a) satisfied if the plaintiff demonstrates that the number of potential class members exceeds forty.[224] This provides a useful point of reference for agencies, particularly where the following factors also weigh in favor of aggregation.

Second, to determine whether the interest in individual control outweighs the benefits of collectively handling cases together, agencies should give weight to the variety and value of potential claims.[225] Aggregation generally becomes more challenging when claims are both highly variable and valuable. By contrast, formal aggregation historically has proven most useful (and least controversial) for very "common" claims seeking what commentators describe as "indivisible" relief, like declaratory or injunctive relief.[226] In such cases, formal aggregation, through a class

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[222] *See, e.g.*, Fed. R. Civ. P. 23(a)(1) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if … the class is so numerous that joinder of all members is impracticable"); 29 C.F.R. § 1614.204(a)(2)(i) (EEOC class complaints must allege that "[t]he class is so numerous that a consolidated complaint of the members of the class is impractical").

[223] Fed. R. Civ. P. 23(a)(1); 29 C.F.R. § 1614.204(a)(2)(i).

[224] *See* 5 James Wm. Moore et al., Moore's Federal Practice § 23.22[3][a] (Matthew Bender 3d ed.1999). *See also* Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 252 (2d Cir. 2011) (quoting Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)) ("numerosity is presumed where a putative class has forty or more members"); Garcia–Rubiera v. Calderon, 570 F.3d 443, 460 (1st Cir. 2009) (citing Stewart v. Abraham, 275 F.3d 220, 226 (3rd Cir.2001) ("generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met")).

[225] ALI REPORT, *supra* note 11, § 2.02; Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 149 (1999); David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657 (2011).

[226] See ALI REPORT, *supra* note 23, § 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 C. Burch,

action or formal consolidation, ensures that a single institution is not subject to inconsistent obligations or contradictory commands.[227] Formal aggregation also arguably provides parties in those cases with more process by ensuring stakeholders have some voice in defining the entitlement and scope of relief likely to impact many people.[228] The use of formal aggregate procedures could thus promote due process and diversify input in other declaratory relief orders, like those considered in the ACUS Recommendations on Declaratory Orders,[229] and other cases seeking systemic or institutional reform.

Formal aggregation procedures may also make sense in cases seeking monetary relief, as part of an action brought on behalf of, or involving the same, employer policy or medical supplier to avoid imposing inconsistent obligations on the same organization, as illustrated by the EEOC and OMHA experiences. Agencies charged with adjudicating claims involving the same contested workplace pattern and practice, or large numbers of claims brought by a government contractor, may also benefit from formal aggregation. Monetary relief cases, however, should also afford parties more chances to participate in the action – or, as we discuss below, to "opt out" – in light of the strong interest each party may have in influencing their final claim to money damages.[230]

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.").

[227] 1 WILLIAM B. RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS § 10 (5th ed. 2015) ([C]lass actions "reduce[] the risk of inconsistent adjudications. Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[228] *See, e.g.*, Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 382 (1996) (observing that aggregate procedures can serve an important democratic function, allowing groups of individuals collectively to petition and redress widespread harm.).

[229] Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 16, 2015), https://www.acus.gov/recommendation/ declaratory-orders; Emily S. Bremer, Declaratory Orders: Final Report to the Administrative Conference of the United States, October 30, 2015, https://www.acus.gov/sites/default/files/documents/declaratory-orders-final-report.pdf.pdf.

[230] This is one reason why the Federal Rules of Civil Procedure affords individuals the right to opt-out of damage class actions, but not class actions that seek injunctive relief. *Compare* FED. R. CIV. P. 23(b)(2) (injunctive relief) *with* FED. R. CIV. P. 23(b)(3) (monetary relief). *See also* Marcus, *supra* note 225, at 659.

As claim values and interests diverge, less formal aggregation may strike a better balance between due process, consistency, and efficiency—like the NVICP's Omnibus Proceeding that afford claimants a separate process with separate representation. In those cases, formally aggregating all claims into a single action may jeopardize plaintiffs' and defendants' ability to offer and test individualized evidence, create too much consistency by encouraging "damage averaging" (where weak claims and strong claims receive the same awards), and raise due process concerns. But informally coordinating similar cases before the same adjudicator, for the purpose of streamlining discovery, motion practice, or even conducting "test cases," may help parties conduct hearings with as much information, consistency, and speed as formal adjudication.[231] At a minimum, the coordinated litigation would aim to ensure that certain categories of claimants raising fact-intensive issues receive consistent and expedited treatment before the agency.[232]

Third, agencies may also consider the extent to which individual litigation has already progressed in determining whether aggregation is appropriate. Cases involving highly fact-specific issues over, for example, one's pending medical treatment, may preclude aggregation, particularly if the results of aggregate adjudication delay treatment for putative members of the litigation. On the other hand, repeatedly raised issues that, if not addressed, otherwise evade review may be appropriate candidates for a class action.[233] For example, some have recently argued that class litigation to resolve many categories of veterans' claims before the VA would be

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[231] Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 466 (2000) ("The benefits of formal aggregation should be weighed against the reality of informal aggregation, rather than against an imaginary picture of economical individualized litigation.").

[232] *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 63, § 20.14 (identifying options for coordinating related cases); Joan A. Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non Jurisdictional Matters*, 42 UCLA L. Rev. 967 (1995). *See also* ALI REPORT, *supra* note 12, § 1.02 cmt. b(2).

[233] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (holding plaintiff has continued interest in litigating class certification question even when lower court enters judgment on individual claim in plaintiff's favor); *see also* 2 WILLIAM B. RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS § 10 (5th ed. 2011) (discussing the "broad rule that once an order granting or denying class certification has issued, a class action will not be mooted if the class representative's claim becomes moot").

more feasible than the current system, which ordinarily requires years of individual litigation over common claims.[234]

Fourth, agencies may assess whether complex or novel issues need time to percolate or "mature" before aggregating large groups of claims before a single decisionmaker.[235] For example, special masters in the NVICP observed that many vaccine cases involve complex questions of causation may require further factual development, and thus may benefit from several opinions and conclusions from different adjudicators about how a case may be handled expeditiously. By comparison, agencies may reap advantages by concentrating claims where adjudicators have reached some consensus about otherwise difficult questions of causation—like in the case of "signature illnesses" where a particular illness ("asbestosis") is known to be associated with exposure to a particular agent (asbestos). In such cases, repeated individualized hearings may unnecessarily involve months or years of the "same witnesses, exhibits and issues from trial to trial."[236]

Fifth, the adjudicator must consider whether aggregation is manageable. Federal courts often deem class actions "unmanageable" when they involve too many different issues of law or fact. Such cases may involve nationwide classes that seek money for workplace discrimination on behalf of different parties under different legal theories,[237] or difficult questions of causation in various locations and times.[238] However, adjudicators should consider aggregation when questions about defendant's liability are more circumscribed in time and space, or when questions of causation and damages overlap substantially. Such questions may include allegations that a government workplace uses a policy that improperly

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[234] *See* Corrected Amicus Curiae Brief of the American Legion, et al., in Support of Appellant, Monk v. McDonald, 2015 WL 8485189 (Fed. Cir. 2015) (No. 15-7092).

[235] McGovern, *supra* note 12, at 1824 (defining "maturity" in which both sides' litigation strategies are clear, expected outcomes reach an "equilibrium," and global resolutions or settlements may be sought). We note, however, that agencies may have less latitude than federal judges to permit disparate legal positions to "percolate" among its adjudicators in public rights and restitution cases.

[236] Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (quoting lower court opinion) (granting certification of a class action involving asbestos); William 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).

[237] Dukes v. Wal-Mart, 564 U.S. 338 (2011).

[238] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

screens out or limits promotions to disabled workers,[239] or a common collusive price fixing scheme at U.S. ports.[240]

Sixth, the agency should consider whether an alternative forum in federal court exists for aggregating claims more efficiently and fairly. As discussed above, both the CFTC and the FCC declined to adopt class actions in their own proceedings, in part, because parties enjoyed the option to file the same aggregated claims in a class action in federal court. Parties proceeding before the Court of Veterans Appeals, the Federal Maritime Commission, or the NVCIP, by contrast, may not.

This factor need not be determinative. The EEOC, for example, hears class actions commenced by government employees, who also enjoy the option to file similar claims in federal court. As set forth above, however, the EEOC has still found class actions to be an "essential tool" to fulfill its own statutory mission and meet its objective to combat systemic policies of workplace discrimination.

Seventh, agencies should consider whether aggregate adjudication is "superior" to other tools available to the agency, such as informal rulemaking. Informal rulemaking may provide a more effective, and less costly, way to address grievances raised by different groups of stakeholders when (1) an agency's decision will impact a large number of future claimants, (2) when parties seek prospective relief, and (3) where the final determination likely will have broad policy implications that impact many other parties without a direct interest in the immediate litigation.[241] By comparison, some form of aggregate adjudication may provide a superior option when: (1) the agency hopes to resolve discrete groups of pending claims; (2) where the parties seek damages or other forms of retrospective relief; and (3) the final outcome only impacts a limited group of stakeholders. For example, informal rulemaking cannot resolve thousands of pending claims commenced by a single durable medical supplier seeking reimbursement from Medicare. Similarly, an informal rulemaking would be too cumbersome to address ratemaking abuses by a single energy supplier or a single employer's workplace discrimination policy.

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[239] *See, e.g.*, *Class Agent v. John Kerry*, EEOC Appeal 0720110007 (June 6, 2014).

[240] Class Action Complaint to Federal Maritime Commission Targets Ro-Ro Lines, JOC.Com, (Jan. 13, 2016) http://www.joc.com/regulation-policy/transportation-regulations/us-transportation-regulations/class-action-complaint-fmc-targets-ro-ro-lines_20160113.html.

[241] M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-90, 1403 n.69 (2004) (collecting scholarship and noting the general preference for rulemaking over adjudication).

F. Agencies Should Structure Aggregate Proceedings to Increase Transparency and Legitimacy By:

- ***Developing written and publicly available policies on aggregation;***
- ***Permitting the filing of amicus briefs or their equivalent in aggregate proceedings;***
- ***Employing mechanisms to encourage participation and ensure that the parties' interests are adequately represented in formal adjudications;***
- ***Training and assigning experienced adjudicators to aggregate proceedings; and***
- ***Using multiple adjudicators to address concerns with having a single adjudicator decide large numbers of claims; and***

1. Developing written and publicly available policies on aggregation.

Agencies that use aggregation should develop written and publically available policies explaining how the agency initiates, conducts, and terminates aggregate proceedings. The policies should also explain how the agency decides whether claims or issues are ripe for formal or informal aggregation.

2. Permitting the filing of amicus briefs or their equivalent in aggregate proceedings

Agencies should develop provisions permitting interested parties to file amicus briefs, or their equivalent, in aggregate proceedings. Appeals to the agency head of initial decisions in such cases should also allow for the possibility of such briefs and oral arguments.

3. Employing mechanisms to encourage participation and ensure that the parties' interests are adequately represented in formal adjudications.

A common structural feature of all aggregate proceedings is that individual parties lose control over the progression of their cases. The EEOC's class action procedure does not require consent (and unlike federal court class actions, all parties must participate in an EEOC class action regardless of the relief sought). Many of the other aggregate adjudications we discuss above—like the NVICP omnibus proceeding and OMHA's

statistical sampling initiative require parties' affirmative consent to participate. But even those proceedings limit plaintiff control in some ways. Individual claimants in the NVICP cannot discharge attorneys, other than their own, who occupy powerful positions on a steering committee. And plaintiffs in OMHA's statistically extrapolated trials must accept good and bad outcomes together.

Accordingly, adjudicators must take extra effort to ensure that parties are adequately represented.[242] The most common mechanism is to permit parties to opt-out of an aggregate proceeding before being bound by litigation or settlement.[243] The Federal Rules of Civil Procedure permit parties to opt-out of class actions that seek monetary relief for that reason.[244] The Principles of Aggregate Litigation similarly recommend that aggregate proceedings offer parties the ability to opt-out, along with several other alternatives, to promote adequate representation and participation.[245]

Agencies might permit parties to opt out of an aggregate process in other ways as well. For example, one commentator has suggested permitting parties to selectively opt-out of aggregate statistical trials. This "modified trial-by-statistics" approach would make the average award—as determined in a trial-by-statistics process—the presumptive award for each class member.[246] The adjudicator would enter judgment for this amount in each case unless a party rebuts the presumption with individualized proof of damages. Unlike the current use of trial-by-statistics, like those performed in the Statistical Sampling Initiative, a presumptive-judgment approach gives the parties the power to "opt-out"—to contest both the fact and the quantum of injury in cases they select. However, a party has "no

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[242] Sant'Ambrogio & Zimmerman, *supra* note 11 at 2056 ("[A]gencies should attempt to notify parties about the litigation so they can meaningfully participate, opt out of the case, or object. ALJs might also convene fairness hearings to solicit direct input from parties.").

[243] ALI Report, *supra* note 11, at § 1.05 cmt. j.

[244] FED. R. CIV. P. 23(b)(3).

[245] ALI Report, *supra* note 11, at § 1.05 (among other things, the ALI Principles of Aggregate Litigation recommend that judges consider the following tools to promote adequate representation: "(1) enforce parties agreements regarding the conduct of the litigation, (2) give named parties with sizeable stakes control of the litigation, (3) enforce fiduciary duties on named parties and their attorneys, (4) appoint competent counsel; (5) use financial incentives, including fee awards and incentive bonuses, to reward good performance, (6) require notice and other communications; (7) permit opt-outs, and (8) employ case management techniques including severance, sub-classing, coordination, and consolidation.").

[246] Jay Tidmarsh, *Resurrecting Trials By Statistics*, 99 MINN. L. REV. 1459, 1462 (2015).

incentive to do so unless the party can expect a better outcome after factoring in the costs of individual litigation."[247]

Of course, agencies must balance the risk of parties opting out after the agency has invested significant resources in the proceeding. The agency may want to limit the points in the process at which a party may exit. But taking the first steps in an aggregated proceeding may build the party's confidence in the process and reduce the number of parties that ultimately opt out.

Such an opt-out mechanism would not be necessary for aggregate cases, like EEOC cases that seek injunctive relief. In such cases, the parties will be affected by the injunction regardless of whether they are member of the class, and defendants should not be subjected to the risk of inconsistent judgments. For the same reason, the Federal Rules of Civil Procedure do not afford parties the right to opt-out of class actions that seek injunctive relief.[248] Rather, federal courts rely on other techniques to assure absent class members are adequately represented—including notice, careful case management, separate representation for different classes or interests, and fairness hearings, where all interested stakeholders may express their concerns with the proposed relief to adjudicators in person or in writing.

4. Training and assigning experienced adjudicators to aggregate proceedings.

Agencies should ensure that adjudicators who handle aggregate proceedings are appropriately trained in such cases. Where feasible, agencies should consider using a specialized core of adjudicators to handle complex aggregated proceedings—much like judges and arbitrators appointed in complex arbitration, patent litigation, and multidistrict litigation.[249] Administrative decisionmakers vary dramatically in their roles and responsibilities. Some conduct hearings akin to full-blown trials, while others are expected to make more routine decisions without the same

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[247] Id.

[248] FED. R. CIV. P. 23(b)(2) & (c)(2)(A).

[249] See Manual for Complex Litigation, supra note 81, § 20.131 (considering "experience" and "skill" of available judges for designation); Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015) (describing such efforts in the Northern District of California and the Eastern Districts of Texas and Virginia); Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 13, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2896309 (noting "arbitrators presiding over class arbitrations conducted under the Rules are appointed from a select national roster of experienced class action arbitrators").

authority to hear evidence or make policy judgments.[250] And some agency adjudicators may simply lack the expertise or time to resolve complex multiparty disputes.[251] By assigning specialized adjudicators to oversee multiparty disputes, agencies would afford more independence and experience in the initial decision to aggregate claims without overtaxing other kinds of more routine, individualized determinations made by agency hearing officers or judges.

Agencies relying on ALJs may need to exercise more care when employing aggregate procedures. ALJs typically are randomly assigned to cases. However, there may be ways to specially assign ALJs to certain categories of cases without raising concerns about randomized assignments—as noted above, specially designated SSA ALJs historically handled the unique issues that arose in Medicare-related claims before Congress created OMHA.

5. Using multiple adjudicators to address concerns with having a single adjudicator decide large numbers of claims.

Finally, to further address the concern that parties have with placing "all their eggs in one basket," agencies that aggregate using statistical sampling or test cases should consider using multiple adjudicators to rule on different parts of a statistical sample or test cases. Joint hearings are consistent with judicial efforts in the United States to informally coordinate efforts in complex actions that often overlap in state and federal court.[252]

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[250] *See, e.g.*, RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 569 (6th ed. 2011) (collecting examples and observing that in some cases administrative adjudication closely resembles court-like hearings while in other cases the judicial analogy is "less comfortable").

[251] As discussed in Part II.A, *supra*, the FCC recently rejected the use of class actions precisely because of its fear that such a proceeding would "needlessly divert" the resources of its lone ALJ to complex cases that just as easily could have been filed in federal court. Solvable Frustrations, Inc., 29 FCC Rcd. 4205, (2014), http://tcpablog.com/wp-content/uploads/2014/05/Memorandum-Opinion-Order.pdf.

[252] In re Joint E. and S. Dists. Asbestos Litig., 129 F.R.D. 434 (E. & S.D.N.Y. & N.Y. Sup. Ct. 1990). *See also, e.g.*, In re A.H. Robins Co., 88 B.R. 742, 743 (E.D.Va. 1988) (confirmation order jointly issued by district judge Merhige and bankruptcy judge Shelley). Byron G. Stier, *Resolving the Class Action Crises: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 913-915 (2005) (collecting cases); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1690–91 (1992) (same). For example, after a year of joint hearings, Judge Rakoff in Southern District of New York and Stuart Bernstein, the Chief Bankruptcy Judge, together approved an agreement between the United States Attorney and the assigned bankruptcy trustee that centralized the distribution of artwork and other assets seized by the federal prosecutor in the civil bankruptcy proceeding. *See* Coordination

As discussed above in Part II.B, the NVICP used three special masters to minimize concerns about bias and efficiently dispose of thousands of cases in its Omnibus Autism Proceeding. In addition, as discussed above in Part II.C.5, OMHA is considering the use of multiple adjudicators in its Statistical Sampling Initiative.

G. Agencies Should Use Aggregation to Enhance Control of Policymaking By:

- ***Publishing opinions in aggregate proceedings as precedential decisions;***
- ***Considering whether policy decisions in aggregate adjudications should be codified in agency rules and regulations; and***
- ***Encouraging input from agency adjudicators in related agency rulemaking.***

Not only can aggregate adjudication produce benefits for the nongovernmental parties that depend upon them, it may also enhance agency control of policymaking through adjudication. Aggregate adjudication provides agency heads with a thoughtful first crack at important questions of law and policy by the agency's most experienced and expert adjudicators, with the benefit of a fully developed record and competent counsel.

1. Publishing opinions in aggregate proceedings as precedential decisions.

To obtain the maximum benefit from the additional resources devoted to aggregate proceedings, agencies should consider publishing the opinions in such cases, at least at the appellate level, as precedential decisions. This will help other adjudicators handle subsequent cases involving similar issues more expeditiously and avoid inconsistent outcomes. Moreover, by reducing the number of cases that are subject to appellate review within the agency, the agency's appellate body will be able to devote more attention to the cases that have the most significant impact on large groups of people.

Agreement in United States v. Marc Dreier, 09-CR-85 (S.D.N.Y. 2009) & In re Dreier LLP, 08 BR 15051 (Bankr. S.D.N.Y. 2009) (Dec. 12, 2009) (on file with author).

2. Considering whether policy decisions in aggregate adjudications should be codified as rules.

Second, agencies that adopt aggregate adjudication procedures should adopt techniques to communicate outcomes with policymakers to determine whether future rulemaking is worthwhile. Aggregation can permit the agency to collect information about pending claims, as well as to determine how an agency can best effectuate its goals. Aggregation in the EEOC and the NVICP has helped agencies effectuate broader change. But hearing officers and adjudicators relying on aggregate techniques acknowledged that few formal tools existed to communicate the results of aggregate adjudication with those charged with conducting future rulemakings.

Agencies that utilize aggregation in cases with implications for policymaking should develop lines of communication between their adjudicators and agency personnel (whether in the same agency or another) involved in related rulemaking. First, like federal court, participants could appeal a final judgment made during the course of coordinated proceeding, class action or class settlement to the final Article I tribunal, often the head of the agency, and ultimately to federal court. Because the decision below will affect large groups of individuals and entities in agency proceedings, it may be worthwhile and possible for the agency to devote more time and attention to the appeal.

Agency policymakers and personnel involved in rulemaking should review the outcomes in aggregated cases to determine whether a notice-and-comment rulemaking proceeding codifying the outcome might be worthwhile. If the agency is uncertain whether it wants to proceed with a rule, it might issue a notice of inquiry to invite interested parties to comment on whether the agency should codify the adjudicatory decision (in whole or in part) in a new regulation

3. Encouraging input from agency adjudicators in related agency rulemaking.

Finally, in rulemaking proceedings, agencies should invite input from adjudicators experienced in handling large cases that raise similar or related policy questions. For example, in the Department of Education's ongoing proceeding to determine debt relief procedures for students at failed for-profit schools, the Department solicited input from Special Master Smith, who had already determined thousands of similar claims arising out of the collapse of the Corinthian Colleges.

When such communication exists, aggregate agency adjudication carries the potential to meaningfully complement agency policymaking. The additional time that the agency can spend on aggregated proceedings by eliminating duplicative efforts may enable the agency to publish its decisions in these cases as precedential rulings to guide adjudicators in future cases. Thus, the agency head will be able to influence not only the aggregated case on direct review, but future administrative proceedings as well, all with a single decision. If the agency decides to institute notice and comment rulemaking to address an issue arising in aggregated adjudication, it will have the benefit of the adjudicator's considered opinion.

Aggregated cases will be more transparent to the political branches, which are rarely concerned with the outcomes of individual adjudications beyond the provision of constituent services by individual representatives.[253] Thus, in addition to increasing the power of agency heads over significant issues that affect large groups of people, agency aggregation may even increase the ability of the political branches to ensure agency accountability.[254]

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[253] *See, e.g.*, INS v. Chadha, 462 U.S. 919, 927 & n.3 (1983) (noting Congress' lack of attention when reviewing individual administrative proceedings).

[254] Of course, in some cases political scrutiny may make it more difficult for the agency to reach an accommodation with injured parties.