

Unmasking Mullane: Due Process, Common Trust Funds, and the Class Action Wars

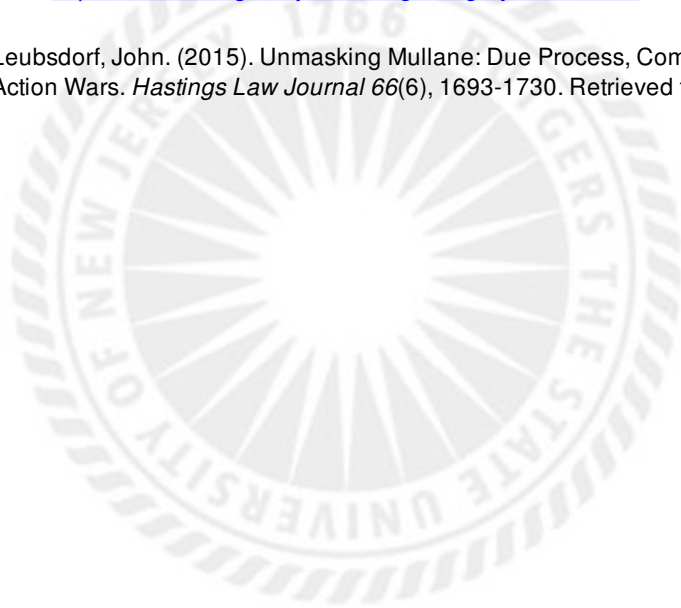
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Unmasking *Mullane*: Due Process, Common Trust Funds, and the Class Action Wars

JOHN LEUBSDORF*

Although Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) is a classic Civil Procedure case, its history has never before been written. This Article reveals that history, traced among other sources, in the papers of New York's Governor Herbert Lehman, whose misgivings did not prevent his signing the legislation that the Supreme Court struck down, and of Justice Robert Jackson, who wrote the opinion striking it down. More or less behind the scenes, two struggles were going on. One involved and prefigured all of the tensions of the modern class action: conflicts within the class, the relative functions of notice and adequate representation, the attempt to secure "global peace" by binding nonparticipants, and more. The other struggle concerned the efforts of trust companies to enlarge their turf and get into the investment business while barring liability to their customers. The due process holding for which we remember Mullane thus emerged from and glossed over deeper and more particularized conflicts. This Article explores both the history and the contemporary relevance of Mullane.

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TABLE OF CONTENTS

INTRODUCTION.....	1694
I. <i>MULLANE</i> IN A PINHEAD	1696
II. LEGISLATING THE COMMON TRUST FUND.....	1698
A. THE MOVEMENT FOR COMMON TRUST FUNDS	1700
B. OBSTACLES	1702
C. ACCOUNTINGS AND NOTICE	1706
III. THE <i>MULLANE</i> LITIGATION	1709
A. THE CHALLENGING LAWYER: KENNETH MULLANE	1709
B. CONFLICTS IN THE CLASS?.....	1712
C. THE CASE BEGINS.....	1715
D. THE SUPREME COURT SPEAKS	1718
E. AFTERMATH	1725
CONCLUSION: COMPARISONS	1727

INTRODUCTION

Although *Mullane v. Central Hanover Bank and Trust Co.*¹ is a standard Civil Procedure case, its history has never before been written. This Article reveals that history, traced among other sources, in the papers of New York Governor Herbert Lehman, whose misgivings did not prevent his signing the legislation that the Supreme Court struck down, and of Justice Robert Jackson, who wrote the opinion striking it down. More or less behind the scenes, two struggles were going on. One involved and prefigured all the tensions of the modern class action. The other struggle concerned trust companies' efforts to enlarge their turf and get into the investment business while barring liability to their customers. The due process holding for which we remember *Mullane* thus emerged from and glossed over deeper and more particularized conflicts.

Mullane has become the leading case on the notice that due process requires in civil actions,² but it can be understood more realistically as a class action disguised as a trust accounting proceeding. The Central Hanover Bank ("Central Hanover") sought a judgment that it committed no wrong in running pooled trusts, a judgment that would bind all the beneficiaries of the trusts and would prevent them from challenging its conduct in future litigation. It tried to obtain this judgment without notifying the trust beneficiaries except by publishing a newspaper announcement, only to be instructed by the Supreme Court that due process required notice by mail to every beneficiary whose name and

1. 339 U.S. 306 (1950).

2. See, e.g., *Jones v. Flowers*, 547 U.S. 220 (2006).

address appeared in the Central Hanover's records. The Court thus established both that notice was required and that a binding judgment could nevertheless be entered without sending even informal notice to every beneficiary.

Mullane's compromise notice requirement—sending a letter to all class members whose names and addresses are known—is an indispensable foundation for every damages class action that seeks to include more than a list of specified class members.³ That includes the great majority of class actions.⁴ Other issues that have bedeviled class actions were also lurking under the surface of *Mullane*: Does class action notice benefit those notified, or their opponents who seek to bind them to the result of the action?⁵ Are the interests of class members sufficiently aligned so that some may protect the interests of others?⁶ Will the lawyers purporting to speak for the class instead pursue their own interests?⁷ All these questions were raised in *Mullane*. And *Mullane* could also be seen as an instance of the courts' unwillingness to address such questions when that might upset a quick and cheap resolution of the cases before them.

From another perspective, the history of the common trust funds considered in *Mullane* offers an intriguing example of how notice and representation requirements work or fail to work in one institutional context. Notice and representation are central both in *Mullane* and in the law of class actions. But what good does each of them do? When considering how to resolve disputes, we usually take for granted the traditional forms of litigation, but when it comes to setting up a new business arrangement, different forms of protection and participation may be preferable. The history of the common trust fund takes place in a conflicted area between the traditional trust, an institution responsible to a court of equity, and something more like a publicly owned corporation. In *Mullane*, those models pointed in different directions, and history, or at least the financial industry, ultimately followed the corporate rather than the courtroom model.

Viewing the case in these different contexts can help us demystify what might be called the myth of *Mullane*. Many cases that are most

3. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75 (1974). The extent to which notice is constitutionally required, especially in class actions seeking only collective injunctive relief, remains unclear. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558–59 (2011).

4. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER (2008).

5. See, e.g., Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97 (1974).

6. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–28 (1997); see also Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

7. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852–55 (1999); see also Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

commonly remembered as establishing broad legal principles turn out, upon closer examination, to be unique responses to particular situations.⁸ *Mullane* is cited for the principle that due process requires practical notice. But in real life the case represented an effort to reconcile the protection of trust beneficiaries in an era that still remembered the investment abuses of the 1920s with what was considered a new and progressive banking method for those without great wealth. That reconciliation was effected through a complex interplay among rulings of which the notice holding was only one part.

This study, after very briefly describing *Mullane* in Part I, will trace in Part II the history of the statute under which the case arose, showing the various motives of its proponents and opponents, as revealed in part by Governor Lehman's private files. We will see how trust companies, reaching out for new business, sought to navigate around Depression-era suspicions of banks and investment companies by appealing to New Deal concern for small investors. In particular, it will appear that the New York statutory provisions for binding accountings that were before the Supreme Court were not necessary—other states did without them—and were included by the trust companies in the hope of reducing their own exposure to beneficiary suits. They sought to enter the riskier world of investment companies while barring liability to their customers. And yet, the banks may have wrought a bit better than they meant: accountings have turned out to be a modest safeguard for beneficiaries lacking in those other states.

Turning to the *Mullane* litigation itself, Part III will explore the adequacy of Kenneth Mullane's representation of the trust beneficiaries he was appointed to represent, look for conflicting interests among those beneficiaries, and consider why the different judges involved in the case approached it as they did. The private papers of Justice Jackson cast new light on what was going on behind the scenes. It turns out that three Supreme Court Justices initially opposed the decision, which helps explain some puzzling features of Justice Jackson's opinion. Finally, this Article will survey the impact of *Mullane* on common trust funds and examine the operation of statutory accountings and other safeguards over subsequent decades.

I. MULLANE IN A PINHEAD

In 1937, New York passed a statute authorizing trust companies to pool small trust funds into a larger common trust fund, thus making it possible to diversify trust investments and perhaps to reduce administrative costs. Instead of having to find a prudent investment for, say, \$5000 placed in trust under a will, the trustee could use \$200,000 coming from many

8. See, e.g., A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW (1995).

such trusts to create a balanced portfolio. A trust company sponsoring such a common trust fund was subject to requirements imposed by statute, by New York's Banking Board and federal authorities, and by fiduciary law. One statutory requirement was that the trust company conduct regular accountings, which, when approved by the court, would bind all beneficiaries of the pooled trusts as to any matter set forth in the account.⁹

To give notice of each accounting, the trust company was required to publish four weekly newspaper advertisements that did not name individual beneficiaries. The beneficiaries received no individual notice of the proceeding, but when funds from their trusts were first invested in the common trust fund, a notification and a copy of the common trust fund statute were mailed to beneficiaries. To further protect the beneficiaries, two guardians *ad litem* were to be appointed on behalf, respectively, of those with an interest in the trust principal and those with an interest in trust income. Also, during each accounting, the superintendent of banking was required to submit to the court a report on the legality of the common trust fund's investments.¹⁰

Kenneth Mullane, a lawyer appointed as guardian *ad litem* for the income beneficiaries in an accounting for a common trust fund established by the Central Hanover Bank and Trust Company, challenged the constitutional validity of a judgment purporting to bind beneficiaries who received no notice of the proceeding. Rebuffed in the New York state courts, Mullane's challenge succeeded in the Supreme Court, which found that the proceeding denied beneficiaries due process.¹¹

Justice Jackson's opinion rejected the argument that personal service was required because the proceeding should be considered as *in personam*. The opinion relied on recent precedents treating the due process requirement as one of notice reasonably likely to reach the party in question rather than one of formal service,¹² and Justice Jackson noted that beneficiaries who received notice could be expected to protect the interests they shared with those who did not.¹³ Indeed, the opinion held that the Central Hanover had no obligation to undergo the "practical

9. 1937 N.Y. Laws 1561 (codified as amended N.Y. BANKING LAW §§ 100-c (1), (6), & (10)). For federal regulation, see *infra* text at notes 73–75, 239–242.

10. 1937 N.Y. Laws 1561 (codified as amended N.Y. BANKING LAW § 100-c (6)).

11. The constitutional claim was first raised and rejected in an interlocutory motion. *In re Cent. Hanover Bank & Trust Co.*, 75 N.Y.S.2d 397 (Sur. Ct. 1947), *aff'd*, 80 N.Y.S.2d 127 (App. Div. 1948), *appeal dismissed for lack of jurisdiction*, 85 N.E.2d 54 (N.Y. 1949). It was raised and rejected again, without additional judicial opinions, on appeal from the trial court's final decree. *In re Cent. Hanover Bank & Trust Co.*, 88 N.Y.S.2d 907 (App. Div. 1949), *aff'd*, 87 N.E.2d 73 (N.Y. 1949), *rev'd sub nom. Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

12. *Mullane*, 339 U.S. at 314–15 (citing *inter alia* *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *Wuchter v. Pizzutti*, 276 U.S. 13, 18–20 (1928)).

13. *Mullane*, 339 U.S. at 319.

difficulties and costs” of locating beneficiaries whose names and addresses it did not already possess.¹⁴ As to those beneficiaries, service by publication would suffice because the expense of doing more might destroy the advantages of the common trust fund scheme.¹⁵

Having thus pared away the more costly aspects of notice—personal service and search costs—Justice Jackson was able to impose on Central Hanover the cheaper alternative of sending letters to those beneficiaries whose identity and location were known.¹⁶ Central Hanover was already mailing them their checks, and had already sent them information about the common trust fund. In the era of the three-cent stamp, sending a few hundred more letters¹⁷ was not an excessive burden. While subsequent increases in the size of classes have made notice considerably more expensive,¹⁸ they have also increased the potential impact of accountings or class actions.

II. LEGISLATING THE COMMON TRUST FUND

In 1937, when the New York statute at issue in *Mullane* was awaiting signature or veto in the governor’s office, someone scribbled on it, “Important bill—I feel little frightened by it.”¹⁹ That someone may have been Governor Herbert Lehman who, as a long-time former partner of Lehman Brothers and a trustee for numerous family trusts,²⁰ might well have been interested by a statute affecting both trust companies and trustees. It would be nice to think that he reviewed statutes so conscientiously. Alternatively, the scribbler may have been his trusted counsel Charles Poletti.²¹ Somehow the fear was assuaged, perhaps as suggested by a reply scribble, by talking with the Superintendent of

14. *Id.* at 317.

15. *Id.* at 317–18.

16. *Id.* at 318–20.

17. *See id.* at 309 (noting that 113 trusts participated in the common trust fund). There was testimony that there were about 350 current beneficiaries, and perhaps between 1000 and 2000 persons with relevant interests. Transcript of Record at 42, 49–50, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (No. 378). There were larger funds but they were outside New York and hence not subject to New York’s account procedures. *Id.* at 54.

18. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166 (1974) (estimating cost of \$400,000 for class action notice). *But see* Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 730–34 (2008) (advocating for greater use of Internet notice).

19. File of Governor’s Office on 1937 N.Y. Laws 1565 (microformed in New York State Library, Legislative Reference Section, Bill Jacket Collection) [hereinafter Governor’s File].

20. ROBERT P. INGALLS, HERBERT H. LEHMAN AND NEW YORK’S LITTLE NEW DEAL 4, 8 (1975); Letter from Edgar Bernheimer to Allan S. Lehman (Nov. 21, 1933) (on file with The Lehman Collections, Columbia University).

21. Poletti is the addressee of several letters in the Governor’s File. He later became a judge, the Lieutenant Governor, and for a few days, the Governor of New York, as well as filling other important positions. INGALLS, *supra* note 20, at 13 (describing Poletti as “a one-man brain trust”); Richard Goldstein, *Charles Poletti Dies at 99; Aided War-Ravaged Italy*, N.Y. TIMES, Aug. 10, 2002, at A11.

Banking, William R. White, who was pushing the proposed statute.²² In any event, Governor Lehman did sign the bill.

What was so frightening or so important about common trust funds? They appear in the *Mullane* opinion as a modest and beneficent development in the ancient art of trusteeship, which is how the banks promoting them wished them to be perceived. Yet the New York statute was opposed by two committees of the New York County Lawyers' Association²³ and approved despite criticism of "somewhat serious defects" by a committee of the Association of the Bar of the City of New York.²⁴ Meanwhile the judges of the New York County Surrogate's Court stood neutral.²⁵

Examination of the banks' concerns and justifications, and the fears they had to overcome to secure authorizing legislation, reveals that the problem aired in *Mullane*—binding many parties in a single judicial proceeding—was a superficial manifestation of the problem of including many trusts in a common trust fund. Establishing such a fund means that the beneficiaries of all the participating trusts will be subject to the investment decisions of the sponsoring bank. Of course, exactly this happens when many stockholders invest in a corporation and are consequently bound by decisions of its board of directors. If one compares a common trust fund to a corporation, it is hard to see what the fuss was about, though it is true that the beneficiaries—like class action members—had not consented to be incorporated in a mass entity.

But if one compares a common trust fund to the situation existing before it was created, in which each participating trust had its own beneficiaries with significant rights against the trustees, beneficiaries could be seen as facing the possible loss both of procedural rights and of the rights traditionally enforced by courts of equity to have the trust corpus managed solely for the purposes of their particular trust. In effect, beneficiaries were being moved from trust law nearer to corporation law,

22. Under the words quoted in the text accompanying note 19, someone wrote: "If you feel uncertain, why not have White come to Albany to discuss it?" Letter from William R. White, Superintendent of Banking, to Charles Poletti, Counsel for Herbert Lehman (May 27, 1939) (on file with the Governor's File) (replying to objections to the bill, and offering to come to Albany to discuss it with the Governor).

23. Letter of Irving J. Joseph, Comm. on the Surrogate's Court (May 13, 1937) (on file with the Governor's File); Substitute Report No. 455, Comm. on State Legislation (Apr. 28, 1937) (on file with the Governor's File).

24. Ass'n of the Bar of the City of N.Y., Comm. on State Legislation, Bulletin 14, at 855, 858 (May 18–25, 1937).

25. Letter of Richard Cumming (May 27, 1937) (on file with the Governor's File). *But see* Memorandum of James A. Delehanty (May 10, 1937) (on file with the Governor's File) (stating that the surrogate courts approved the legislation). The Legislative Committees of the Schenectady and Genesee County Bar Associations approved the statute. Memorandum of N.Y. State Bar Ass'n (Apr. 8, 1937) (on file with the Governor's File). Of course, these counties played a far smaller role in trust administration than did New York County.

just as class members are moved from a proceeding in which the plaintiff is “master of his claim”²⁶ to a mass production remedy controlled by class counsel and the court.²⁷

A. THE MOVEMENT FOR COMMON TRUST FUNDS

The 1920s brought challenges for trust companies. Inexperienced investors entered the market for common stocks, lured by investment companies promising the benefits of diversification and professional management.²⁸ Trusts, meanwhile, were often still limited to their traditional investments in mortgages, government bonds, and high-quality industrial bonds,²⁹ of which only the first was likely to provide high returns. When a trust was small, adequate diversification was out of reach. Though the market for trust services might have been expanding, trust companies faced increasing competition from national banks.³⁰

So trust companies began experimenting with diversification schemes. In some states it was already possible to divide a single mortgage among several trusts,³¹ either to share the risk or to make it possible for trusts with few assets to invest in mortgages as well as bonds. The next step was to make it possible for a trust to invest in a pool of mortgages,³² further reducing the risk—though not by any means eliminating it, as we learned again in 2007.³³ And a few institutions set up common trust funds whose investments were not limited to mortgages.³⁴

“With the collapse of the mortgage-loan market during the . . . [1929] depression, the mortgage pool and single mortgage participation types of investment became greatly discredited.”³⁵ Not that the few common

26. Nestle Waters N. Am., Inc. v. Bollman, 505 F.3d 498, 502–03 (6th Cir. 2007).

27. For the classic discussion, see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

28. 2 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR (1900–1970) 123–43 (2002); S.E.C., Investment Trusts and Investment Companies, H.R. Doc. No. 707, 75th Cong., pt. 1, at 35–65 (1938).

29. See RESTATEMENT OF TRUSTS § 227 cmt. f, n (1935); 1 JAIROS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES §§ 452, 456, 458 (6th ed. 1911); Symposium, *The Investment of Trust Funds*, 5 LAW & CONTEMP. PROBS. 335 (1938).

30. Eugene N. White, *Banking Innovation in the 1920s: The Growth of National Banks' Financial Services*, 13 BUS. & ECON. HIST. 92, 93, 95–98 (1984).

31. *In re Union Trust Co.*, 114 N.E. 1057 (N.Y. 1916); Frank C. McKinney, *Legality of Participating Mortgage Certificates as Investments for Trustees*, 24 YALE L.J. 286 (1914).

32. G. Fred Berger, *Pooling or Participation Mortgages as Investments for Trust Funds*, 48 TR. CO. 599 (1929); Comment, *Participation Mortgages as a Method of Trust Investment by Corporate Fiduciaries*, 45 YALE L.J. 857 (1936).

33. See, e.g., Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177 (2012).

34. James J. Saxon & Dean E. Miller, *Common Trust Funds*, 53 GEO. L.J. 994, 995–99 (1965).

35. C.A.W., Jr., Note, *Commingled Investment by Corporate Fiduciaries in Pennsylvania*, 87 U. PA. L. REV. 577, 579 (1939).

trust funds did much better.³⁶ In any event, it was to common trust funds that the trust companies turned in an effort to maintain their share of what was now a disillusioned but still desirable market.

In 1934, the Trust Division of the American Bankers Association set up the Special Committee on Common Trust Funds, which proceeded to seek the adoption of common trust fund legislation.³⁷ By 1941, eleven states had authorizing statutes, and the National Conference of Commissioners on Uniform State Laws had promulgated a Uniform Common Trust Fund Statute.³⁸

Although the benefits of diversifying investments constituted a major argument for common trust fund legislation,³⁹ the bankers also struck a New Deal note by asserting that they were protecting the little guy by reducing administrative costs.⁴⁰ They relied on “the social obligation they owe to all people who need trust service whether their estates are large or small.”⁴¹ Indeed, some claimed that they were administering small trusts at a loss, as a sort of public service.⁴² Bankers disagreed as to how introducing common trust funds would affect this situation. Some thought that the innovation would actually increase administrative expenses by adding complex record-keeping requirements.⁴³ This may explain why, as we shall see, trust companies did not rush to take advantage of the legislation once it was passed.⁴⁴ Others foresaw substantial

36. S.E.C., INVESTMENT TRUSTS AND INVESTMENT COMPANIES 20–24 (1939) (reporting substantial declines in value from 1929 to 1936, though not out of line with those registered by stock and bond indexes); see also Note, *The Common Trust Fund Statutes—A Legalization of Commingling*, 37 COLUM. L. REV. 1384, 1385 (1937) (asserting that holders of straight mortgage participations did no worse than mortgagees as a class, and that “the real debacle occurred” with mortgage participation certificates in mortgage pools).

37. B. Magruder Wingfield, *Reappraisal of Common Trust Fund*, 25 TR. BULL. 10 (1946); C. Alexander Capron, *The Federal Reserve Board Regulations of Common Trust Funds*, 5 LAW & CONTEMP. PROBS. 439, 440 (1938).

38. *Development of Common Trust Funds in the United States: Establishment and Public Relations Approach*, 72 TR. & EST. 367 (1941). The eight statutes in effect in 1939 may be found in Securities and Exchange Commission. See S.E.C., *supra* note 36, at 31–52.

39. E.g., Revenue Act of 1936, *Hearings Before the S. Finance Comm.*, 74th Cong., 1st Sess. 789–90 (1936) (statement of Gilbert T. Stevenson, Trust Division, American Bankers Association); C.A.W., Jr., *supra* note 35, at 578.

40. *Supra* note 37; Merrel P. Callaway, *Problems of the Trust Division of the American Bankers Association*, 63 TR. CO. 280, 284 (1936).

41. *Hearings*, *supra* note 39, at 794 (memorandum submitted by Gilbert T. Stevenson, Trust Division, American Bankers Association).

42. See Rodman Ward, *Trust Service for Persons of Small Means*, 62 TR. CO. 610 (1936); see also Edward L. Clifford, *Commingled Trust Funds*, 11 HARV. BUS. REV. 253 (1933).

43. Clifford, *supra* note 42, at 257–60. See generally L.B. Gunn, *A Caution on Common Trust Funds*, 16 TR. BULL. 7 (1937) (warning that “the accounting expense is almost prohibitive under the plans developed to date”).

44. *Infra* Part III.A.

savings for banks sponsoring common trust funds,⁴⁵ predicting that they would reap “profits that will delight their executives, directors, and stockholders.”⁴⁶

Like common trust fund legislation in other states, the New York statute of 1937⁴⁷ was sought by bankers and their lobbyists.⁴⁸ Its supporters expressed the usual hopes that it would help the less wealthy by promoting diversification and cutting administration costs,⁴⁹ while the *Wall Street Journal* also saw it as “enhancing profits”⁵⁰ for the sponsoring banks. The New York statute differed from other state statutes in its far greater length and detail,⁵¹ and in its provision for binding accountings without individual notice (to be challenged in *Mullane*). As we shall see, the opposition to the New York statute was also more detailed, or at least more accessible to this author’s research.

B. OBSTACLES

The trust companies faced at least five kinds of difficulties as they sought to establish common trust funds. They confronted a legacy of mistrust, threats of liability, novel issues arising from the common trust fund’s novel approach, tax burdens, and competing providers. The presence of these difficulties explains why the trust companies needed to obtain authorizing legislation, and in part why that legislation took the form that it did. To some extent, it also explains why the New York drafters provided for frequent binding accountings.

First, the behavior of investment companies during the stock market boom of the late 1920s had given rise to well-deserved suspicion, which

45. John Horn, *Economies Through the Common Trust Fund*, 67 TR. CO. 54 (1938); Albert W. Whittlesey, *Commingle Fund Recommended as Solution of Several Major Trust Problems*, 58 TR. CO. 321, 324 (1934).

46. Albert W. Whittlesey, *Post-War Trust Dollar and Common Trust Funds*, 79 TR. & EST. 551, 554 (1944).

47. 1937 N.Y. Laws 1561.

48. Letter of Samuel Aronowitz, Legislative Counsel for the Trust Cos. Ass’n of N.Y. (May 12, 1937) (on file with the Governor’s File); Letter of Chairman, Nat’l City Bank (May 11, 1937) (on file with the Governor’s File); Letter of Raymond Ball, President, N.Y. State Bankers Ass’n (May 22, 1937) (on file with the Governor’s File).

49. Letter of William R. White, Superintendent of Banking, State of N.Y. Banking Dep’t (May 20, 1937) (on file with the Governor’s File); Letter of C. Alexander Capron (May 25, 1937) (on file with the Governor’s File) (replying to claims that expenses would be increased).

50. *Small Trust Business in State Takes Forward Stride with Passage of Bill Enabling Banks To Pool Funds of Estates; Seen Enhancing Profits*, WALL ST. J., May 8, 1937 (on file with the Governor’s File).

51. In the compilation of eight statutes found in the Securities and Exchange Commission, the New York statute alone occupied ten pages and its implementing regulations occupied nine more. See S.E.C., *supra* note 36, at 31–52. The other seven statutes occupied four pages in all, and none was accompanied by regulations. *Id.*

ultimately led to the Investment Company Act of 1940.⁵² Trust companies, garbed in the traditional mantle of fiduciaries, might have been a bit less suspect than other financial innovators. But after all a common trust fund, just like investment companies, placed the funds of many investors under control of managers who might be incompetent or self-interested. Indeed, some of the entities appealing directly to investors had been organized as trusts or were known as investment trusts,⁵³ while some of the pioneering common trust funds had been organized as corporations.⁵⁴ Even though only trusts could invest in common trust funds, trust companies might be suspected of urging investors to set up trusts, perhaps revocable trusts, so they could join in.

The possibility of unleashing a new financial scam may have been what frightened someone in Governor Lehman's office.⁵⁵ One correspondent discussing a related measure noted a belief that, when trust companies allocated mortgages among several trusts, "there had been serious abuses and that the trust company's own mortgages were of much higher quality than those held in trust for various beneficiaries."⁵⁶

To avoid the danger that they would be regarded—and regulated—like investment companies, the trust companies disclaimed any speculative intent, and submitted their common trust funds to the relatively friendly supervision of the Federal Reserve System,⁵⁷ and, in New York, the Banking Board.⁵⁸ The Federal Reserve in turn required that no interest in a common trust fund should be negotiable or assignable, and that a trust could participate only if it was created and used for bona fide fiduciary purposes.⁵⁹ Later, it restricted advertisements of common fund earnings.⁶⁰ A single trust's investment in a fund was limited (though this was not to survive) to \$25,000.⁶¹ Perhaps most important, the trust

52. Pub. L. No. 75-768 (1940), amended by 15 U.S.C. §§ 80a-1–80a-64 (2014). See MATTHEW P. FINK, *THE RISE OF MUTUAL FUNDS: AN INSIDER'S VIEW* 9–19 (2d ed. 2011); S.E.C., *Investment Trusts and Investment Companies*, H.R. Doc. No. 279, 76th Cong., pt. 3 (1939) (describing abuses and deficiencies).

53. MARKHAM, *supra* note 28, at 137–43; S.E.C., *supra* note 28, at 29–31.

54. S.E.C., *supra* note 36, at 7–16.

55. See *supra* text accompanying note 19.

56. Letter of Paul R. Taylor, Dep't Counsel, State of N.Y. Ins. Dep't (Mar. 30, 1937) (on file with the Governor's File).

57. Revenue Act of 1936, Pub. L. No. 74-740 § 169 (a)(2) (1936), amended by I.R.C. § 584 (a)(2) (2003).

58. 1937 N.Y. Laws 1561 (codified as amended N.Y. BANKING LAW § 14 (1)(c)).

59. S.E.C., *supra* note 36, at 27 (quoting Regulation F, Part (a)). Regulation F is the distant ancestor of 12 C.F.R. § 9.18 (2014). For discussion of Regulation F, see C. Alexander Capron, *supra* note 37. For similar state provisions, see Robert W. Bogue, *Common Trust Fund Legislation*, 5 LAW & CONTEMP. PROBS. 430, 434 (1938). New York also barred revocable trusts from participating in a common trust fund. 1937 N.Y. Laws 1561, 1562, ch. 687, § 1(1).

60. TRUST DIVISION, AMERICAN BANKERS ASS'N, *COMMON TRUST FUNDS: A HANDBOOK ON THEIR PURPOSES, ESTABLISHMENT, AND OPERATION* 15 (2d ed. 1948).

61. *Id.* at 14; 1937 N.Y. Laws 1561.

company or national bank sponsoring the fund could not receive compensation for its management,⁶² presumably because it was already being paid for its services as trustee of the participating trusts. Such provisions secured a common trust fund exemption from the Investment Companies Act,⁶³ but would not prevent future controversy over the scope of that exemption.⁶⁴

Second, the collapse of land values after 1929 had exposed trustees and trust companies involved in split mortgages and mortgage pools to suits by disgruntled beneficiaries. Relying on fiduciary principles, plaintiffs argued that their trustees were not authorized to make joint investments,⁶⁵ that such investments improperly commingled trust assets while their makers failed to keep records specifying who owned what,⁶⁶ and that trustees had engaged in improper self-dealing by selling their own mortgages to trusts of which they were trustees.⁶⁷

Although beneficiary suits often failed,⁶⁸ they posed a continuing threat to trust companies, which were contemplating common trust funds and were well aware that markets could go down as well as up. That the New York statute legalized common trust fund investments by existing trusts, set up before such funds were recognized,⁶⁹ shows that trust companies were aware of their exposure. They therefore needed to protect themselves through legislation legitimating investment in common trust funds and stating what records and procedures would be required—and still better, by providing for court approval of their investments that would bar future claims. And opponents criticized the common trust fund's infringement of the principle that “[e]ach estate, however small, should be kept separate and distinct.”⁷⁰

62. 1937 N.Y. Laws 1561 (codified as amended N.Y. BANKING LAW § 100-c (3)); S.E.C., *supra* note 36, at 30 (quoting Regulation F, Part (b)(8)). Regulation F, Part (b)(8) was the ancestor of the more permissive 12 C.F.R. § 9.18 (b)(9) (2014).

63. 15 U.S.C. § 80a-3 (c)(3) (2014).

64. *See infra* Part III.F.

65. *In re Waxelbaum's Estate*, 281 N.Y.S. 186 (Sur. Ct. 1935). For discussion of this and other possible objections, see Comment, *Participation Mortgages as a Method of Trust Investment by Corporate Fiduciaries*, 45 YALE L.J. 857, 866–73, 877 (1936).

66. *Chapter House Circle v. Hartford Nat'l Bank & Trust Co.*, 186 A. 543 (Conn. 1936); C.A.W., Jr., *supra* note 35.

67. *In re Ryan's Will*, 52 N.E.2d 909 (N.Y. 1943); *In re Tuttle's Estate*, 294 N.Y.S. 230 (Sur. Ct. 1937). For common trust fund legislation modifying the ban on self-dealing, see Bogue, *supra* note 59, at 434–36.

68. *E.g.*, *Springfield Safe Deposit & Trust Co. v. First Unitarian Soc'y*, 200 N.E. 541 (Mass. 1936) (explaining mortgage participation investment was permissible under Massachusetts “prudent investor” rule); *In re Guthrie's Estate*, 182 A. 248 (Pa. 1936) (inadequate records did not cause loss).

69. 1937 N.Y. Laws 1561, ch. 687, § 1(1).

70. Substitute Report No. 455, N.Y. Cnty. Lawyers' Ass'n, Comm. on State Legislation (Apr. 28, 1937) (on file with the Governor's File); Letter of Frank H. Twyeffort (May 11, 1937) (on file with the Governor's File).

Third, in addition to problems already litigated, common trust funds raised a host of new issues that might give rise to future beneficiary suits. If two trusts invested equal sums in a trust whose holdings had changed in price between the first and the second investment, how should their respective interests be valued? If a trust withdrew its investment, as of what date should the sum to be received be calculated in an age before computers made it easy to calculate the total value of the fund at any instant? Legislation dealing with such matters would protect sponsoring banks from future challenges.⁷¹

Fourth, in 1936 both federal and New York courts raised a tax barrier to common trust funds.⁷² Passing on cases involving the few existing funds, they held that the fund itself was a taxable entity, so that taxes might be collected from it as well as from its participating trusts and from the beneficiaries. The banks promptly obtained corrective legislation from Congress and the New York legislature.⁷³ But that legislation limited its benefits to common trust funds in compliance with applicable regulations—the federal statute referring to the Federal Reserve Board regulations, and the New York statute adding the New York Banking Board—suggesting at least some concern that funds might misbehave. During the same years, mutual funds went through a parallel history, likewise winding up with tax benefits but also subject to regulation.⁷⁴

Fifth, the banks might have faced self-interested opponents of common trust funds. Sponsors of competing investment vehicles might have wished to stymie new rivals—though in the 1930s investment companies and the like were too unpopular themselves to wield as much legislative influence as they might today. But what about lawyers? One lawyer opponent of the New York legislation complained that “the bill is special legislation in favor of the corporate as against the individual trustee.”⁷⁵ Individual trustees were often lawyers. The common trust fund legislation did not authorize them to establish funds for the investment of their trusts, except in Pennsylvania.⁷⁶ They would therefore lack the advantage of being able to invite prospective trustors to diversify the investments of a small trust. Although there is no conclusive evidence that lawyers led the opposition, it is suggestive that a number of bar

71. 1937 N.Y. Laws 1561; Note, *supra* note 36, at 1390–93.

72. *Brooklyn Trust Co. v. Comm’r*, 80 F.2d 865 (2d Cir. 1936); *City Bank Farmers Trust Co. v. Graves*, 3 N.E.2d 612 (N.Y. 1936).

73. Revenue Act of 1936, Pub. L. No. 74-740 § 169 (1936), amended by I.R.C. § 584(a)(2) (2014); 1937 N.Y. Laws 1561.

74. FINK, *supra* note 52, at 26–29; Mark J. Roe, *Political Elements in the Creation of a Mutual Fund Industry*, 139 U. PA. L. REV. 1469, 1478–83 (1991).

75. Letter from Frank H. Twyeffort 3 (May 11, 1937) (on file with the Governor’s File).

76. Bogue, *supra* note 59, at 432. Even if lawful, a common trust fund sponsored by a lawyer would rarely be economically practical.

association committees opposed the New York statute,⁷⁷ and that the statute was crammed with detailed provisions likely to mollify or distract the legal mind. The provision for regular accountings may have been one of these: how could a lawyer object to a fund regularly blessed by a court?

C. ACCOUNTINGS AND NOTICE

So far as I can tell, New York's provisions for the settlement of common trust fund accounts by the court, including the notice provisions challenged in *Mullane*, were included entirely for the protection of the banks. None of those responsible for promoting common trust fund legislation said anything that I can find about protecting beneficiaries by giving them an opportunity to challenge the acts of a fund's trustees. The statutory provisions were not shaped so as to promote such challenges—if anything, the opposite. They thus resemble the features of today's class action and aggregate settlements designed to ensure that those with possible claims will be precluded from asserting them elsewhere.⁷⁸ Yet it does not follow that the New York statute actually did what its makers intended. On the contrary, we shall see that they may have overreached themselves, opening themselves up to court challenges rarer in other states.⁷⁹

The goal of common trust fund accountings, as stated by a New York trust company Vice President, was to “give the trustee full protection as to all investment matters reflected in the accounts.”⁸⁰ It was the trustee who was to be protected, not the beneficiaries. A New York lawyer who assisted a committee of the American Bankers Association in its study of common trust funds found it “a practical necessity that some means should be provided for the periodic and final settlement of the accounts of a bank relating to a common trust fund, and that such settlement should be conclusive upon all parties interested in the participating trusts.”⁸¹ His concern, and that of others,⁸² was to avoid leaving trust companies open to challenge each time a trust participating in a common trust fund settled its own accounts. And the Trust Division of the American Bankers' Association worried about “the possibility of annoyance from litigious beneficiaries who with a very small interest in

77. See *supra* text accompanying notes 24–25.

78. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 108–13, 136–43, 151–59 (2007).

79. See *infra* Part II.C.

80. Baldwin Maull, *Answering Objections to Common Trust Fund*, 19 TR. & EST. 55, 57 (1944).

81. Capron, *supra* note 37, at 450.

82. Bogue, *supra* note 59, at 437–38; Rodman Ward, *Practical Problems in Operation*, 66 TR. CO. 217, 221 (1938).

the fund might force expensive legal accountings covering the operation of the whole fund for many years.”⁸³

The New York statute implemented this plan by providing for what class action lawyers now call “global peace,”⁸⁴ to be obtained through the magic of *res judicata*. It made the court’s decree “binding and conclusive in respect of any matter set forth in the account . . . upon all parties having or who may thereafter have any interest in such common trust fund or in any estate trust or fund held by such trust company.”⁸⁵ One result was that beneficiaries of trusts whose funds were invested in a common trust fund would lose the right to challenge investment decisions, other than the decision to invest in the fund, and perhaps even that decision.⁸⁶ Another was that persons who became beneficiaries after the accounting would be bound by it, which is an early example of the attempt to bind “futures” that has given rise to more recent controversy.⁸⁷ Not satisfied with this level of immunity, the statute also barred challenges to good faith valuation decisions made pursuant to New York Banking Board rules.⁸⁸ As a bar association committee pointed out, this exculpation was “somewhat anomalous” considering that a statute passed just the year before had barred will clauses granting executors and testamentary trustees a similar immunity.⁸⁹

The statutory notice provisions likewise appear to have been drafted to protect sponsoring trust companies by making challenges to their acts unlikely. The requirement for notice by publication, properly described by the *Mullane* court as a “feint,”⁹⁰ forbade the identification of beneficiaries in the published announcement of each accounting, which was to include only the names of the grantor or decedent establishing the participating trusts.⁹¹ Directing (with much detail) the Trust company to send out copies of the statutory accounting provisions when trust assets were first invested in the common trust fund, and making later accountings binding only when that had been done,⁹² was properly characterized by a lower court judge in the *Mullane* case as manifesting a “studied purpose . . . to avoid giving such notice as is practicable” by

83. TRUST DIVISION, AMERICAN BANKERS ASS’N, COMMON TRUST FUNDS: A HANDBOOK ON THEIR PURPOSES, ESTABLISHMENT, AND OPERATION 47 (1939).

84. *E.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 159 (2010).

85. 1937 N.Y. Laws 687 (codified as amended N.Y. BANKING LAW § 100-c(6)).

86. *In re Lincoln Rochester Trust Co.*, 111 N.Y.S.2d 45, 56–57 (Sup. Ct. Monroe Cnty. 1952) (noting that courts have discretion to adjudicate propriety of investment by trust in common trust fund, with a binding effect).

87. *E.g.*, Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000); Rhonda Wasserman, *Future Claimants and the Quest for Global Peace*, 64 EMORY L.J. 531 (2014).

88. 1937 N.Y. Laws 1565. This provision is no longer included in N.Y. BANKING LAW § 100-c.

89. Ass’n of the Bar of the City of N.Y., *supra* note 24, at 857.

90. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

91. 1937 N.Y. Laws 1567–68.

92. *Id.* at 1565–66.

creating “the appearance without the substance of real notice.”⁹³ Indeed, even these clauses appear to have been meant to protect the banks by preventing objections to the investing of trust assets in a common trust fund.⁹⁴

These problems with the provisions for notice, which later gave rise to *Mullane*, were not entirely unobserved when the statute was passed. A prescient opponent of the statute pointed out while it was awaiting signature that

[T]he beneficiaries of the small trusts scrambled into the huge common trusts are not to be properly advised of what is going on. . . . The picture of a beneficiary in New York City devoting himself from January 1 until April 1 in each year to the . . . perusal of all legal notices until, perchance, he finds . . . the name of the estate in which he is interested, is a picture which must have caused sardonic amusement to those who conceived this method of giving “notice.”⁹⁵

The final twist may have been provided by the requirement in the original statute of 1937 for annual accountings,⁹⁶ amended by the time of *Mullane* to mandate accountings every three years.⁹⁷ Although frequent accountings might have been meant to provide more careful judicial supervision for common trust funds, they might also have been intended to provide more frequent immunity baths for those sponsoring the funds. By the time an investment turned out to have been improvident, beneficiaries would no longer be able to challenge it. And as some critics of the legislation pointed out, the cost of annual accountings would have been substantial.⁹⁸

Those who sought to protect common trust fund sponsors from litigation had another course open to them, one followed by many states outside of New York that passed a common trust fund statute. In 1939, there were seven such states, and none of their statutes mentioned an accounting; at least one of these, Connecticut, had considered an accounting provision but then rejected it.⁹⁹ As reported in 1951, soon after *Mullane*, about half of the thirty-one states with statutes had no provision for court accountings binding on beneficiaries, while many others allowed but did not require accountings (as provided in the

93. See *In re Cent. Hanover Bank & Trust Co.*, 80 N.Y.S.2d 127, 129, 132 (App. Div. 1948) (Van Voorhis, J., dissenting); see also *In re Security Trust Co.*, 70 N.Y.S.2d 260, 280 (Sup. Ct. Monroe Cnty. 1947) (noting that a “colorable and illusory provision that seems to provide for notice and yet is calculated not to give notice”).

94. See *In re Security Trust Co.*, 70 N.Y.S.2d at 277–78.

95. Letter of Frank H. Twyeffort (May 11, 1937) (on file with the Governor’s File).

96. 1937 N.Y. Laws 1566–67.

97. 1943 N.Y. Laws 1222.

98. Substitute Report No. 455, *supra* note 23; Letter from Frank H. Twyeffort (May 11, 1937) (on file with the Governor’s File).

99. S.E.C., *supra* note 36, at 31–32, 50–52; Ernest L. Averill, *Common Trust Funds*, 13 CONN. B.J. 14, 24–25 (1939).

Uniform Common Trust Fund Act of 1938), and four subjected common fund accounts to the same requirements as those of ordinary trusts.¹⁰⁰

When the law does not require them, sponsors of common trust funds have been in no hurry to seek court accountings. So far as I can tell from reported cases, Massachusetts is the only state outside New York where they have occurred.¹⁰¹ As one California banker said, “we certainly do not plan to seek court settlement of our fund’s accountings . . . [A]ny bank that prudently administers a common trust fund does not, in my opinion, need any judicial skirts behind which to hide.”¹⁰² Whether or not only sissies need accountings, it does seem that there is more than one way for a bank to protect itself from litigation, and that the bank going to court itself may not be the best way.

III. THE *MULLANE* LITIGATION

In focusing on the adequacy of notice to trust beneficiaries, *Mullane* may have missed the point. Neither before nor after the Supreme Court decision did beneficiaries play any detectable role whatsoever in common trust fund accountings. In reality, it is the guardians *ad litem* appointed under the New York statute¹⁰³ to represent beneficiaries who provide the only representation for their interests. Yet the subsequent history of class actions teaches that this kind of representation may be impaired by conflicts between class members, or between the interests of the class and those of its representatives. So it is important to consider whether similar impairments have occurred in common trust fund accountings, and in particular, in *Mullane* itself.

A. THE CHALLENGING LAWYER: KENNETH MULLANE

The due process claim adjudicated in *Mullane* was not raised for ten years after the New York statute came into effect, but not because it was too recondite to be noticed—as we have seen, lawyers at the time saw the problem¹⁰⁴—and not because guardians *ad litem* were delinquent. Rather, there were no guardians because there were no accountings, and there were no accountings because there were no New York common trust funds. At the very moment the New York statute became available, it became known that only one large bank was preparing to establish a

100. Note, *Accounting for Common Trust Funds: A Statutory Scheme*, 64 HARV. L. REV. 473, 475 (1951).

101. *Roche v. Boston Safe Deposit & Trust Co.*, 464 N.E.2d 1341 (Mass. 1984); *First Nat’l Bank of Boston v. Aloisi*, 481 N.E.2d 1189 (Mass. App. Ct. 1985).

102. Claude C. Blakemore, *Common Trust Fund Experience in California*, 87 TR. & EST. 35, 36 (1948).

103. 1937 N.Y. Laws 1567 (codified as amended at N.Y. BANKING LAW § 100-c(6)).

104. See *supra* text accompanying notes 91–96.

fund.¹⁰⁵ And in fact, the first New York fund appeared only in 1944.¹⁰⁶ Not until after World War II did the common trust fund movement take off nationally, and as late as 1948 New York had only four of the approximately sixty-five extant funds.¹⁰⁷

Some causes of slow development were national, but others can be traced to the special features of the New York statute. During the war, interest on U.S. bonds was high enough to make diversification into other investments relatively unimportant.¹⁰⁸ An individual trust could only invest \$25,000 in a common fund until 1945, when the Federal Reserve Board raised the maximum to \$50,000, to the joy of bankers whose devotion to the little guy had its limits.¹⁰⁹ Meanwhile, in New York, bankers complained of the “[e]xpensive and complicated accounting requirements under the State law.”¹¹⁰ The legislature responded by changing annual to triennial accountings; it also authorized “discretionary common trust funds” whose investments were not limited to the traditional trust menu.¹¹¹

As common trust funds appeared in New York, guardians *ad litem* began challenging some of their practices.¹¹² Guardians also raised questions about the jurisdiction of the Surrogate’s Court, and about its power to use an accounting to pass on the propriety of a trust’s investment in a common trust fund.¹¹³ And on April 30, 1947, the Surrogate’s Court in Rochester upheld a guardian’s due process challenge to the statutory notice provisions.¹¹⁴ Less than a month later, Kenneth Mullane, guardian *ad litem* for the income beneficiaries of Central Hanover Bank and Trust Company’s Discretionary Trust Fund No. 1, raised the same due process

105. See *State Gives Rules for Common Trusts*, N.Y. TIMES, Apr. 28, 1938, at 29; *Banks Here Plan Careful Study of Common Trusts*, WALL ST. J., Mar. 1, 1938, at 1.

106. See *Obstacles to Common Trust Funds*, 78 TR. & EST. 475 (1944) (reporting the results of a survey of obstacles to creating common trust funds).

107. Gilbert T. Stephenson, *Participating Investments—The Common Trust Fund Device*, 12 OHIO ST. L.J. 522, 531 n.46 (1951).

108. See *In re Bank of New York*, 67 N.Y.S.2d 444 (Sup. Ct. N.Y. Cnty. 1946); Louis S. Headley, *Uses and Limitations of Common Trust Funds*, 77 TR. & EST. 465, 467 (1943).

109. B. Magruder Wingfield, *Reappraisal of Common Trust Fund*, 25 TR. BULLETIN 10, 13 (Apr. 1946). By 1951, New York funds could accept investments of \$100,000. 1951 N.Y. Laws 835.

110. See *supra* note 106.

111. 1943 N.Y. Laws 1219, 1222.

112. See *In re Bank of New York*, 67 N.Y.S.2d 444, 465–66 (Sup. Ct. N.Y. Cnty. 1946) (recognizing amortization and investments by trusts in common fund in the form of U.S. bonds); see also *In re Cont’l Bank & Trust Co.*, 67 N.Y.S.2d 806, 807 (Sup. Ct. N.Y. Cnty. 1946); *In re Lincoln Rochester Trust Co.*, 111 N.Y.S.2d 45, 53 (Sup. Ct. Monroe Cnty. 1952) (dealing with investments by trusts created before common fund statute as well as objections to plan of operations and bank’s compensation); *In re Chase Nat’l Bank*, 116 N.Y.S.2d 141, 143 (Sup. Ct. N.Y. Cnty. 1952) (focusing on expenses chargeable to fund).

113. *In re Security Trust Co.*, 70 N.Y.S.2d 260, 267 (Sup. Ct. Monroe Cnty. 1947); *In re Lincoln Rochester Trust Co.*, 111 N.Y.S.2d 45, 50–51 (Sup. Ct. Monroe Cnty. 1952).

114. *In re Security Trust Co.*, 70 N.Y.S.2d 260, 282 (Sup. Ct. Monroe Cnty.), *rev’d*, 92 N.Y.S.2d 308 (App. Div. 1949), *rev’d on reh’g*, 97 N.Y.S.2d 922 (App. Div. 1950).

objection in the accounting proceeding that would give rise to the Supreme Court's decision.

Was Mullane merely going through the motions of representing the interests of beneficiaries? Given the recent Rochester ruling, he could well have felt obliged to assert the notice issue. Indeed, his pleading said that, in view of that ruling, "I deem it my duty to raise" the issue, a rather lukewarm phrasing of his claim.¹¹⁵ He did not assert any other objections to the conduct of the accounting or of the common trust fund other than a jurisdictional point that had also been asserted in Rochester. When he examined the records of the fund, he found them all in order.¹¹⁶

Yet Mullane's representation was more than perfunctory, as evidenced by his ultimate triumph in the Supreme Court. When the trial court rejected his claim, he pursued an unsuccessful interlocutory appeal to New York's Appellate Division and Court of Appeals,¹¹⁷ followed by another appeal from the trial court's final decree.¹¹⁸ In the Supreme Court, he filed an elaborate, albeit disorganized, ninety-page brief, and a twenty-three-page reply brief.¹¹⁹

Mullane faced substantial opposition in court. Central Hanover was represented by the firm now known as Kelley Drye & Warren LLP, already a large corporate firm.¹²⁰ The New York State Bankers Association defended the statutory notice provisions in an amicus brief.¹²¹ Even the guardian *ad litem* appointed to represent the principal beneficiaries of the common trust fund told the court that he considered Mullane's objections not to be valid.¹²²

Although the reputation of the court that appointed Mullane guardian *ad litem*, the Surrogate's Court for New York County, has not always been savory, there seems no reason to believe that he was a hack appointed as a piece of political patronage, with the expectation that he would not rock the boat. Mullane was a long time member of the New

115. See Transcript of Record, *supra* note 17, at 34-35. The New York County Surrogate's Court has been unable to find the original files of the proceeding.

116. *Id.* at 190-98.

117. See *In re Cent. Hanover Bank & Trust Co.*, 75 N.Y.S.2d 397, 399 (Sup. Ct. N.Y. Cnty. 1947), *aff'd*, 80 N.Y.S.2d 127 (App. Div. 1949), *appeal dismissed*, 85 N.E.2d 54 (N.Y. 1949).

118. *In re Cent. Hanover Bank & Trust Co.*, 88 N.Y.S.2d 907 (App. Div. 1949), *aff'd*, 87 N.E.2d 73 (N.Y. 1949).

119. See Brief for Appellant, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (No. 378); Reply for Appellant, *Mullane*, 339 U.S. 306 (No. 378). The Supreme Court briefs of both parties were much the same as those they had filed in the New York Court of Appeals.

120. ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 34-35 (1964) (noting that as of December 1957, Kelley, Drye, Newhall & Maginnes was the nineteenth largest firm, with fifty lawyers).

121. Brief for New York State Bankers Association, as Amicus Curiae Supporting Appellees, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (No. 378). A similar brief was filed in the New York Court of Appeals.

122. See Transcript of Record, *supra* note 17, at 35-36. In the New York Court of Appeals, the guardian *ad litem* submitted a brief likewise opposing Mullane's arguments.

York Bar and a graduate of Harvard Law School.¹²³ He had considerable experience in trusts and estates litigation.¹²⁴ He was later to be politically active in the Conservative Party of New York State,¹²⁵ while Surrogate William T. Collins, who appointed him, was a Democrat, albeit one opposed by the Tammany Hall Democratic leadership.¹²⁶ At any rate, if Surrogate Collins thought that Mullane would make no waves, he was wrong.

B. CONFLICTS IN THE CLASS?

New York's common trust fund statute foresaw that one kind of conflict might arise in accountings by providing for two guardians *ad litem*—one to represent the beneficiaries interested in trust income and the other to represent those interested in principal.¹²⁷ In the *Mullane* case, two instances of possible conflict between these two groups of beneficiaries and their guardians arose. One has already been mentioned: James N. Vaughan, representing the beneficiaries interested in principal, opposed Mullane's due process claim, missing out on the chance of winning eternal glory by giving his name to a leading Civil Procedure case. It is not clear why Vaughan thought the due process claim was bad for principal beneficiaries. Perhaps he believed that requiring more extensive notice would increase the costs of accountings to be paid out of principal¹²⁸ without affecting the result of accounting proceedings. If so, he had a point.

The second conflict between income beneficiaries and principal beneficiaries was posed by Central Hanover when it asked the court to instruct whether certain stock dividends should be treated as income or principal.¹²⁹ As it happened, both guardians agreed that they were income, which had also been the position suggested by Central Hanover.¹³⁰ In this instance, the court proceeding was not adversarial and operated primarily as an immunity bath for Central Hanover, though it is certainly possible that Vaughan would have claimed the stock dividends as principal had he found plausible grounds for doing so. Like Mullane, he was no political hack, but an experienced lawyer¹³¹ with some reform

123. Kenneth J. Mullane, *A Noted Lawyer*, 68, N.Y. TIMES, Oct. 15, 1977, at 26.

124. *In re Eitington*, 72 N.E.2d 27 (N.Y. 1947); *In re Sittenfield*, 54 N.Y.S.2d 507 (App. Div. 1945); *In re Kilsheimer*, 42 N.Y.S.2d 272 (App. Div. 1943).

125. See *supra* note 123.

126. Leo Egan, *Collins Selected by Dewey to Fill Surrogate Post*, N.Y. TIMES, Mar. 11, 1946, at 1.

127. 1937 N.Y. LAWS 1567-68 (codified as amended at N.Y. BANKING LAW § 100-c (6)). A beneficiary could fall into both groups, for example, if she would not receive income until a time well into the future when the amount of that income would depend on the size of the principal.

128. *In re Bank of New York*, 67 N.Y.S.2d 444, 448 (Sup. Ct. N.Y. Cnty. 1946).

129. See Transcript of Record, *supra* note 17, at 23.

130. *Id.* at 23, 155-56, 161. For a contemporary instance of dispute between the two guardians, see *In re Bank of New York*, 67 N.Y.S.2d 444, 449-50 (Sup. Ct. N.Y. Cnty. 1946).

131. *E.g.*, *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944).

credentials.¹³² He was not only a former law secretary to a Surrogate, but also a teacher of philosophy and law and something of an intellectual.¹³³

Although conflicts between income and principal beneficiaries were the only ones the New York statute contemplated, other conflicts among beneficiaries were possible. As one banker pointed out in 1943:

A common fund is administered for the average trust and cannot give consideration to the needs of the particular account; the beneficiary of one trust may have use for tax exemption, his other income considered, whereas for another it is unimportant. . . . The beneficiary of a trust which has bought in when markets were low and yields were high suffers a reduction in income when new accounts are admitted after the market has arisen, at least where amortization is attempted; to a degree profits are capitalized and the funds of his trust are invested at a lower yield. To convert inherited securities on which the beneficiary is receiving the entire coupon usually has the same result.¹³⁴

Note that these are described, not as conflicts in accounting proceedings, but as conflicts in the actual operation of common trust funds, caused by placing the funds of many different trusts in a single investment pool. Yet they carry over into accountings, where members of different groups might wish to challenge decisions that others would favor.

Do such conflicts call for subclassing and separate representation in common trust fund accountings? Certainly not always. One can tell whether any of these potential conflicts has been actualized only by examining the particular decisions made by the fund's trustees. I am in no position to say whether any such conflicts existed in the *Mullane* case. Even when there is a real conflict of interest concerning a decision of the trustees, that decision may not be subject to legal challenge because the trustees of the common fund have considerable discretion.¹³⁵ Yet it is hard to deny that, sometimes, beneficiaries will have conflicting interests that go unrepresented by the guardians *ad litem* in the accounting proceeding. The only safeguards in those situations are feeble ones: a beneficiary may respond to the *Mullane* notice; the Superintendent of Banking may spot the problem;¹³⁶ or the court may see and act on its own.

A final sort of conflict might exist between the guardians *ad litem* and the beneficiaries. Like class counsel, the guardians might want to swell their fees at the expense of the fund and its beneficiaries. Indeed, Justice Jackson, foreshadowing many critics of class lawyers,¹³⁷ observed

132. *Drive to 'Divorce' Tammany Started*, N.Y. TIMES, May 5, 1943, at 29.

133. James N. Vaughan, *Lawyer for Shubert Interests*, N.Y. TIMES, Sept. 5, 1977, at 20.

134. Headley, *supra* note 108, at 468.

135. See, e.g., *In re Bank of New York*, 323 N.E.2d 700 (N.Y. 1974).

136. 1937 N.Y. Laws 1568. The Superintendent's involvement in accountings has been omitted in the current statute, N.Y. BANKING LAW § 100-c.

137. E.g., Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

in his opinion that the interests of beneficiaries were “presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.”¹³⁸ This observation was no doubt meant to strengthen the case for beneficiary “voice” by undermining claims of guardian “loyalty.”¹³⁹ The third safeguard, “exit,” allowing beneficiaries to opt out of accountings, was not considered.¹⁴⁰

In *Mullane* itself, the Surrogate’s Court awarded each guardian *ad litem* \$1500 and the lawyers for Central Hanover \$2000, all payable out of the fund, which had assets approaching three million dollars.¹⁴¹ A comparison of these awards makes clear that Mullane was not being paid off for some kind of abandonment of beneficiary interests. Beyond that, the fees do not appear exorbitant compared to at least some contemporary fee awards.¹⁴² But the Surrogate noted that the award covered only services in his court,¹⁴³ so Mullane probably received more after he triumphed in the Supreme Court. Unfortunately, the Surrogate’s Court files for the case have mysteriously disappeared from their box,¹⁴⁴ leaving one free to imagine the best or the worst.

In sum, although no signs of class conflicts other than those between income and principal beneficiaries appear in the surviving *Mullane* record, such conflicts are always a possibility in common trust fund accountings. Even if present, they did not appear because no one had any reason to bring them forward. And because no one brought them forward, the courts had no occasion to consider them.

Nevertheless, the Supreme Court’s opinion did allude in two ways to the possibility that conflicting interests might yield inadequate representation, a possibility it had considered ten years earlier in *Hansberry v. Lee*.¹⁴⁵ First, it noted that Central Hanover, trustee of both the common trust fund and its participating trusts, could not be expected to protect the beneficiaries: “[I]t is their caretaker who in the accounting

138. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); see also Richard A. Matasar, *Teaching Ethics in Civil Procedure Courses*, 39 J. LEGAL EDUC. 587, 600–02 (1989) (raising the question of Mullane’s motives).

139. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 (2000).

140. The beneficiaries were in effect a defendant class, so they would have had an incentive to use any opt out rights granted to them. See Vince Morabito, *Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States*, 14 DUKE J. COMP. & INT’L L. 197, 209 (2004).

141. See Transcript of Record, *supra* note 17, at 144–47.

142. E.g., *Milwaukee Towne Corp. v. Loew’s, Inc.*, 190 F.2d 561, 569–71 (7th Cir. 1951); *In re Lustron Corp.*, 196 F.2d 975, 976 (7th Cir. 1952); *Eddy v. Kelby*, 163 F.2d 56, 59 (2d Cir. 1947); *Warner v. Warner*, 215 P.2d 20, 23 (Cal. 1950); *In re Cent. Hanover Bank & Trust Co.*, 125 N.Y.S.2d 495, 495 (App. Div. 2d Dept. 1953).

143. Transcript of Record, *supra* note 17, at 147.

144. Message from Kimberley A. Sulik, Archivist and Records Manager, Surrogate’s Court to John Leubsdorf (July 29, 2013) (on file with author).

145. 311 U.S. 32 (1940).

becomes their adversary.”¹⁴⁶ The Court was clearly correct that Central Hanover’s goal of securing a court decree approving its accounts that would bar the beneficiaries from future challenges was directly opposed to the beneficiaries’ interest in raising such challenges if and when they learned of misconduct in the management of the fund. True, Central Hanover might have brought possible conflicts among the beneficiaries to the court’s attention in order to be sure of obtaining a judgment that could not be collaterally challenged¹⁴⁷ for inadequate representation. Class action defendants sometimes do this, but usually when they have something else to gain such as denial of class certification.¹⁴⁸

Second, the *Mullane* Court relied on the *absence* of conflicts within the class when it ruled that notice to every class member was not required:

This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore, notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all since any objection sustained would inure to the benefit of all.¹⁴⁹

This is not entirely correct. The interests of the beneficiaries are “identical” in some respects, but not in others. In any event, the Court relied on adequate representation by some class members as an alternative to individual procedural rights, just as it was later to do in *Phillips Petroleum Co. v. Shutts*.¹⁵⁰ Again, *Mullane* prefigures later class action jurisprudence. And it also points out a relationship between notice and representation requirements, often regarded as posing separate issues. Here, the claim is that adequate representation justifies weaker notice requirements. Somewhat unrealistically, the Court relied more on the willingness of beneficiaries to appear and object than on the presence in court of guardians appointed to represent beneficiary interests. It did this even though the economic stake of any beneficiary in the accounting was miniscule, since the trusts being pooled were all small ones.

C. THE CASE BEGINS

Had *Mullane* been a class action, the court would have had an obligation to protect the interests of class members even without being

146. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 316 (1949).

147. *E.g.*, *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003).

148. *See, e.g.*, *Rodriguez v. E. Tex. Motor Freight*, 505 F.2d 40, 50–51 (5th Cir. 1974), *rev’d*, 431 U.S. 395, 405 (1977). On the standing of defendants to raise such issues, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 803–06, 809–10 (1985).

149. *Mullane*, 339 U.S. at 319.

150. 472 U.S. 797, 809–14 (1985).

asked.¹⁵¹ The Surrogate's Court is likewise entitled to question accounts laid before it even in the absence of an objection.¹⁵² Whether because there was nothing worth questioning or because it relied on the guardians *ad litem* to find anything questionable, the *Mullane* court limited itself to passing on Mullane's objections.

Mullane raised those objections before Surrogate Collins by filing a special appearance challenging the Surrogate's Court's jurisdiction on two grounds.¹⁵³ The first was that the notice provisions of the New York common trust fund statute were insufficient to provide due process, so that "the notice given herein is inadequate to confer jurisdiction herein upon this Court."¹⁵⁴ The second was that the Surrogate's Court lacked jurisdiction under state law because Central Hanover "has commingled in the common trust fund moneys from *inter vivos* trusts with moneys from testamentary trusts," and the court lacked jurisdiction over the former.¹⁵⁵ Although the Monroe County Surrogate's court in Rochester had recently upheld both objections,¹⁵⁶ the second one was not promising, granted the language of the New York statute and its rejection by Judge Collins' fellow-Surrogate James Delehanty.¹⁵⁷ Making that objection did, however, allow Mullane to use the word "commingled"—commingling was a sin under trust law.¹⁵⁸

When Mullane's objections came on for hearing, each party headed down a different factual track. Central Hanover introduced the testimony of three bankers from three different banks that to ascertain and locate every beneficiary of the trusts invested in the common fund would be difficult and burdensome.¹⁵⁹ Surrogate Collins intervened once or twice to reinforce this point.¹⁶⁰ Mullane, introducing no witnesses of his own, cross-examined those of Central Hanover to establish that it would indeed be practical to send notice, not to all beneficiaries, but to those who had received notice when the funds of their trusts were first invested in the common fund.¹⁶¹ These divergent tracks outlined the

151. See Fed. R. Civ. P. 23(e); *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 182 (2d Cir. 1987); *In re* Sch. Asbestos Litig., 842 F.2d 671, 679–80 (3d Cir. 1988).

152. *Stortecky v. Mazone*, 650 N.E.2d 391 (N.Y. 1995); *In re* De Vany, 132 N.Y.S. 582 (App. Div. 3d Dept. 1911), *rev'd on other grounds*, 98 N.E. 1101 (N.Y. 1912); *In re* Estate of Andrus, 381 N.Y.S.2d 985 (Sur. Ct. Allegany Cnty. 1976).

153. Transcript of Record, *supra* note 17, at 34–35.

154. *Id.*

155. *Id.*

156. *In re* Sec. Trust Co., 70 N.Y.S.2d 260 (Sur. Ct. Monroe Cnty. 1947). As of 1950, two banks in Rochester had sponsored common trust funds, as compared to nine in New York, and two elsewhere in the state. Stephenson, *supra* note 107, at 532 n.46.

157. *In re* Hoaglund's Estate, 74 N.Y.S.2d 156, 164 (Sur. Ct. N.Y. Cty. 1947).

158. See *supra* notes 66–71, 87–88. See RESTATEMENT (THIRD) TRUSTS § 84, 214–16 (2007) for examples of commingling.

159. Transcript of Record, *supra* note 17, at 38–41, 44–48, 51–54.

160. *Id.* at 41, 58–59.

161. *Id.* at 41–43, 48–51, 55–57.

Supreme Court's ultimate holding: common trust funds would not be required to send notice to all beneficiaries, but would be required to notify those whose names and addresses were in their records.

The case had a long voyage on its way to the Supreme Court. Surrogate Collins filed an opinion rejecting Mullane's objections to jurisdiction,¹⁶² leading to an interlocutory appeal that was rejected on the merits by the Appellate Division,¹⁶³ and then dismissed for lack of appellate jurisdiction by the Court of Appeals.¹⁶⁴ Mullane then had to return to the Surrogate's Court for the entry of a final decree,¹⁶⁵ duly affirmed by the Appellate Division and Court of Appeals.¹⁶⁶ Only then could he bring his appeal before the Supreme Court.¹⁶⁷

The only opinion rendered in the *Mullane* case by the New York courts, other than that of Surrogate Collins, was the passionate dissent of Judge Van Voorhis from the Appellate Division's unexplained decision upholding the notice provisions.¹⁶⁸ Judge Van Voorhis, soon to be promoted to the New York Court of Appeals as "outstandingly qualified,"¹⁶⁹ was never reluctant to dissent when constitutional liberties were at stake.¹⁷⁰ One aspect of this case that gripped him was the "studied purpose" of the statute to avoid giving practicable notice of accountings,¹⁷¹ masked by its provision for notice at an earlier time, when a trust's assets were invested in the common fund.

It is remarkable that so much care should have been taken by the statute to inform interested parties of the general structure of the law, and of the making of the initial investment in the common fund, which the beneficiaries would be powerless to alter or to prevent, but that the Act should limit so drastically as to render practically nugatory the much more important notice of the judicial settlement of the accounts of the trustees.¹⁷²

162. *In re Cent. Hanover Bank & Trust Co.*, 75 N.Y.S.2d 397 (Sur. Ct. N.Y. Cty. 1947).

163. *In re Accounting of Cent. Hanover Bank & Trust Co.*, 80 N.Y.S.2d 127 (App. Div. 1st Dept. 1948).

164. *Matter of Cent. Hanover Bank & Trust Co.*, 85 N.E.2d 54 (N.Y. 1949).

165. Transcript of Record, *supra* note 17, at 133.

166. *In re Cent. Hanover Bank & Trust Co.*, 88 N.Y.S.2d 907 (App. Div. 1st Dept.), *aff'd*, 87 N.E.2d 73 (N.Y. 1949).

167. Transcript of Record, *supra* note 17, at 234-39. At the time, the case was appealable as of right under 28 U.S.C. § 1257 because the New York courts had upheld the validity of a challenged New York statute. Robert L. Stern, et al., *Epitaph for Mandatory Jurisdiction*, 74 A.B.A. J. 66 (Dec. 1988).

168. *In re Accounting of Cent. Hanover Bank & Trust Co.*, 80 N.Y.S.2d 127 (App. Div. 1948).

169. *Appeals Bench Is Filled: Governor Appoints Van Voorhis to State's Highest Court*, N.Y. TIMES, Apr. 24, 1953, at 35; *State Bar Grades Bench Candidates*, N.Y. TIMES, Oct. 28, 1954, at 21.

170. *E.g.*, *People v. Stover*, 191 N.E.2d 272, 277 (N.Y. 1963); *Courtesy Sandwich Shop v. Port of N.Y. Auth.*, 190 N.E.2d 402, 407 (N.Y. 1963); *People v. Sibron*, 219 N.E.2d 196, 197 (1966), *rev'd*, 392 U.S. 40 (1968).

171. *In re Accounting of Cent. Hanover Bank*, 80 N.Y.S.2d at 129; *see also supra* note 93.

172. *In re Accounting of Cent. Hanover Bank*, 80 N.Y.S.2d at 129.

He pointed out that notice and binding account provisions like that of New York were “not contained in the statutes of the other 28 states having legislation upon this subject,” and drew attention to the very limited powers of the superintendent of banks to supervise common trust fund investments.¹⁷³ Then the case moved on to the Supreme Court, to which Mullane had an appeal as of right because the New York courts had rejected a constitutional challenge to a New York statute.¹⁷⁴

D. THE SUPREME COURT SPEAKS

The Court’s almost unanimous decision in *Mullane* took some achieving. When the Court first conferred, the vote was five to three in favor of reversal, the ultimate result. Justices Black, Frankfurter, Jackson, Clark and Minton supported that result, but Chief Justice Vinson and Justices Burton and Reed would have affirmed the New York courts, and Justice Douglas did not participate.¹⁷⁵ Ultimately Justices Vinson and Reed joined the majority, while Justice Burton filed a dissent, one routinely omitted in Civil Procedure casebooks.

Justice Burton was not a frequent dissenter,¹⁷⁶ and his brief and bland opinion yields only limited insight into why he felt strongly about this case:

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.¹⁷⁷

Justice Burton’s first point—that trustors have consented to the statutory notice provisions—foreshadows more recent law on contracting out of jurisdictional law,¹⁷⁸ and also recalls one of his own opinions for the Court.¹⁷⁹ Yet even today’s Court might well shrink from upholding

173. *Id.* at 131.

174. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 307 (1949).

175. Papers of Robert H. Jackson on *Mullane v. Cent. Hanover Bank & Trust Co.* (on file in the Library of Congress, Box 164, file for case No. 378). Note that this file is not paginated, and the order of composition of its components is often unclear.

176. David N. Atkinson, *Justice Harold H. Burton and the Work of the Supreme Court*, 27 CLEV. ST. L. REV. 69, 73–74, 84 (1978).

177. *Mullane*, 339 U.S. at 320.

178. See *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 314–15 (1964) (upholding contractual designation of local agent for service of process, at least when agent mails process to the defendant). See generally *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (presenting the same jurisdictionally contracting out issue but in the context of forum selection clauses); *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980) (becoming officer or director of Delaware corporation creates jurisdiction over claims arising out of one’s conduct as such). Reliance on explicit or implicit consent as a ground for jurisdiction dates back at least to *Pennoyer v. Neff*, 95 U.S. 714, 735–36 (1878).

179. See *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947) (Burton, J.). South Dakota may not refuse to enforce as contrary to public policy a contractual limitations period of an

implicit consent, ascribed not only to trustors but also to beneficiaries, to be bound without notice of the proceeding other than publication. The reference to “notice and representation” suggests a theory that adequate representation by Mullane and the other appointed guardian might suffice to bind beneficiaries without notice, a theory supported by the Court’s 1940 decision in *Hansberry v. Lee*.¹⁸⁰ But again, it is dubious that even adequate representation could overcome the lack of notice (other than publication) to any of those to be bound.¹⁸¹ Perhaps the best explanation of Justice Burton’s dissent is that, even when some colleagues disagreed, he regularly voted to uphold state court jurisdiction.¹⁸²

It must have been the desire to head off arguments such as Justice Burton suggested—and in particular, to win over Chief Justice Vinson and Justice Reed to the majority—that caused Justice Jackson to write an opinion that emphasized the rightful powers of the state and the minimal requirements of due process almost more than the actual holding that New York had not satisfied those requirements. When Justice Jackson’s clerk Howard C. Buschman, Jr. first outlined an opinion, he made a few simple points: the *in rem* versus *in personam* distinction was not helpful; the beneficiaries had some right to be heard, while the state had a legitimate interest in closing estates; New York had not provided any form of personal notice; and mailing notice to the known beneficiaries would accommodate both state and beneficiary interests.¹⁸³ Although Buschman, similar in this respect to other clerks, later recalled that the Court issued his own draft “in Jackson’s name almost without editing,”¹⁸⁴ Justice Jackson’s papers contain many pages of rewriting, continuing through two printed versions of the opinion.¹⁸⁵ One result was to add a number of phrases in Justice Jackson’s colorful style. Another was to make clear that the Court was *not* limiting New York’s power to deal with a practical problem in a practical way, reassuring the possible

Ohio fraternal benefit society lawfully under Ohio law when a society member sues for insurance benefits in South Dakota. *Id.*

180. 311 U.S. 32, 40–43 (1940).

181. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558–59 (2011).

182. *Hanson v. Denckla*, 357 U.S. 235, 256, 260–61 (1958) (joining Justice Black’s dissent, which relied on the jurisdictional holding in *Mullane*); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (Burton, J.); *Travelers Health Ass’n v. Virginia ex rel. State Corp. Comm’n*, 339 U.S. 643 (1950) (pending together with *Mullane* as Justice Jackson was one of the dissenters who rejected state jurisdiction); see MARY FRANCES BERRY, *STABILITY, SECURITY, AND CONTINUITY* 137 (Greenwood Press 1979) (ascribing Burton’s *Mullane* dissent to his states’ rights views).

183. Papers of Robert H. Jackson, *supra* note 175. The Papers, dated March 21, 1950, provide for the Outline of the Present Opinion and are signed “HCB.” *Id.* For the identification of HCB as Buschman, see John Q. Barrett, *Howard C. Buschman, Jr. (1917-2009) Jackson Law Clerk*, THE JACKSON LIST (2009), <http://thejacksonlist.com/wp-content/uploads/2014/02/20090313-Jackson-List-Buschman.pdf> (last visited Aug. 5, 2015).

184. *Id.* at 4. This report of Buschman’s recollection is apparently based on an interview in “his later years,” many decades after *Mullane* had been decided. *Id.* at 5.

185. Papers of Robert H. Jackson, *supra* note 175.

dissenters. It may have been the need to minimize dissent by qualifying the Court's analysis that caused Justice Black (far from Justice Jackson's closest friend on the Court¹⁸⁶) to congratulate him on how he "handled this delicate question."¹⁸⁷

Justice Jackson's opinion thus traced a sinuous course, carefully awarding points to each side. At the outset, he upheld New York's jurisdiction to enter a binding decree to settle trust accounts.¹⁸⁸ Next, he expounded the need for notice when beneficiaries' interests were at stake, rejecting notice by publication as no "more than a feint."¹⁸⁹ That phrasing might recall Judge Van Voorhis' portrayal of the notice provisions as designed to give the appearance without the reality of notice, as well as Justice Jackson's own quips about farmers forced to read the Federal Register to discover their rights.¹⁹⁰ At any rate, he then swerved to support Central Hanover's position by finding it unnecessary to send notice to beneficiaries whose whereabouts were not already known,¹⁹¹ only to turn once again to strike down as unconstitutional the denial of notice to those whose whereabouts were known¹⁹²—but with a final proviso that notice could be accomplished by ordinary mail.¹⁹³

The opinion's appearance of evenhandedness was reached only by painting Mullane's position as more radical than it was—indeed, by outright misrepresentation of his claims. He had not challenged "the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York."¹⁹⁴ On the contrary, he agreed that, provided adequate notice was given, New York's jurisdiction over nonresidents "is sufficient for New York to authorize its courts to render a judgment *in personam* against such persons to the extent necessary for the proper administration of the said fund. . . ."¹⁹⁵ Actually, an early version of the Jackson opinion had stated that "Appellant does not and indeed he could not seriously challenge the jurisdiction or power of the state to proceed in the matter involved here,"¹⁹⁶ a correct statement wholly at odds with what appeared in the published opinion.

186. Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (1988).

187. See Papers of Robert H. Jackson, *supra* note 175 for a handwritten note from Justice Black, Apr. 20, 1950.

188. *Mullane v. Cent. Hanover Bank & Trust Co.* 339 U.S. 306, 313 (1950).

189. *Id.* at 315.

190. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387 (1947).

191. *Mullane*, 339 U.S. at 317–18.

192. *Id.* at 318–20.

193. *Id.* at 319.

194. *Id.* at 311.

195. Brief for Appellant, *supra* note 119, at 15. The point was repeated in Appellant's Reply Brief, *supra* note 119, at 6 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

196. Papers of Robert H. Jackson, *supra* note 175, for a handwritten insert in a printed draft dated March 1950.

Likewise, Mullane did not argue that the proceeding was *in personam* and that therefore “the Surrogate is without jurisdiction as to nonresidents upon whom personal service of process was not made.”¹⁹⁷ On the contrary, his argument that the proceeding was *in personam*—more precisely, that it was at least in part *in personam*¹⁹⁸—was advanced simply to rebut Central Hanover’s central argument¹⁹⁹ that the case fell within the rule that notice by publication sufficed in proceedings *in rem*.²⁰⁰ *Mullane* itself was to help destroy that rule.²⁰¹ Mullane expressly disclaimed any contention that personal service was required, relying on the possibility of notice by mail.²⁰² Nor, despite Justice Jackson’s intimation,²⁰³ did Mullane claim that Central Hanover must send individual notice to beneficiaries whose interests or addresses were unknown to it.²⁰⁴ The opinion thus appeared to be slapping down contentions that Mullane had never advanced, presumably in order to show how balanced it was.

In reality, Mullane’s position coincided with the Court’s conclusions, albeit expressed less gracefully and with more technical entanglement. One reading of this coincidence was that Mullane was one of those rare advocates who can find precisely the argument that appeals to the court. Another is that, having no visible clients to satisfy, he was free and indeed obliged to seek the result he considered best for all concerned, even at the expense of some beneficiaries. Here again, he could act like a class action lawyer.²⁰⁵ A third reading is that, for whatever reason, Mullane carefully avoided any contention that might seriously upset common trust funds or the banks sponsoring them. He did not, for example, argue that beneficiaries who received no notice should not be bound, even though common trust funds outside New York were getting along without

197. *Mullane*, 339 U.S. at 311–12.

198. Brief for Appellant, *supra* note 119, at 58–61.

199. Brief for Appellee Cent. Hanover Bank & Trust Co., at 14–34, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1949) (No. 378). This was also the central argument of the Brief of New York State Bankers Ass’n, *supra* note 121, at 7–11.

200. *Grannis v. Ordean*, 234 U.S. 385, 392–93 (1914); *Goodrich v. Ferris*, 214 U.S. 71, 80–81 (1909); see *Estin v. Estin*, 334 U.S. 541, 546–47 (1948) (distinguishing divorce from *in personam* money judgment).

201. See *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

202. Brief for Appellant, *supra* note 119, at 13, 41, 76–77; Appellant’s Reply Brief, *supra* note 119, at 5.

203. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1949) (“[W]e overrule appellant’s constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.”).

204. Brief for Appellant, *supra* note 119, at 16, 41, 76–77. That had also been his position in the trial court. *In re Cent. Hanover Bank & Trust Co.*, 75 N.Y.S.2d 397, 408 (Sur. Ct. N.Y. Cty. 1947).

205. See FED. R. CIV. P. 23(g)(4) (providing that class counsel must represent interests of the class); see also *Lazy Oil Co. v. Witco*, 166 F.3d 581 (3d Cir. 1999) (explaining that class counsel may advocate settlement opposed by some named plaintiffs).

binding accountings. The result was that both sides won: the Court portrayed common trusts approvingly and upheld binding accountings, while giving Mullane himself a victory and many beneficiaries a right to notice.

Though Justice Jackson's destination coincided with Mullane's position, his starting point was the New York State Bankers Association *amicus* brief's portrait of the common trust fund as a beneficent innovation protecting people of small and moderate means.²⁰⁶ As not only a New Dealer but also a former bank lawyer and director in Jamestown, New York, Justice Jackson could sympathize with this position. Justice Minton may have detected the influence of Justice Jackson's background when he approved the opinion in a letter stating "I am for Jamestown jurisprudence!"²⁰⁷ In any event, the implication of Justice Jackson's description of common trust funds was that constitutional law should not be allowed to strangle such a fine thing. Justice Jackson's description emphasized the economies of the common trust fund more than its facilitation of investment diversification.²⁰⁸ That enabled him to argue that expensive searches for contingent beneficiaries "would impose a severe burden on the plan, and would likely dissipate its advantages."²⁰⁹ His opinion thus looked forward to the inclusion of cost in the due process calculus.²¹⁰

Having established an implicit foundation for his argument in public policy, Justice Jackson proceeded to fuzz over the distinction between *in rem* and *in personam* actions as a basis for jurisdictional rules.²¹¹ Rejection of broad conceptual classifications as a premise for judicial decision was of course a classic legal realist ploy,²¹² also used by Justice Jackson's friend²¹³ Justice Frankfurter,²¹⁴ who enthusiastically praised Justice Jackson's opinion.²¹⁵ Here, it enabled the Court to sidestep the

206. Brief of New York State Bankers Association, *supra* note 121, at 2-4.

207. Eugene C. Gerhart, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 41, 56-57 (1958); Papers of Robert H. Jackson, *supra* note 175, at letter of Justice Sherman Minton, Apr. 21, 1950.

208. *Mullane*, 339 U.S. at 307-08.

209. *Id.* at 318.

210. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

211. *Mullane*, 339 U.S. at 311-13.

212. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921).

213. Gerhart, *supra* note 207, at 165-66, 230, 305; H.N. Hirsch, *THE ENIGMA OF FELIX FRANKFURTER* 185-88 (1981).

214. *Guar. Trust Co. v. York*, 326 U.S. 99, 108 (1945); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943).

215. Papers of Robert H. Jackson, *supra* note 175, handwritten note (noting "[y]our Notice case suits me down to the ground and will be an invaluable stream of sanity and clarity") (emphasis in original). Justice Frankfurter made one suggestion that Jackson adopted, the inclusion of citations to *Hess v. Pawloski*, 274 U.S. 352 (1927) and *Wuchter v. Pizzuti*, 276 U.S. 13 (1928). *See Mullane*, 339 U.S. at 315.

parties' debate about how the accounting should be classified²¹⁶ without having to reconsider precedents that relied on the classification. Appearing to rise above technicality, the Court could go on to appraise the effectiveness of notice by publication and by ordinary mail in a practical way.²¹⁷ In the process, it opened the way to the rejection of special jurisdictional rules for “*in rem*” proceedings based on the presence of property within the forum state.²¹⁸

With the traditional classification out of the way, Justice Jackson could allow the New York courts to cut off the rights of beneficiaries elsewhere by holding that:

[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the rights of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.²¹⁹

Reliance on the forum state's interests and regulatory authority was at that time a prominent theme of the Court's personal jurisdiction decisions,²²⁰ and was perhaps implied by the reference in Justice Burton's dissent to “the discretion of the State.”²²¹ Still to come was the doctrine that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.”²²²

Under today's doctrine, personal jurisdiction to bind out of state beneficiaries could be questioned because, although receiving benefits from the New York common trust fund, they did so because of someone else's act in making them beneficiaries, without themselves “purposefully” reaching out to New York.²²³ To uphold jurisdiction, the Court would have had to rely on the theory of jurisdiction by necessity²²⁴ or on the sort of

216. See *supra* text accompanying notes 193–202.

217. *Mullane*, 339 U.S. at 314–15, 319.

218. *Shaffer v. Heitner*, 433 U.S. 186, 206–07 (1977); see also *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). But see *Hanson v. Denckla*, 357 U.S. 235, 245–51 (1958) (relying on the *in rem* versus *in personam* distinction).

219. *Mullane*, 339 U.S. at 313.

220. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647–48 (1950); see also *Carroll v. Lanza*, 349 U.S. 408, 412–13 (1955) (relying similarly on forum state's interests in Full Faith and Credit Clause case).

221. *Mullane*, 339 U.S. at 320 (Burton, J., dissenting).

222. *Denckla*, 357 U.S. at 253.

223. See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115, 1122–23 (2014).

224. George P. Fraser, Jr., *Jurisdiction by Necessity: An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951); Chilenye Nwapi, *A Necessary Look at Necessity Jurisdiction*, 47 U.B.C. L. REV. 211 (2014); see *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984) (reversing judgment on that theory).

analysis it later invoked in *Phillips Petroleum Co. v. Shutts*²²⁵ to hold that out of state class members could be bound by an Oklahoma judgment because they benefited from being able to sue as a class, enjoyed adequate representation without having to appear, and received notice and the right to opt out. In short, the Court would have had to treat the trust accounting as a class action brought by the bank against a defendant class of beneficiaries. But *Mullane* differs from *Phillips Petroleum*. The *Mullane* beneficiaries reaped little benefit from the common trust fund accounting, and only some of them would receive notice (unaccompanied by the right to opt out) under the Court's ruling. Thus under today's standards, Justice Jackson's jurisdictional conclusions might not stand up as a matter of first impression.

Once the Court had established that New York could establish common trust funds and determine in an accounting proceeding the interests of both resident and nonresident beneficiaries, it followed that the state could not be required to make personal service on known beneficiaries, or to give individualized notice to beneficiaries whose identity or addresses were unknown to Central Hanover. Either requirement would have frustrated "the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement."²²⁶ Moreover, the Court had already turned service of process from a means of asserting jurisdiction²²⁷ to an obligation of fair notice.²²⁸ Likewise, notice by publication had been upheld for defendants whose whereabouts were unknown.²²⁹ The only remaining issue was whether notice by publication would suffice for known beneficiaries who could be reached by ordinary mail. Once the issue was posed in those terms, there could be only one answer.

One mystery remains: why did Justice Jackson fail to cite *International Shoe*?²³⁰ How could an opinion written only five years after the leading case on personal jurisdiction and notice fail even to mention it? The most plausible explanation is that, less than two months after *Mullane* was decided, Justice Jackson joined Justices Minton, Reed and Frankfurter in a dissenting opinion stating that *International Shoe* allowed jurisdiction only over corporations with agents acting within the

225. 472 U.S. 797 (1985). Kevin M. Clermont, PRINCIPLES OF CIVIL PROCEDURE 334 n.303 (4th ed. 2015) (analyzing *Mullane* as a defendant class action).

226. *Mullane*, 339 U.S. at 313.

227. *McDonald v. Mabee*, 243 U.S. 90, 91–92 (1917).

228. *Griffin v. Griffin*, 327 U.S. 220, 228 (1946); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945); *Wuchter v. Pizzuti*, 276 U.S. 13, 19 (1928).

229. *Mullane*, 339 U.S. at 317 (citing *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458 (1905); *Blinn v. Nelson*, 222 U.S. 1 (1911); see also *Jacob v. Roberts*, 223 U.S. 261 (1912)); *Sec. Sav. Bank v. California*, 263 U.S. 282, 288–89 (1923).

230. *Int'l Shoe Co.*, 326 U.S. at 320.

forum state.²³¹ On that reading, *International Shoe* would not have supported jurisdiction in the *Mullane* case. And relying on it for any proposition at all might have stirred up controversy within the Court. It is also possible that, at that time, *International Shoe* was regarded as just one important but not seminal case on personal jurisdiction, as important as much for what it said about a state's regulatory and taxing authority²³² as for its bearing on procedural due process. Neither the Court nor the parties treated it as sweeping away previous doctrine.

E. AFTERMATH

The requirements imposed by *Mullane* did not stunt the growth of common trust funds. In 1950, the year of the Supreme Court's decision, there were twenty-three funds in New York.²³³ By 1952, there were twenty-nine, and their value had increased during the past year from \$171.5 million to \$243.3 million.²³⁴ Nationwide, in 1950 there were 101 funds with assets of about \$425 million,²³⁵ while by the end of 1959 there were 366 funds with assets of more than \$2.7 billion.²³⁶ Two years later, there were 511 funds with assets of \$3.5 billion.²³⁷ As self-employed people became able to set up individual retirement funds,²³⁸ trust companies dreamed of channeling billions more into their common trust funds.²³⁹

But growth invited attention. In 1962, federal regulation of common trust funds was shifted from the Federal Reserve Board to the Comptroller of Currency. As common trust funds began to appeal for business beyond beneficiaries of trusts run by their sponsoring banks, the Securities Exchange Commission decided that they should register as sellers of securities and disclose information to the general public.²⁴⁰ After all, they were now competing with mutual funds, which had to do

231. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 658–59 (1950).

232. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 575 (1949); *Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 551 (1948). See also *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, (1946); *Nippert v. Richmond*, 327 U.S. 416 (1946).

233. Stephenson, *supra* note 107 at 531–32 n.46.

234. *New York Trust Division Hears Suggestions for Law Reform, New Business and Investment Facilities*, 91 TR. & EST. 816 (1952) (noting that much of the increase in value resulted from allowing \$100,000 in individual investments).

235. Editorial Staff, *Common Trust Funds: First Nationwide Study of Diversification and Growth*, 89 TR. & EST. 740, 741 (1950).

236. *Common Trust Funds Over \$2.7 Billion*, 99 TR. & EST. 256 (1960).

237. Joseph H. Wolfe, *Wider Horizons for Common Trust Funds*, 101 TR. & EST. 1075, 1077 (1962).

238. Teresa C. Campbell, *The Self-Employed Individuals Tax Retirement Act of 1962*, 32 FORDHAM L. REV. 279 (1963) (discussing Pub. L. 87–792, 76 Stat. 809 (1962)).

239. G.T. Lumpkin, Jr., Vice President, Wachovia Bank & Trust, A Fork in the Road (Feb. 5, 1963), in COMMON TRUST FUNDS: OVERLAPPING RESPONSIBILITY AND CONFLICT IN REGULATION; Hearing before a Subcomm. of the H. Comm. on Gov't Operations, 88th Cong., 1st Sess. 114 (1963) [hereinafter House Hearings].

240. House Hearings 3–15 (referencing statement of William L. Cary, SEC Chairman).

just that. The bankers and the Comptroller disagreed,²⁴¹ with the Comptroller even taking to the law reviews to expound his position.²⁴² An interagency brouhaha ensued, complete with Congressional hearings and proposed legislation.²⁴³ Ultimately, the SEC softened its position, but by no means abandoned it.²⁴⁴ It still acts against common trust funds that transgress the narrow boundaries established in the 1930s.²⁴⁵

Later in the 1960s, a further skirmish broke out. This time the mutual funds sought to keep the banks from developing common trust funds into collective investment funds and the Comptroller from allowing the banks to do so. The Supreme Court struck down the Comptroller's permissive regulation as a violation of the Glass Steagall Act, which barred banks from trading in securities on their own account.²⁴⁶ But gradually banks were able to enter the mutual fund business,²⁴⁷ and in 1999 Glass Steagall was repealed by the Gramm-Leach-Bliley Act.²⁴⁸

Whether or not mutual funds are run by banks, John Langbein reports that they "have been supplanting common trust funds as the pooling vehicle of choice for trust investing. Mutual funds have significant advantages over common trust funds, and in 1996 Congress facilitated the spread of mutual funds for trust investing by allowing tax-free conversion of existing common trust funds to mutual funds."²⁴⁹ Mutual funds were reported to yield better returns than common trust funds²⁵⁰ and even some common fund sponsors invested fund assets in mutual funds²⁵¹ or turned common funds into mutual funds.²⁵² Interestingly, one of the mutual fund advantages asserted by Langbein is that "[i]n some states, especially New York, common trust funds are

241. House Hearings 32-40, 77-80, 88-89 (referencing statements of James J. Saxon, Comptroller, Charles W. Buek, U.S. Trust Co. and Robert L. Hoguet, First National City Bank).

242. James J. Saxon & Dean E. Miller, *Common Trust Funds*, 53 GEO. L.J. 994 (1964-65).

243. House Hearings, *supra* note 239; Comment, *Regulation of Bank-Operated Collective Investment Funds—Judicial or Legislative Resolution of an Administrative Controversy?*, 73 YALE L.J. 1249 (1964).

244. John Michael Webb, *Of Banks and Mutual Funds: The Collective Investment Trust*, 20 SW. L.J. 334 (1966).

245. William P. Wade & Donald W. Smith, *S.E.C. Enforcement Action Targets Common Trust Fund*, 13 INVESTMENT LAWYER, NO. 11, at 1-2 (Nov. 2006) (discussing *In re Dunham & Associates Holdings, Inc.*, Securities Act Release No. 8740 (Sept. 22, 2006)); *see supra* Part II.B.

246. *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 625-628 (1971).

247. *Bd. of Governors of Fed. Reserve Sys. v. Inv. Co. Inst.*, 450 U.S. 46 (1981) (explaining that a bank may provide investment advice to closed-end investment funds); *Inv. Co. Inst. v. Conover*, 790 F.2d 925 (D.C. Cir. 1986) (providing that a bank may establish collective investment trust for Individual Retirement Accounts).

248. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

249. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 973 (2005).

250. Eileen Shanahan, *Agency Analyzes Bank Trust Funds*, N.Y. TIMES, Apr. 20, 1970, at 74.

251. *In re OnBank & Trust Co.*, 688 N.E.2d 245 (N.Y. 1997).

252. *In re Chase Manhattan Bank*, 813 N.Y.S.2d 855 (Sur. Ct. N.Y. Cty. 2005); *Parsky v. First Union Corp.*, 51 Pa. D. & C. 4th 468 (Ct. Com. Pl. Phila. Cty. 2001).

required to undergo periodic judicial accountings, a form of make-work that provides ample opportunity for the court to appoint politically well-connected guardians *ad litem* to litigate imaginary grievances at the expense of the fund and its underlying trust beneficiaries.”²⁵³ He goes on to mention *Mullane*, but without saying whether he considers that the denial of notice it remedied was one of the “imaginary grievances.” Views such as Langbein’s help explain why the interval between accountings was extended from three to four years in 1958,²⁵⁴ from four to six in 1975,²⁵⁵ and from six to ten in 1986.²⁵⁶

Nevertheless, common trusts of one sort or another continue to exist, and have even expanded their market share in recent years, now holding at least \$1.6 trillion in total assets.²⁵⁷ Nowadays they are sometimes called Collective Investment Trust Funds. That term includes common trust funds of the traditional kind, but also funds (apparently holding more assets) consisting solely of retirement accounts and the like.²⁵⁸ Some common trust funds are even marketed online to wealthy investors.²⁵⁹ So the common trust fund has indeed turned out to be what some feared in the 1930s, a competitor for investment companies.²⁶⁰

CONCLUSION: COMPARISONS

Mullane foreshadows our current class action controversies in one final way: considering it in its historical context raises questions about alternative procedures. In the case of class actions, restrictive Supreme Court decisions have turned some of the flow of mass tort litigation into new channels, notably prepackaged bankruptcy and aggregate settlements,²⁶¹ while Troy McKenzie has recently drawn our attention to

253. Langbein, *supra* note 249, at 973 n.231.

254. 1958 N.Y. Laws 1235.

255. 1975 N.Y. Laws 412.

256. 1986 N.Y. Laws 1982.

257. Robert Powell, *Not Your Normal Nest Egg*, WALL ST. J., Mar. 15, 2013, at R4; Scott Holsopple, *Collective Investment Trusts: To Trust or Not to Trust?*, U.S. NEWS (Jan. 10, 2012, 9:01 AM), <http://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2012/01/10/collective-investment-trusts-to-trust-or-not-to-trust>.

258. 12 C.F.R. § 9.18 (2011); Manning & Napier Advisors, Inc., *The Re-Emergence of Collective Investment Trust Funds*, at 2–3, <https://www.manning-napier.com/Corporate/Insights/ResearchLibrary/Article/tabid/308/Article/119/The-Re-Emergence-of-Collective-Investment-Trust-Funds.aspx> (last visited Aug. 5, 2015); Richard E. Llewellyn II, *Selecting a Successor Trustee—Why the Usual Suspects May Not Be Your Best Choice*, 27 PROBATE & PROPERTY 46 (2013).

259. Westwood Holdings Group, Inc., Annual Report (Form 10-K), 5–6, F20-21 (Feb. 18, 2013) (reporting \$2,091,000,000 in common trust funds); see also *Salt Aire Trading LLC v. Enter. Bank & Trust Corp.*, 967 N.Y.S.2d 869 (Sup. Ct. N.Y. Cty. 2013) (involving litigation resulting from failure of common trust fund tax shelter).

260. See *supra* text accompanying notes 52–56.

261. Nagareda, *supra* note 78; Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002); Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 U. NEV. L. REV. (forthcoming 2015).

the historical precedent of the equity receivership.²⁶² As Judith Resnik has shown, *Mullane* likewise constitutes an important forbear of current aggregation methods.²⁶³ Many of the dynamics of such methods recapitulate those of class actions, but the procedural safeguards are different and not necessarily superior. Likewise, other ways of pooling investments have much in common with the New York common trust fund, but protect investors in different ways.

The growth of mutual funds thus casts an interesting light on the approach taken in *Mullane*. Mutual funds do not submit their dealings to a court in a quest for globally binding absolution, with or without notice or representation. The main safeguards for their honest and competent conduct consist of disclosure requirements, and the ease with which investors can sell their interests. These safeguards are of course related: disclosure is supposed to ensure that investors and potential investors will know when to buy or sell. Despite the safeguards, the mutual fund industry has known price collapses and scandals.²⁶⁴ These in turn have led to class actions by investors,²⁶⁵ bringing us back to the realm of notice and representation. On the other hand, in a few recent instances legal claims have themselves been incorporated, albeit without much protection for the resulting stockholders.²⁶⁶

Another point of comparison is provided by the states that do not require common trust funds to undergo judicial accountings, with or without notice. Outside New York and Massachusetts,²⁶⁷ there seems to be no reported instance of a bank instituting a judicial accounting proceeding in a state allowing it to do so. Other safeguards have, however, emerged. In some instances, federal regulatory authorities step in to stop common trust fund abuses.²⁶⁸ In others, common trust fund beneficiaries have found a remedy in court. Not surprisingly, it is in the

262. Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue*, 90 WASH. U.L. REV. 839 (2013); Troy A. McKenzie, "Helpless" Groups, 81 FORDHAM L. REV. 3213 (2013); see also John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 460 (1997).

263. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 137-39 (2011).

264. FINK, *supra* note 52, at 77-78, 183-88, 221-45 & 249-51.

265. See *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214 (3d Cir. 2001).

266. Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1171-75 (2015).

267. *Roche v. Boston Safe Deposit & Trust Co.*, 464 N.E.2d 1341 (Mass. 1984); *First Nat'l Bank of Boston v. Aloisi*, 481 N.E.2d 1189 (Mass. App. Ct. 1985). The courts in these proceedings likewise rejected the challenges of guardians *ad litem*, though lower courts had upheld some of them.

268. *Cent. Nat'l Bank of Mattoon v. U.S. Dept. of Treasury*, 912 F.2d 897 (7th Cir. 1990) (upholding Comptroller of the Currency's revocation of bank's trust powers); *Martin v. Nat'l Bank of Alaska*, 828 F. Supp. 1427 (D. Alas. 1992) (upholding Department of Labor claim of improper loans by bank running ERISA common trust fund); see *United States v. Sun First Nat'l Bank of Orlando*, 510 F.2d 1107 (5th Cir. 1975) (upholding summons to produce common trust fund records in tax investigation).

form of a class action.²⁶⁹ Whether class members will be bound by the disposition of such an action has raised the usual issues of notice and representation.²⁷⁰

Meanwhile, New York guardians *ad litem*, including Kenneth Mullane,²⁷¹ continued to raise challenges to the accounts of common trust funds²⁷² and to be paid for doing so.²⁷³ I have not found any instance in which a trust beneficiary sought to raise her own challenges, or indeed to participate in any way. Nor have I found even one reported case since *Mullane* in which the guardian's challenge prevailed, though in one instance the banks had to procure the enactment of a retroactive authorizing statute in order to defeat the challenge.²⁷⁴ So the benefit of the accounting proceeding, with or without notice, seems to be limited to keeping trustees on their toes—and of course protecting banks from later challenges.²⁷⁵

I conclude that, although the general principles of notice that the Supreme Court laid down in *Mullane* are sound, they did little good in the context of common trust fund accountings. John Langbein may be correct that accountings are a waste of money,²⁷⁶ in which case the rise of mutual funds may have provided better protection for investors than anything the Due Process Clause could warrant. But even if he is wrong, it is entirely clear that any benefit accountings produce comes from the participation of the guardians *ad litem*, and that notice to the beneficiaries has no effect other than to make it easier to claim that they are bound by the results. It might be preferable to dispense with both the notice and the binding effect, or at least to legislate broad exceptions to

269. *Meyer v. Citizens & S. Nat'l Bank*, 106 F.R.D. 356, 364 (M.D. Ga. 1985) (certifying class); *First Alabama Bank v. Martin*, 425 So.2d 415, 423–24 (Ala. 1982) (upholding claim of imprudent investments); *Parsky v. First Union Corp.*, No. 771, 2001 WL 535786, at *9 (Ct. Com. Pl. Pa. 2001) (certifying class).

270. *Brooks v. Wachovia Bank, N.A.*, No. 06-00955, 2007 WL 2702949, *5–6 (E.D. Pa. 2007), *aff'd*, 312 Fed. Appx. 494 (3d Cir. 2009) (showing a class member bound by a settlement could not collaterally attack sufficiency of notice); *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 255–56 (Tex. 2002) (explaining that once the court properly rejected putative class representative's claim, there could be no class action, and other members would not be bound).

271. *In re Marine Midland Bank*, 354 N.Y.S.2d 332 (Sur. Ct. N.Y. Cty. 1974).

272. *See In re Bankers Trust Co.*, 636 N.Y.S.2d 741 (Sup. Ct. 1995); *In re Chase Manhattan Bank*, 813 N.Y.S.2d 855 (Sur. Ct. N.Y. Cty. 2005); *In re Morgan Guaranty Trust Co.*, 396 N.Y.S.2d 781 (Sur. Ct. N.Y. Cty. 1977).

273. *In re Bankers Trust Co.*, 1996 N.Y. Misc. Lexis 614 (Sur. Ct. N.Y. Cty. 1996) (approving further interim fee awards of \$40,000 plus disbursements to one guardian and \$15,000 to the other).

274. *In re OnBank & Trust Co.*, 688 N.E.2d 245 (N.Y. 1997).

275. *Estate of Mendleson*, 706 N.Y.S.2d 228 (App. Div. 3d Dept. 2000); *In re Marine Midland Bank*, 354 N.Y.S.2d 332 (Sur. Ct. N.Y. Cty. 1974).

276. *See supra* text accompanying notes 248–55.

the judgment's preclusive effect. Collateral attack might be at least as necessary here as it is in class actions.²⁷⁷

Why is it that beneficiaries have not participated in common trust fund accountings, when intervening class members—or rather, their lawyers—have played such an important role in challenging class action settlements? It could be that there is not all that much to challenge in trust fund accountings. After all, the trustee of a common trust fund does little beyond keeping the books and investing the money, presumably in a well-balanced and somewhat conservative portfolio. But it is also true that trust fund accountings offer no pot of gold to challengers or their lawyers, especially since New York does not recognize the common fund attorney fee doctrine.²⁷⁸ As is now generally recognized, financial incentives play a vital role in explaining the behavior of both class lawyers and those representing intervenors.

So ultimately the lesson of *Mullane* for those interested either in common trust funds or in notice or in class actions may be: follow the money and the lawyers, not the procedures. New York bankers sought a *res judicata* bath for their common trust funds, while those in other states did not, but both approaches turned out to shield banks from liability in almost all instances. The original New York statute contained only derisory provisions for notice, while after *Mullane* more was required; but again, there was little real difference in the results. Yet from these contexts in which procedural choices meant little, there grew a principle that means a lot: that one can cut off the claims of thousands of nonparticipating people in a proceeding, but only if notice by mail goes to those whose addresses are known. More than sixty years later, that principle is still very much with us, for good and for ill.

277. For one view of the collateral attack issue, see William B. Rubinstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 791 (2007).

278. *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 938 N.E.2d 937 (N.Y. 2010). Those appointed like *Mullane* as special guardians and attorneys did of course receive fees. See *supra* Part III.B.