

Class Action with Chinese Characteristics: The Role of Procedural Due Process in the Sanlu Milk Scandal

Lauren M. Katz

TABLE OF CONTENTS

I. INTRODUCTION	421
<i>A. Overview of the Sanlu Milk Scandal</i>	424
II. LEGAL AMBIGUITY AND REFORM IN PROCEDURAL DUE PROCESS RIGHTS	428
<i>B. The Judiciary's Political and Economic Interests</i>	429
III. THE MILK SCANDAL CRISIS: TENSIONS BETWEEN CITIZENS' LEGAL RESPONSE AND GOVERNMENT INTERESTS	432
<i>A. Filing Lawsuits: Ambiguities and Infringement of Plaintiff's Rights under the Civil Procedure Law</i>	434
<i>B. Legal Effect of Bankruptcy on Plaintiff's Litigation Rights</i>	435
<i>C. Political Tension between Substantive and Procedural Due Process</i>	441
IV. LAWYER'S OBLIGATION TO THE STATE AND THE PUBLIC IN ACCEPTING CLASS ACTION CASES	443
V. JUDICIARY'S DEBATABLE LEGAL COMPETENCE TO PRESIDE OVER CLASS ACTIONS	450
<i>A. It is Unclear which Court has Proper Jurisdiction to Accept Sanlu Class Actions</i>	451
<i>B. Political Sensitivity of Class Actions Supports Minimal Discretionary Use by the Courts</i>	454
VI. ALTERNATIVE DISPUTE RESOLUTION: AN IMPERFECT SOLUTION TO PROTECT DUE PROCESS RIGHTS AND THE POTENTIAL FOR REPRESENTATIVE MEDIATION	459
<i>A. Mediation and Direct Negotiation Not Available to Victims</i>	459
<i>B. Inadequacy of the Petition System</i>	460

VII. THE INTERNET HAS POTENTIAL TO PRESSURE THE GOVERNMENT TO IMPROVE PROCEDURAL DUE PROCESS	462
VIII. CONCLUSION	466

Class Action with Chinese Characteristics: The Role of Procedural Due Process in the Sanlu Milk Scandal

Lauren M. Katz

“Procedure mirrors our most basic notions of fairness and about the meaning of justice. Procedure tries to capture our ideas about the acceptable forms of settling disputes—about whether we most desire peace or truth, efficiency or justice. Procedure in this aspect embodies not just the rules governing “the way we do things here” but the reasons we do them that way.”¹

“The purposes of the Civil Procedure Law of the People’s Republic of China are to protect the litigation rights exercised by the parties, to ensure that the people’s courts find facts, to distinguish right from wrong, to apply the law correctly, to try civil cases promptly, to affirm the rights and obligations in civil affairs, to impose sanctions for civil wrongdoings, to protect the lawful rights and interests of the parties, to educate citizens to voluntarily abide by the law, to maintain social and economic order, and to guarantee the smooth progress of the socialist construction.”²

I. INTRODUCTION

The first quote offers a contextual understanding of the purpose of civil procedure in the American justice system. Civil Procedure is not an objective tool of democratic governance, but rather reflects values and compromises of how a nation desires its legal system to

¹ STEPHEN C. YAEZELL, CIVIL PROCEDURE 1 (6th ed. 2004).

² 民事诉讼法, Min shi su song fa [Law on Civil Procedure] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective Apr. 9, 1991) [hereinafter CPL], art. 2, LAWINFOCHINA (last visited Feb. 2, 2009) (P.R.C.).

function, while it acknowledges that no set of rules is ideal. Thus, when critiquing the function of civil procedure in The People's Republic of China (PRC), the discussion should focus on the PRC's notions of fairness, judicial efficiency, and justice. A nation's legal development is intertwined with its history. In a historical comparison between colonial India and dynastic China, Ocko found that although dynastic China had established complex codes for criminal procedure, the equivalent in civil law was often lacking. Ocko also found that Chinese historical notions of fairness focused on substantive justice rather than emphasizing the importance of procedure: "the fusing of procedure and substance in defining the law in China had equally significant long-term effects."³

While a complex analysis of the historical role of procedural due process in China is beyond the scope of this paper, it is important to keep in mind that the codification of civil procedure law is part of China's larger legal reform process that has borrowed heavily from Western practices and texts. Similarly, the creation of legally protected individual "rights" is still in the early stages of development, with an emphasis on contractual rights rather than fundamental rights. This paper assumes that the Chinese Communist Party (CCP) views procedural due process rights as subordinate to substantive due process. Where the issue at stake is perceived to be politically sensitive, the CCP does not trust the courts to handle its affairs. Therefore, procedural due process can be suspended, depending on political interests.⁴ Although procedural due process' "flexibility" can lead to arbitrary results and political interference in the courts, it can also create opportunities for parties who would otherwise struggle to meet the formal procedural and

³ Jonathan K. Ocko & David Gilmartin, *State, Sovereignty, and the People: A Comparison of the "Rule of Law" in China and India*, 68 J. ASIAN STUDIES 88(2009).

⁴ Email from anonymous Chinese lawyer to author (Feb. 11, 2009) (on file with author) ("I would never believe we should even talk about due process in such a politically sensitive case in China. . . . [A]lthough social stability is mainly a political term, rather than a legal standard, courts and judges usually take it into consideration in sensitive cases, particularly in those cases involving public outrage or class action. However, when a case [is] so sensitive that [it] draws enormous attention [from] the central government and the Party leaders, it could not be treated as a lawsuit. Instead, it would become a political campaign, leaving little space for any so-called due process or procedural rights. As a matter of fact, it would be somehow naïve if any Chinese judges, lawyers, or other legal professionals really argue over due process in this Case [compensation for Sanlu victims]. It is generally understood that in politically sensitive cases like this one, the government never cares about due process. It is all about politics.").

substantive litigation requirements. Thus, the analytical framework of this paper attempts to consider legal expectations and notions of fairness from various Chinese, rather than Western perspectives of justice.

China's rapid economic modernization has increased international attention and scholarship with respect to China's legal reform process, especially within the context of supporting a legal framework to protect economic activity. International and domestic human rights activists have largely focused their attention on revealing due process and fairness issues in criminal cases. Other scholars have researched the judiciary's institutional reforms and cultivation of competent judges. In civil cases, debate has mainly discussed legal developments of new laws and their interpretations, in addition to persisting ambiguities. International scholarship has also analyzed institutional corruption in the legal system, the role of the petition system, and the failures of regulatory agencies. However, little scholarship has been granted to exploring the interrelationship between procedural due process, substantive laws and political interests in the context of consumer class actions. This paper attempts to fill that void.

The Chinese Civil Procedure Law (CPL) provides for "joint litigation" rather than "class action." While some scholars believe that the two terms are interchangeable, other Chinese scholars believe that China's representative joint litigation system is distinct from American class action suits.⁵ Since class action litigation is not widely used in China, few scholars have discussed formal and practical barriers to safeguarding procedural due process in consumer class actions.

⁵ See 陈巍, 我国代表人诉讼若干观点评析, 山东大学法学评论, Chen Wei, *Wo guo dai biao ren su song ruo gan guan dian ping xi* [*A Review on Several Points on China's Representative Action*], 4 SHANDONG DA XUE FA LU PING LUN [SHANDONG UNIV. L. REV.] 50, 52-53, 55 (2007) (P.R.C.) ("The primary purpose of 6th representative joint litigation is to increase judicial efficiency and to reduce costs for plaintiffs. There are two variations of joint litigation: where the number of plaintiffs is known, or where the number of plaintiffs is unknown. There is no intrinsic difference between these two types of joint litigation. Where the number of litigants is unknown, the court should issue an announcement to give notice to potential litigants, who must then register with the court. That author argues that these two types of litigation have no significant differences. . . . In China, representative joint litigation is not meant to represent large numbers of people who only have small claims, but rather is meant to facilitate joint litigation for large claims. . . . Protecting the rights of consumers is mentioned by that author as an example of the intended use of representative joint litigation."). The representative joint litigation system will be discussed further in section IV herein.

A. Overview of the Sanlu Milk Scandal

As a Chinese Fortune 500 LLC and the leading milk formula producer in China,⁶ Sanlu sold products in 31 Chinese provinces, cities and autonomous regions, with joint venture arrangements and cooperative agreements in 30 provinces.⁷ On June 16, 2006, Sanlu and New Zealand's Fonterra Corporation signed a high-profile joint venture agreement, giving Fonterra a 43% interest in Sanlu.⁸ Since Sanlu's products were significantly cheaper than imported and higher quality brands, Sanlu mainly targeted lower-class consumers.⁹ As early as 2005, there are reports that some of Sanlu's suppliers knew about melamine contamination in baby formula products.¹⁰ Melamine is a nitrogen-rich chemical commonly used to make plastics, adhesives, countertops, dishware and whiteboards.¹¹ It is not an approved substance for food by either the World Health Organization or the Chinese government. Dairy farmers who supplied Sanlu with raw milk would first dilute the milk with water and then add melamine to make the milk appear to have higher protein levels than it actually contained, since a test of nitrogen levels was used to measure protein.

Despite early signs of contamination, the official investigation by the Chinese procuratorate did not begin until August-September 2008. Although the Chinese and international public were not notified of the melamine contamination until September 11, 2008, there is evidence that some retailers were already aware of product quality issues in early August before the 2008 Beijing Olympics.¹²

⁶ 新华社，三鹿决定召回受三聚氰胺污染婴幼儿奶粉，Xinhua, Sanlu jue ding zhao hui shou san ju qing an wu ran ying you er nai fen [Sanlu Has Decided to Recall the Melamine-tainted Baby Formula] (Sept. 11, 2009), <http://news.163.com/08/0911/21/4LJCTVCF0001124J.html> (showing that Sanlu was taking 18.26% of the Chinese milk products market in 2007).

⁷ 石家庄三鹿乳业集团简介, Shi jia zhuang san lu ru ye ji tuan jian jie [Introduction to Sanlu Group], <http://www.dac.org.cn/chpzx/chpzx/sanlu.php> (last visited May 10, 2010) (corporate history, awards, development, strategy, and revenue).

⁸ *Id.*

⁹ Interview with two Chinese lawyers, JD students, Univ. of Wash. Sch. of Law (Jan. 2009).

¹⁰ 杜晓，三鹿陨落关键词潜规则捂盖子监管缺失，法制日报，Du Xiao, Sanlu yun luo guan jian ci qian gui ze wu gai zi jian guan que shi [The Downfall of Sanlu: Covering up the Truth and Management Failure] FA ZHI RI BAO [LEGAL DAILY], Jan. 7, 2009, at 8, available at http://www.legaldaily.com.cn/bm/2009-01/07/node_2.htm.

¹¹ World Health Organization, Questions and Answers on Melamine, <http://www.who.int/csr/media/faq/QAmelamine/en/index.html> (last visited May 18, 2010).

¹² Although they were not told of the specific investigation, distributors were told that the Sanlu products failed "qualified aviation standards" and thus could not be sold to retailers. Associated Press,

By September, television, newspaper and internet media heavily reported that tens of thousands of babies from all over China were sick. As of January 2009, “nearly 300,000 [babies] suffered kidney stones and other ailments, 53,000 were hospitalized and six died of kidney failure. More than 300 babies remain in hospital.”¹³ Sanlu was easily identified as the responsible party, and investigations focused on Sanlu’s criminal negligence and conspiracy, rather than administrative negligence in product quality oversight. Many of the victims’ parents attempted to file lawsuits against Sanlu in their local courts and in the Shijiazhuang, Hebei courts where the company has its principle place of business. Initially, none of the cases were accepted by the courts, but rather were rejected without any legal justification.¹⁴ On December 23, 2008 the Shijiazhuang Middle People’s Court accepted a creditor’s bankruptcy petition, which was filed after Sanlu borrowed 902 million RMB on December 19, 2009 to pay for the victims’ medical fees, bringing its total debt to 1.1 billion RMB (\$165 million USD).¹⁵

Contemporaneously, on December 31, 2008, four Sanlu executives were put on trial and charged for the criminal offense of endangering public safety by producing fake or substandard products. Sixty-six year old Tian Wenhua, the then general manager of Sanlu, was formally sentenced to life imprisonment on January 22, 2009, which was upheld on appeal. Three other Sanlu executives were sentenced to life imprisonment. Fifteen other defendants were sentenced from 2-15 years imprisonment. Zhang Yujin, Geng Jinpin and Gao Junjie all received death sentences, but Gao Junjie’s sentence was given a two-year reprieve, so he may

Liquid Milk Found to be Tainted in China, MSNBC.COM, last updated Sept. 19, 2008, <http://www.msnbc.msn.com/id/26769189/>, last visited Jan. 27, 2009.

¹³ Bill Schiller, *Father of Poisoned Baby Rallies Parents in Tainted-Milk Fight*, THE TORONTO STAR, Jan. 17, 2009, <http://www.thestar.com/article/572723>.

¹⁴ It is widely believed that the Supreme People’s Court (SPC) ordered the lower courts not to accept the Sanlu victims’ civil compensation claims. The SPC is effectively controlled by the CCP, and thus the SPC’s order can be construed as an official order. A Chinese scholar confirms that “various news releases have reported that no case brought by grieving parents against Sanlu has ever been accepted by any court”, see email from anonymous Chinese lawyer to author (Feb. 28, 2009) (on file with author).

¹⁵ See generally *Court Declares Bankruptcy of Sanlu Group*, CHINA ECONOMIC NET, Feb. 12, 2009, http://en.ce.cn/Business/Enterprise/200902/12/t20090212_18183744.shtml [hereinafter *Bankruptcy*] (explaining that the government orchestrated, or at least significantly influenced, the scandal’s aftermath since this event was quoted as “creditor filing bankruptcy”, rather than naming the specific creditor, and the timing of this event only several days after Sanlu took out a loan for medical fees).

ultimately be spared execution. These three men were found culpable of supplying significant amounts of melamine powder to the dairy companies.¹⁶

On February 24, 2009, the Beijing Municipal Bureau of Labor and Social Security announced a national compensation plan to provide medical care for five kinds of diseases and specified the type of medical treatment the plan would cover for each illness. Sanlu and 21 other dairy companies were responsible for contributing a total of 1.1 billion RMB to the fund. The compensation fund will be managed by ChinaLife, an insurance company. Two-hundred million RMB was maintained for ongoing medical treatment, and 900 million RMB was awarded to the victims on a one-time basis. The amount of compensation depended on the severity of the victim's illness. Levels of compensation ranged from 200,000RMB for death, 30,000RMB for severe injuries to 2,000RMB for minor injuries. There was widespread dissatisfaction among the parents of the victims, who felt that the amount of compensation was too low and the quality of medical treatment was poor. The parents further feared that upon the government's termination of medical treatment on a victim's 18th birthday, he or she might suffer from long-term ailments that would become a later financial burden.¹⁷

On March 2, 2009, the Chief Justice of the Supreme People's Court (SPC) announced during an internet public relations event that the courts would accept civil cases against Sanlu. It was reported that by this time 95% of the victims had already accepted compensation, which highly suggests that the timing to allow litigation was purposefully controlled by the government to minimize the role of the courts in settling the victims' claims. On March 25, 2009, the first lawsuit was formally accepted by the Middle People's Court of Shijiazhuang.¹⁸ However, the court refused to allow joint-litigation and required each victim to file an individual claim. As of

¹⁶ David Barboza, *Death Sentences in Chinese Milk Case*, N.Y. TIMES, Jan. 23, 2009, at A5, available at <http://www.nytimes.com/2009/01/23/world/asia/23milk.html>.

¹⁷ Liu Jingjing, *Compensation Plan Announced for Tainted Milk Victims*, CAIJING ONLINE, Feb. 26, 2009, <http://english.caijing.com.cn/2009-02-26/110074473.html>.

¹⁸ 叶逗逗, 河北法院受理三鹿民事赔偿第一案, 财经网, Ye Doudou, *he bei fa yuan shou li san lu min shi pei chang di yi an* [*The Hebei Court Accepts the First Civil Compensation Case*], CAIJING.COM.CN, Mar. 25, 2009, <http://www.caijing.com.cn/2009-03-25/110128054.html>.

June 1, 2009, there was no further information available about the status of this case.

The Sanlu victims' attempt to file class action lawsuits illustrates the potential for infringement of procedural due process rights in class actions, despite recent reforms to the CPL, Bankruptcy Law and Consumer Protection and Product Liability laws. This article analyzes the relationship between procedural and substantive laws and argues that procedural due process in the Milk Scandal was suspended for both individual and class action litigation due to the government's manipulation of the new bankruptcy law and interference in suspending ambiguous procedural protections.

This article focuses on the Sanlu Milk Scandal to discuss the political and legal obstacles of filing a lawsuit according to the civil procedure law, and the institutional impediments caused by an abuse of power by the case filing divisions. Since the Sanlu Milk Scandal involves a large class of plaintiffs with similar injuries arising from the same harm, this article also focuses on the specific issues of initiating class action litigation. Part III highlights the inherent tensions between the leadership's desire for order and stability, juxtaposed with the victims' desire for justice, by illustrating how the leadership manipulated the use of the courts to permit Sanlu's bankruptcy while barring civil compensation lawsuits. Part IV discusses the complex patron-client relationship between Chinese lawyers and the leadership, and the inherent tensions between lawyers' commitment to civil society and their obligations to the State. Part V argues that the Chinese civil procedure law is functionally competent to accept class action cases, despite some ambiguities concerning proper jurisdiction, but judicial competency is still vulnerable to political interference and negative perceptions, which undermines participation in the court system. Part VI argues that due to political interference and control, alternative dispute resolution, such as mediation and petitioning are not adequate alternative remedies to litigation. Part VII concludes by briefly discussing the extraordinary role of the internet in mobilizing victims, lawyers and the leadership involved in the Sanlu Milk Scandal.

II. LEGAL AMBIGUITY AND REFORM IN PROCEDURAL DUE PROCESS RIGHTS

A. Ambiguous Case Filing Requirements and Abuse of Case Filing Division Discretion Facilitates Infringement of Plaintiffs' Due Process Rights

It is clear that recent amendments to the CPL are meant to strengthen procedural due process rights *after* a case has been accepted for litigation. However, it is less clear that the government is committed to preserving litigation rights at the first stage of filing a lawsuit.¹⁹ Article 2²⁰ of the CPL illustrates the inherent tension between the government's competing objectives to both "protect litigation rights" and "maintain social and economic order."²¹ A reasonable reading of this article cannot simply imply that the government's political interest in maintaining economic order legitimizes suspending the CPL. However, the government has effectively made this interpretation in practice.²² The CPL was first implemented in October 1982, and was amended in September 1991. Nevertheless, Article 81 of the original CPL²³ remains substantively unchanged in Article 108 of the revised CPL.²⁴ The

¹⁹ See 刘南平, Liu Nanping, Justice Without Judges (Aug., 2008) (unpublished manuscript, on file with author).

²⁰ CPL, *supra* note 2, art.2. ("The purposes of the Civil Procedure Law of the People's Republic of China are to protect the litigation rights exercised by the parties, to ensure that the people's courts find facts, to distinguish right from wrong, to apply the law correctly, to try civil cases promptly, to affirm the rights and obligations of civil affairs, to impose sanctions for civil wrong doings, to protect the lawful rights and interests of the parties, to educate citizens to voluntarily abide by the law, to maintain the social and economic order, and to guarantee the smooth progress of the socialist construction.").

²¹ *Id.*

²² Email from anonymous Chinese lawyer to author (Feb. 28, 2009) (on file with author) ("Technically speaking, there is no legal foundation for the government's suspension of procedural due process and access to the judicial system. Someone may refer to Civil Procedure Law article 2, saying 'the function of civil procedure law, is...to maintain social order and economic order.' However, such a broad statement could not be construed to overturn all the specific provisions of the following articles.").

²³ Law on Civil Procedure (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982), art. 81 (repealed 1991) (last visited Feb. 2, 2009) (P.R.C.). ("The following requirements must be met when a suit is brought: (1) The plaintiff must be an individual, enterprise, institution, state organ or public organization that has a direct interest in the case; (2) There must be a specific defendant, a concrete claim and a factual basis for the suit; and (3) The suit must fall within the scope of jurisdiction of the people's courts and the specific jurisdiction of the people's court where it is filed.") The CPL is organized in four parts, 18 chapters, which are then subdivided into sections and articles.

²⁴ CPL, *supra* note 2, art.108. ("The following conditions must be met before a lawsuit is filed: (1) the plaintiff must be a citizen, legal person, or an organization having a direct interest with the case; (2) there must be a specific defendant; (3) there must be a concrete claim, a factual basis, and a cause for

National People's Congress' ('NPC') failure to amend the original Article 81 suggests that either the drafters did not believe that the 1982 standards needed revision, or perhaps that legal ambiguity at this initial stage of litigation had important political benefits that outweighed the concerns for broader notions of procedural due process rights. There have been institutional reforms that attempted to increase the judicial efficiency of the courts, define roles of court personnel, combat institutional corruption, and strengthen enforcement mechanisms. Nevertheless, institutional reforms have not affected the procedural requirements for initiating a lawsuit.²⁵ Article 108 is thus considered the "Gatekeeper" to the Chinese courts, and more precisely a provision that determines which cases shall be accepted or rejected before having the right to proceed on the merits of a case. While appeals from a rejection notice by the case filing division are legally permissible, they are rarely effective. It has also been observed that courts of original jurisdiction have often deliberately failed to issue an official rejection notice, which formally bars a plaintiff from appealing, since evidence of case filing refusal is a necessary requirement to file an appeal. Therefore, while seemingly illogical, plaintiffs in this situation often have difficulty obtaining an official rejection letter, despite their requests.²⁶ Thus, the case filing division wields tremendous power at this initial stage of litigation.²⁷

B. The Judiciary's Political and Economic Interests

Cases that the "Gatekeeper" welcomes or rejects must be considered within the context of the role of civil litigation in contemporary China. The Constitution emphasizes that the courts are an institution of political governance, and thus the judiciary is itself a multipurpose governing tool.²⁸ The most important function

the lawsuit; and (4) the lawsuit must be within the scope of civil lawsuits to be accepted by the people's courts and within the jurisdiction of the people's court to which the lawsuit is filed.").

²⁵ court to which the lawsuit is filed.").

²⁵ 文], Liu, *supra* note 19.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 2, 2-41 (2007). According to Liebman, "[t]he PRC Constitution makes explicit that both the SPC and the Supreme

of the judiciary is to “maintain social stability,” a broad and vague notion that can be applied to nearly any expression of public discontent. Initiating a lawsuit signals the presence of disputes, which the parties have found serious enough to require official remedy. In accepting a case, a judge has a political obligation to the State to resolve the issue and avoid escalation. Where the individual judge or an official perceives that accepting a case would actually enhance social unrest, then accepting the case would be contrary to the public interest of maintaining social stability. The revised CPL thus maintains ambiguity at the initial filing stage to give the judiciary ample maneuvering power to reject a case. Arguably, neither the judiciary, nor the CCP as its guardian, needs a legal provision to justify rejecting litigation. As will be exemplified in the Milk Scandal incident, formal legal analysis or legal reasoning are not required to refuse a case, and official instructions to withhold from issuing a formal rejection document are legally justified under the ‘public interest’ doctrine. Thus, legally ambiguous provisions serve the purpose of enabling judges and officials to manipulate the laws in their favor, which further reinforces the limited role of the judiciary as a means to resolve civil disputes.

Judicial reforms have focused on protecting domestic and foreign business interests,²⁹ which have largely developed at the expense of protecting individuals from the harms caused by labor abuse, inadequate regulations, and sub quality products.³⁰ It would be

People’s Procuratorate are ‘responsible to the National People’s Congress.’ XIAN FA arts. 128, 133 (P.R.C.). The Constitution also states that the courts, procurators and public security bureau shall coordinate their efforts in handling criminal cases, thus perhaps providing support for the inclusion of procurators in court adjudication committees.” *Id.* at 12. Despite the fact that the courts and procuratorates are “not subject to interference by administrative organs, public organizations, or individuals” *Id.* art. 126, 131, 135. Such phrasing is generally understood to permit supervision of the courts and procuratorates by the people’s congresses, the Party, and each other”, *id.*

²⁹ There have been major reforms in property law, contract law, IP law, securities law, bankruptcy law, etc. Such an overview is beyond the scope of this paper. However, it should be noted that each of these laws have undergone significant reforms and continue to be subjects of ongoing discussions for the purpose of strengthening economic development.

³⁰ Pro business legal reforms have outpaced the development of regulatory reforms, such as product liability and food safety. *See* Dongsheng Zang, Building a Castle on Sand: Regulating Food Safety in the Wake of Pet Food and Frozen Dumpling Incidents, Jan. 16, 2009 (unpublished comment, on file with Professor Dongsheng Zang, University of Washington School of Law). Even where the laws themselves are well written, enforcement continues to be a major obstacle. *See* Kui Hua Wang, *Celebrations Turn Into Sorrow: Where is China’s Consumer Protection Law?*, 4 CANBERRA L. REV. 151 (1997-1998). “[U]nfortunately, China’s ‘powerful’ laws can be matched by ‘powerless law enforcement.” *Id.* at 154. *See also* Liebman, *supra* note 28 at 15-16.

terribly unfair to characterize this result as either “oppressive,” or as a reflection of legislative incompetence. Rather, the government has been proactive and open-minded in studying foreign legal systems, and has codified an outstandingly large body of law in less than thirty years. The government values accelerated legal reform as a necessary step to attract foreign investment and support stable economic growth. The government’s emphasis on mediation and arbitration in all non-criminal cases reflects the fact that the courts were not foreseen to be the most significant dispute resolution mechanism, but rather were considered to be the last resort where alternative dispute resolution failed. The lack of a coherent legal system, low level of judicial competence, and weak enforcement mechanisms make the courts an inefficient forum for dispute resolution. While the court system has been highly improved in economically developed regions to respond to growing civilian and corporate demands, the courts still do not enjoy a high level of public opinion.³¹

Thus, it is hardly surprising that textual vagueness and inconsistencies between laws actually forces civilians to resolve their grievances out of court. This is especially true where laws that are primarily focused on regulating business interests, such as the Enterprise Bankruptcy Law, conflict with laws aimed at protecting consumer interests, such as the Consumer Protection and Product Liability Laws. Since the NPC and its Standing Committee are responsible for legal interpretation where laws are either ambiguous or conflicting,³² removing such cases from the judiciary and

³¹ For an analysis of Chinese public opinion of their court system see Liebman, *supra* note 28 at 10; See also Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2006).

³² 立法法, Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000), art. 42, 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112(P.R.C) (“The power of legal interpretation belongs to the Standing Committee of the National People’s Congress. A law shall be interpreted by the Standing Committee of the National People’s Congress if: (1) the specific meaning of a provision needs to be further defined; or (2) after its enactment, new developments make it necessary to define the basis on which to apply the law.”); as Mitzi Huang explains in her analysis of the Luoyang Seed Case, there is a strong politically motivated agency relationship between the Supreme People’s Court (SPC) and the National People’s Congress (NPC) and its Standing Committee (NPCSC). Mitzi Huang, Case Note, *Seeds of Legal Discontent: The Luoyang Seed Case: A Case Study of the Rule of Law in China*, DARTMOUTH C. UNDERGRADUATE J.L., Mar. 2005, at 32, 32, 33 (“[S]PC is responsible to the NPC and NPCSC, which collectively have the authority to appoint and remove from office judges of the SPC. . . . [T]he entire judiciary is also, of course, subject to the Chinese Communist Party (CCP) ideology and current policy.”). Lower courts are then subject to regulation by the corresponding level of Local People’s Congress’s (LPC). Thus, where

resolving them without judicial involvement is not an abuse of power, but rather a legitimate exercise of judicial power reserved to the legislative branch. This principle is critical to understanding the State's interference in the Sanlu Milk Scandal.

III. THE MILK SCANDAL CRISIS: TENSIONS BETWEEN CITIZENS' LEGAL RESPONSE AND GOVERNMENT INTERESTS

The 2008 Sanlu Milk Scandal is a classic example of how textual ambiguity, political interests, and inconsistencies between laws create legal justifications for the Gatekeepers to lock the gates. Images of babies becoming deathly ill from drinking intentionally contaminated milk created a national outrage, causing Chinese citizens to openly question official corruption and regulatory oversight. Well-trained Beijing lawyers, believing that they had a moral obligation to represent the victims, offered their services for free. News reports of attorneys attempting to file class action lawsuits³³ in Shijiazhuang, Sanlu's principle place of business, spread through the Chinese and international internet. In another instance, a group of well-trained Beijing lawyers attempted private negotiation and settlement on behalf of nearly 100 families.³⁴ Some victims have preferred to file lawsuits against Sanlu at their own domicile.³⁵ Thus, it is clear that both lawyers and victims

there is ambiguity or conflict between local and national laws, the legally correct mechanism is for the case to be referred to the SPC, which then must certify the question to the NPC.

³³ See generally Chen, *supra* note 5. (explaining class action lawsuits, translated as "joint litigation" are permissible under CPL art. 53-55, which distinguishes between classes where the number of litigants is known (art. 54) or unknown (art. 55)).

³⁴ The group was headed by lawyer Xu Zhiyong, who was initiating a class action lawsuit to reduce costs for their clients and "set a benchmark for compensation." The lawsuit asked for compensation for medical and other expenses, trauma and compensation for the families of those who died. *Sanlu Facing Class Action Lawsuit*, 3 NEWS.CO.NZ, Nov. 14, 2008, <http://www.3news.co.nz/Business/Story/tabid/421/articleID/79889/Default.aspx>.

³⁵ "Yi Yongsheng is the father of 6-month-old Yi Kaixuan, one of the first victims, who died on May 1 from melamine-contaminated powdered milk manufactured by Sanlu Group. Yi filed a lawsuit against Sanlu in the Middle Court of Lanzhou City, Gansu Province on October 13 and seeking more than one million yuan (approximately US\$152,700) as compensation. According to Yi's lawyer, Dong Juming, the suit has still not been admitted by the court. Instead, they have been told to wait for 'formal instructions.' Another such plaintiff is Tian Xiaowei, a farmer from Xunyi in Shaanxi Province. Tian filed a lawsuit against Sanlu Group seeking damages of 730,000 yuan (\$106,772) at Xunyi Court on October 9 over the wrongful death of his one-year-old son who also died from contaminated milk powder." Xin Fei, *Chinese Courts Delay Admission of Lawsuits Against Sanlu*, EPOCH TIMES, Nov. 4, 2008, <http://www.theepochtimes.com/n2/content/view/6672/>.

recognized their private rights to seek compensation against Sanlu, either through representative negotiation or litigation. The Chinese and foreign internet media quickly circulated the news that the courts were not accepting litigation.³⁶

While the government was clearly considering how Sanlu should provide medical care and compensation to the families, it was also extremely concerned about limiting the economic impact on the market, considering that many provinces relied heavily on Sanlu for employment, taxes, and products. There would not only be claims for bodily injury, wrongful death, emotional distress and medical bills, but also demands from creditors³⁷ who assumed huge losses from tainted inventory. With hundreds of thousands of individuals directly affected by this case, all with potentially enormous losses, the government feared that a failure to respond in a timely and socially responsible manner would further undermine its legitimacy in an already unusually tumultuous year.³⁸ Thus, the government had a vested interest in maintaining social and economic stability throughout the crisis. Clearly, market efficiency, creditor compensation, and victim compensation were all factors that led to the government's determination that a national unified policy issued by the central government would be far superior to ad hoc compensation through individual and class action lawsuits.³⁹

³⁶ See also *Guang dong shou ge nai fen shi jian shou hai ying er zhuang gao san lu suo pei 90 wan* [The First Civil Compensation Suit Against Sanlu in Guangdong Province for RMB 900,000] ZHONG GUO PU FA WANG [CHINA LEGAL PUBLICITY], Oct. 9, 2008, http://www.legalinfo.gov.cn/misc/2008-10/09/content_957548.htm; Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008, at A1, available at <http://www.nytimes.com/2008/10/17/world/asia/17milk.html>; Schiller, *supra* note 13; *First Suit Filed Against Sanlu*, PEOPLE'S DAILY, Oct. 8, 2008, <http://english.people.com.cn/90001/90776/90882/6511163.html>.

³⁶ Creditors include mainly wholesale buyers of milk products for resale, such as supermarkets.

³⁷ *Id.*

³⁸ 2008 was notable for social upheavals: riots in Tibet and Xinjiang, the May 12 Sichuan Earthquake, and numerous rural protests.

³⁹ Liu, *supra* note 17 (explaining that plan announced by Beijing Municipal Bureau of Labor and Social Security on February 24 established a fund of RMB 1.1 billion for ongoing compensation and one-time cash payments, including medical care before victim turns 18 and reimbursement of treatment expenses already paid by the victims).

A. Filing Lawsuits: Ambiguities and Infringement of Plaintiff's Rights under the Civil Procedure Law

It is widely acknowledged that the plaintiffs were in compliance with civil procedure requirements at the time they attempted to file suits in the various peoples' courts. When the victims' attempted to file law suits, they were certainly in compliance with CPL Article 108, and the courts did not even attempt to legitimize their failure to accept the cases or formally reject them within seven days, as required.⁴⁰ However, if the case filing division wished to dismiss the lawsuit according to law, it could have cited Article 108(4) as an action beyond the scope of civil lawsuits accepted by the courts.⁴¹ Since the "scope" is not clearly defined, this is a convenient way to dismiss a sensitive case. The sensitivity and level of political involvement of a case can be gleaned from the courts' way of dismissing a case. In the most sensitive of cases, the court does not even issue a formal document of refusal, because without that document, a plaintiff cannot appeal, thus completely closing off all avenues to litigation. Since the Consumer Protection Law and Product Liability law both clearly give standing for civil lawsuits arising from consumer injuries,⁴² citing Article 108(4) would only have increased domestic and international criticism.

⁴⁰ Xin Fei, *supra* note 35.

⁴¹ However, considering the large body of substantive law governing product quality and consumer protection, it would not have been legally or politically astute to cite this provision when there are substantive laws that would clearly enable the Sanlu victims' cases fall within the scope of civil litigation.

⁴² 消费者权益保护法, Xiao fei zhe quan yi bao hu fa [Law on Protection of the Rights and Interests of the Consumers] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), art. 30 (amended 2009), LEHMANLAW (last visited Feb. 2, 2009) (P.R.C.) [hereinafter Consumer Protection Law] ("People's courts shall take measures to convenience the consumers in filing suits. Where a case of dispute over consumer's rights and interests meets the indictment conditions as provided in the Civil Procedure Law of the People's Republic of China, the people's court must take cognizance of and timely hear such case."); *see also id.* art. 40 (imposing legal responsibility on sellers and manufacturers of defective products); *id.* art. 41 (stating that where such "operator" causes injury to a consumer, they are responsible for the victim's medical expenses, nursing costs during treatment period, and loss of income for working days, and further provides more strenuous obligations when the injury results in disability and death). 产品质量法, Chan pin zhi liang fa [Law on Product Quality] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2000, effective Sept. 1, 1993), art. 40-47, ISINOLAW (last visited Feb. 4, 2009) (P.R.C.) [hereinafter Product Liability Law] (for compensation and damages); *see also id.* art. 22-24 (for consumers rights to lodge complaints). Importantly, the State Council has passed an amended Product's Liability Law for Dairy Products Regulation Law as a result of this scandal and previous incidents. *See* 乳品质量安全监督管理条例, Ru zhi pin zhi liang an quan jian du guan li tiao li [Regulation on the Supervision and Administration of

Furthermore, the Supreme People's Court's (SPC) Interpretation on "Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury" clearly states that personal injury cases "shall" be accepted by the people's courts.⁴³ The SPC's interpretation for tort liability fills the legal gap by providing guidance for adjudicating tort cases, since as of this writing, China does not have a codified tort law. This SPC Interpretation is notable for its similarity to both American tort law principles and its discussion of agency liability. The document specifies a standard by which to compute compensation for disability, medical expenses, missed working time, nursing expenses, traffic and accommodation, and death.⁴⁴ The document also cites the SPC's previous Interpretation for determining compensation for emotional distress.⁴⁵ While SPC Interpretation's do not have the same status as law, they are persuasive among lower courts and are considered as gap fillers where law is lacking or ambiguous. However, in order to benefit from the relatively liberal compensation scheme under this document, plaintiffs must of course first establish the tortfeasor's civil liability.

B. Legal Effect of Bankruptcy on Plaintiff's Litigation Rights

From a procedural due process perspective, the court's acceptance of a creditor's petition to the court to initiate bankruptcy proceedings against Sanlu⁴⁶ is extremely interesting and significant. Chinese lawyers recognized that initiating bankruptcy proceedings would endanger the consumer victims' litigation rights. Chinese lawyers believe that the Enterprise Bankruptcy Law is

the Quality and Safety of Dairy Products] (promulgated by the State Council Oct. 9, 2008, effective Oct. 9, 2008) LAWINFOCHINA (last visited June 9, 2009) (P.R.C.).

⁴³ 最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释, Zui gao ren min fa yuan fuan yu shen li ren shen an jian shi yong ruo dan wen ti de jie shi [Interpretation of the Sup. People's Ct. of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Judicial Comm. of the Sup. People's Ct. Dec. 26, 2003, effective May 1, 2004), art. 1, LAWINFOCHINA (last visited Feb. 25, 2009) (P.R.C.) ("Where an obligee to compensation brings a lawsuit due to an injury to his life, health or body, claiming compensation for property losses or psychological injuries against the obligor to compensation, the people's court shall accept the lawsuit.").

⁴⁴ *Id.* art. 17.

⁴⁵ *Id.* art. 18.

⁴⁶ Bankruptcy, *supra* note 15.

unsophisticated⁴⁷ and argue that it does not protect the compensation rights of tort victims who suffered from bodily harm. These lawyers believe that there is a direct contradiction between the protections offered by the Product Quality Law and Consumer Protection Law, and the lack of protection by the Enterprise Bankruptcy Law to protect consumers under relevant circumstances.

On December 23, 2008, when the Shijiazhuang Middle People's Court accepted a creditor's bankruptcy petition, it was already clear that Sanlu was not going to be restructured, but would instead undergo liquidation. Considering the large number of infants who will continue to suffer complex injuries for a prolonged period of time, the victims' lawyers were furious and they publicly stated that Sanlu should not be allowed to be liquidated. Rather, it should be reorganized so that its legal personality continues, thus ensuring that it will be responsible for ongoing liabilities. At this point it was clear that Sanlu would no longer be a legal person when liquidation was completed.⁴⁸ Acceptance of the bankruptcy petition thus signaled a clear danger that if the plaintiffs could not participate in the legal proceedings to claim compensation as creditors, they would have no future rights to litigation since the defendant would cease to exist as a legal person. It was also obvious that any company that bought Sanlu's assets would not agree to assume its tort liabilities. Even before bankruptcy proceedings were known to the public, the parents' of injured children, represented by pro bono attorneys, attempted to sue Sanlu.

For example, in early October, individual plaintiffs began filing lawsuits against Sanlu.⁴⁹ On December 8, 2008, a group of lawyers that named themselves the "Sanlu Melamine Victim's Legal Support Team" filed a tort suit in Shijiazhuang's Middle People's Court on behalf of 63 named melamine victims, demanding compensation for bodily harm (RMB 68,180,000), and emotional distress (RMB

⁴⁷ Literally, *cu lou* [rough and crude], 秦旭东, 三鹿破产善后难题: 受害者权益谁来保障, 财经网, Qin Xudong, Sanlu po chan shan hou nan ti shou hai zhe quan yi shei lai bao zhang? [*In the Aftermath of the Sanlu Bankruptcy, Who Will Protect the Victim's Rights?*], CAIJING.COM.CN, Dec. 12, 2008, <http://www.caijing.com.cn/2008-12-25/110042541.html>.

⁴⁸ *Id.*

⁴⁹ Tian Xiaowei, a farmer from Xunyi County in Shaanxi Province, filed a claim at a court in Xunyi for damages of RMB 730,000 for wrongful death of his one-year old son. Yi Yongsheng filed a complaint for wrongful death on October 13 in Middle Court of Lanzhou City, Gansu Province, seeking 1 million RMB in compensation. Fei, *supra* note 35.

6,910,000).⁵⁰ This is just one example of many attempts to file a lawsuit that was improperly and unofficially rejected by the various courts' case filing divisions.

Despite the legal ambiguities between the Enterprise Bankruptcy Law and the Consumer Protection and Product liability laws, the Enterprise Bankruptcy Law does stipulate certain procedural requirements to ensure that all creditors have a right to join a bankruptcy proceeding and receive compensation for outstanding debts. The issue for the victim's lawyers was thus how to combine their clients' claims to initiate a class action, or to preserve their clients' claims during the bankruptcy proceedings. According to Article 14 of the Enterprise Bankruptcy Law, "the people's court shall, within 25 days as of the day when it decides to accept an application for bankruptcy, notify the relevant creditors and announce its decision as well." Under this article, the announcement should be made to the public for the purpose of giving proper notice to all relevant creditors. The time frame to secure creditors' rights should be "no less than 30 days [from the day the people's court announces its acceptance of an application for bankruptcy] and no more than three months."⁵¹ Thus, the challenge for the Sanlu victims' lawyers was to determine how to establish their clients as legitimate creditors within this restricted time frame. Since the courts up to this point had all refused to accept the cases, there was no judgment specifying a specific compensation amount for which Sanlu would be liable to its consumer victims.

A professor from Law and Politics University interviewed by *Caijing* Magazine confirmed that the victims' failure to procure a judgment against Sanlu is problematic to stating their rights as creditors under the bankruptcy law.⁵² Another Chinese lawyer argues that "as prescribed by China Enterprise Bankruptcy Law Article 21⁵³ and Article 47⁵⁴, tort victims could sue Sanlu even after

⁵⁰ 秦, Qin, *supra* note 47.

⁵¹ 企业破产法 Qi ye po chan fa [Law on Enterprise Bankruptcy] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 27, 2008, effective June 1, 2007), art. 45, LAWINFOCHINA (last visited Feb. 4, 2009) (P.R.C.) [hereinafter Enterprise Bankruptcy Law].

⁵² 秦, Qin, *supra* note 47.

⁵³ Enterprise Bankruptcy Law, *supra* note 51, art. 21. ("[A]fter the people's court accepts an application for bankruptcy, the relevant civil actions shall be filed only in the court that accepted the bankruptcy").

the commencement of the bankruptcy proceeding. Moreover, regardless of whether these lawsuits are completed or pending, tort victims could secure creditors' rights."⁵⁵ If the victims' were able to establish their rights as creditors, then they would be entitled to attend and vote during creditor's meetings and make resolutions affecting liquidation of the insolvent enterprise.⁵⁶ However, "any creditor whose creditor's right has not yet been decided is not entitled to exercise any right to vote unless the people's court can temporarily decide the amount of the creditor's right for the sake of exercising the right to vote."⁵⁷ Thus, without securing a creditor's right, the tort plaintiffs have no legal right to participate in the bankruptcy proceedings. Since creditor's have the right to decide if the company should be liquidated or revived, adopt compromises, and adopt a distribution plan for insolvent assets,⁵⁸ the ability to attend these meetings is a significant due process right. This issue becomes even clearer at the conclusion of bankruptcy, when the remaining assets are liquidated in priority order. The first priority category, after compensating for the cost of the bankruptcy proceedings and community liabilities, is for "medical treatment and disability, comfort and compensatory expenses"⁵⁹ that the bankrupt party defaulted upon as a result of filing for bankruptcy. Thus, without having a creditor's right to Sanlu's bankruptcy, the victims were denied legal priority to Sanlu's bankruptcy assets.

To remedy this situation, the victims' attorneys argued that the courts should accept the victims' compensation cases even after the bankruptcy administrator assumed management authority of Sanlu's assets. During this period, the lawyers argued, the victims, bankruptcy administrator and the judge should participate in a meeting to establish a temporary judgment against Sanlu for the purpose of establishing their right to compensation. For those victims that are unable to establish their rights to compensation at this point should have a mechanism ensure their rights in the future,

⁵⁴ *Id.* art. 47. ("[A]s to any creditor's right attached with certain conditions or time limit or any creditor's right that fails to be settled through an action or arbitration, the relevant creditor may file it with the people's court").

⁵⁵ Email from anonymous Chinese lawyer to author (Feb. 28, 2009) (on file with author).

⁵⁶ See Enterprise Bankruptcy Law, *supra* note 51, art. 59-60.

⁵⁷ *Id.* art. 59.

⁵⁸ *Id.* art. 61.

⁵⁹ *Id.* art. 113.

and the bankruptcy administrator should set assets aside for this purpose.⁶⁰ The Enterprise Bankruptcy Law Article 119 gives the bankruptcy administrator the responsibility to preserve assets “in advance” for “any creditor’s right that has not been settled by action or arbitration.” The potential creditors’ then have two years to establish their right to such compensation.⁶¹ However, the article does not clarify if the action has to be pending at the time of bankruptcy, or if it can be brought subsequent to the distribution of assets. Practically, if the courts do not allow plaintiffs to file cases within this two year statute of limitations, then they are still effectively barred from ever having the right to file a claim for compensation. The government’s decision to suspend the plaintiffs’ litigation rights was not based on any procedural or substantive law, but rather was a product of government policy.

Clearly, the courts had official orders to accept the bankruptcy petition, as the entire proceeding was likely orchestrated by the central leadership as part of a unified plan. Article 20 of the Enterprise Bankruptcy Law conveniently suspends civil actions or arbitration when the court accepts a bankruptcy application.⁶² However, when Sanlu completed bankruptcy, the government facilitated Sanyuan Company’s acquisition to some of Sanlu’s assets in the form of a ‘bankruptcy package’ through a bank loan, and Sanlu then ceased to have legal existence. The problem is that in order for the victims to properly resume a civil action against Sanlu, Sanlu must be a legal person. Otherwise, the lawsuit can be dismissed for failing to state a specific defendant under CPL Article 108(2).⁶³ If Sanyuan assumed Sanlu’s liability as its successor, then plaintiffs could theoretically sue Sanyuan; however, this does not appear to be the case. Sanlu’s assets were sold at an auction on March 4, 2009 for RMB 616,500,000,⁶⁴ after Sanyuan’s

⁶⁰ 秦, Qin, *supra* note 47.

⁶¹ Enterprise Bankruptcy Law, *supra* note 51, art. 119.

⁶² *Id.* art. 20. (“After the people’s court accepts an application for bankruptcy, any civil action or arbitration involving the relevant debtor that is in the process of trial shall be suspended. The action or arbitration can be resumed after a bankruptcy administrator takes over the debtor’s assets.”).

⁶³ Interview with anonymous Chinese attorney in Mainland China (on file with author).

⁶⁴ 陈中小路, 北京三元6.165亿元成功竞购三鹿核心资产, 公盟, Chen Zhongxiaolu, Beijing Sanyuan 6.165 yi yuan cheng gong jing gou Sanlu he xin zi chan[Beijing’s Sanyuan Company has succeeded in Buying Sanlu’s principal assets for 600,165,000RMB], GONGMENG, March 4, 2009, http://www.gongmeng.cn/sub_r.php?zyj_id=2286 (on file with author).

stockholders voted to approve bidding on Sanyuan's non-liquid assets to take over several milk stations with the goal of broadening its production scope, potentially making profit by 2010.⁶⁵ Even before the auction took place, Sanyuan's assertion that it projects to make Sanlu's production profitable within only one year strongly suggested that it did not intend to assume any future legal liability arising from Sanlu's gross negligence and criminal acts. This assertion was validated by the formal auction whereby Sanyuan's payment for the acquired assets was transferred to Sanlu's bankruptcy credit.

Criminal investigations and proceedings were taken against Sanlu executives and producers, but considering the potentially enormous size of the plaintiff class, it would not be efficient to sue individuals who do not have enough assets to provide reasonable compensation. It has been reported that there are about 300,000 children affected, where the average compensation ranges between 2,000RMB to 30,000RMB. Thus, at a minimum, by multiplying 2,000RMB by 300,000, Sanlu's liability to the victim's alone would amount to 600 million RMB. The majority of Sanlu's assets were only auctioned to Sanyuan for about \$616 million RMB. If a higher median compensation was assumed, such as 10,000 RMB, Sanlu's liability would be about 3 billion RMB. Thus, even with the contribution of 22 other negligent dairy companies that had been directed to provide funds for victims' compensation,⁶⁶ the potentially enormous gap between available funds and liability suggests that the government's decision to set up a national compensation scheme was a rational mechanism to provide minimum compensation for every victim. Thus, the legal effect of bankruptcy and the inadequacy of its bankruptcy assets may leave plaintiffs with no defendant to sue.⁶⁷ Even if the plaintiffs sue the

⁶⁵ 三元股东大会表决通过竞购三里资产议案, 新浪财经, San yuan gu dong da hui biao jue tong guo jing gou san li zi chan yi an [Sanyuan's Shareholder's Meeting Voted to Compete to Buy Sanlu's Assets], SINA, March 2, 2009, <http://finance.sina.com.cn/chanjing/b/20090302/17235919738.shtml>.

⁶⁶ It should be noted that Fonterra, a New Zealand company that had a 43% interest in Sanlu, wrote off its entire investment in Sanlu as a loss. However, the Chinese government did not ask Fonterra to contribute to the compensation fund, nor did it instigate other civil or criminal charges against Fonterra executives.

⁶⁷ 117名三鹿奶粉受害者再提诉讼索赔2500万, 新浪新闻中心, 117 ming Sanlu nai fen shou hai zhe zai ti su song suo pei 2500 wan [117 Sanlu Victims are filing a lawsuit again for 25 million RMB], SINA, Feb. 18, 2009, <http://news.sina.com/oth/chinanews/301-101-101-102/2009-02-18/17233648722.html>.

manager of Sanlu's bankruptcy, Sanlu and its executives and agents are simply incapable of meeting this burden.

In the alternative, suppose that the courts had originally accepted the suits and determined that Sanlu was liable for certain compensation, that ruling would have been meaningless because it would be unenforceable. CPL Article 232(4) states that a "people's court shall make a ruling to suspend the enforcement: [when] a legal person or any other organization as one of the parties ceases its existence, and the person succeeding to its rights and obligations has not been determined, or (5) other circumstances that the people's court deems the enforcement should be suspended." Thus, Sanlu's bankruptcy could have nullified enforcement under CPL Article 232(4) or, alternatively, the government's victim compensation plan may have prompted annulment under CPL Article 232(5). Therefore, from a judicial efficiency perspective, denying procedural due process at the outset of litigation may have been the most efficient choice for both the courts and the plaintiffs.

C. Political Tension between Substantive and Procedural Due Process

The substantive laws and recent Supreme People's Court statement on Emotional Damages for Civil Torts creates a public assumption that victims should be able to access the courts to determine their rights to compensation. Contention between substantive and procedural due process emphasizes the government's interest in balancing substantive justice and broad notions of social harmony. In order to achieve social harmony, justice has to be efficient, expedient and reasonable to the national public as well as to the individuals involved. Where the government's calculation of reasonable compensation falls far short of the victims' expectations, the result is exactly what the government is attempting to avoid: social discontent. Thus, facilitating Sanlu's bankruptcy effectively prevented future litigation, leaving the government's compensation plan as the only viable option. The interplay between using the courts to initiate and conclude Sanlu's bankruptcy, while simultaneously locking the doors to class action tort litigation, exemplifies the function of the courts as a multipurpose governance

tool, rather than as a protector of procedural due process rights. Contentious lawyers and resilient plaintiffs continue to try to file cases against Sanlu in case filing division's throughout the country, only to find that they "cannot find a defendant."⁶⁸

While the suspension of procedural due process rights has created frustration among those who would prefer to reserve judgment on proper compensation to a judge, the government's interference and alternative settlement mechanism has nevertheless resulted in opportunities for those who would prefer compensation without participating in litigation. The majority of affected families are from poor regions throughout China. Shen Xianlei, a lawyer representing a couple from Gansu whose 5-month-old son died from milk poisoning, stated that "the couple was unlikely to get more than 200,000 RMB by taking their case to court in Gansu. Dong Junming, another lawyer working for the couple, stated that legal procedures are too complicated for them, which made them decide to take the money."⁶⁹ There are two notable issues that could be ascertained from these attorneys' statements. The first is that many parents, as the legal representatives of their child, may prefer a simple compensation scheme that would enable them to avoid litigation. The other issue is that most families would not have even had jurisdiction to pursue their claims in the local courts as of the date Sanlu filed for bankruptcy, because only the court that presided over the bankruptcy would have had jurisdiction to hear civil claims. Mr. Shen was thus mistaken to believe that the claims could be pursued in a Gansu court, suggesting that the litigation was not only too complicated for the plaintiffs, but also for their inexperienced attorneys. Even if the courts had had accepted the cases, litigation might render thousands of families worse off when they could neither afford the inconvenience of pursuing litigation in Hebei, nor had access to more experienced lawyers. Another important consideration is that had the plaintiffs been accepted as creditors to assert claims during the bankruptcy proceedings, Sanlu

⁶⁸ *Id.* In response to these circumstances, some lawyers are representing classes from within specific regions, targeting other smaller milk producers as the proximate cause of the plaintiffs' harms. However, the courts have thus far refused to accept those cases as well.

⁶⁹ China Daily & Xinhua, *Bereaved Parents Compensated by Sanlu*, ENGLISH PEOPLE'S DAILY ONLINE, Jan. 17, 2009, <http://english.people.com.cn/90001/90776/90882/6575916.html>. Also note that the official compensation for a deceased child would be RMB 200,000.

might not have had enough assets to cover its liability, thus making enforcement an irresolvable issue.⁷⁰ These issues raise the question of whether suspending procedural due process rights have actually facilitated substantive fairness for a majority of plaintiffs.

IV. LAWYER'S OBLIGATION TO THE STATE AND THE PUBLIC IN ACCEPTING CLASS ACTION CASES

Considering the enormous number of plaintiffs who all suffered from varying levels of illness due to melamine contamination, the Sanlu Milk Scandal provided a classic opportunity for Chinese lawyers to consolidate plaintiffs' cases into a class action lawsuit. Lawyers in China are public servants of the CCP, with the majority of lawyers holding party membership. Lawyers are often critics of the State, and seek to reform or challenge CCP leadership from within the system.⁷¹ The potential for lawyers to challenge the CCP represents the most significant threat from the intellectual class.⁷² It is thus not surprising that the government has a significant political interest in regulating the practice of law, especially where the State's interests are high. In a case like the Sanlu Milk Scandal, lawyers' dual role as social advocates and civil servants came into direct conflict with each other.

⁷⁰ Email from anonymous Chinese lawyer to author (Dec. 10, 2008) (on file with author) ("If everything goes by law, I would guess Sanlu does not have enough assets to cover its liability.").

⁷¹ Interview with anonymous China Mainland lawyer (Summer, 2008).

⁷² In the Fall of 2008, members of the Beijing Lawyers Association challenged the CCP leadership to allow the Beijing lawyers to elect their own leadership, as already stipulated by law. The Beijing lawyers complained that the organization was a means to control their activities rather than a means of self-regulation through a democratic process. The bold debate, highlighted below, exemplifies the emerging conflict between Chinese lawyers and their leadership, *see* China Free Press, Accord With the Tide of History, Directly Elect Beijing Bar Association Directors (Sept. 9, 2008), http://www.chinafreepress.org/publish/case/Accord_With_the_Tide_of_History_Directly_Elect_Beijing_Bar_Association_Directors.shtml (Beijing Lawyer's petition to the Beijing Justice Bureau and Bar Association); China Free Press, The Beijing Bar Association's Response to a Small Number of Lawyers and Their So-Called "Call For Direct Elections to the Beijing Bar Association (Sept. 10, 2008), http://www.chinafreepress.org/publish/case/The_Beijing_Bar_Association_s_Response_to_a_Small_Number_of_Lawyers_and_Their_SoCalled_Call_For_Direct_Elections_to_the_Beijing_Bar_Association.shtml (condemning promotion and dissemination of the concept of direct elections as "a vain attempt to evade the supervision of the Justice Bureau and the Bar Association's professional management"); China Free Press, Our Response to the Beijing Bar Association's "Serious Statement" (Sept. 11, 2008), http://www.chinafreepress.org/publish/case/Our_Response_to_the_Beijing_Bar_Association_s_Serious_Statement.shtml (arguing that the participation in democratic election of new Bar Association representatives are legal rights and denying the accusation by the Bar Association).

The Lawyer's Law Article 42,⁷³ read in connection with CPL Articles 53-55 provide a legal basis for lawyers to accept class action suits pro bono. However, a close reading of both the Chinese and English translations illustrates that each of these articles allow for judicial discretion. In the English translations of each of these articles, it states that "the people's court may combine actions⁷⁴, brought by representatives⁷⁵, issue public notices.⁷⁶" Thus, the right to bring a class action should be interpreted as discretionary.⁷⁷ The Consumer Protection Law (1994) was promulgated specifically to provide legal protection to consumers from harms caused by sub quality or fake products.⁷⁸ Article 11 states that "a consumer who suffers injury or damage to the person or property in purchasing and utilizing commodities or accepting services enjoys the right to seek compensation according to law."⁷⁹ Articles 40-42 further detail the operator's liability,⁸⁰ in accordance with the Product Quality Law, while Articles 30 and 34 specifically state that the courts should accept consumer cases where they meet the terms of the CPL.⁸¹

⁷³ Law on Lawyers and Legal Representation (promulgated by the Standing Comm. of the Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997), art. 42(amended 2007), LEHMANLAW (last visited Feb. 2, 2009) (P.R.C.) ("Lawyers must undertake the obligation to provide legal assistance in accordance with state regulations, fulfill their duties and provide those who need assistance with legal services").

⁷⁴ CPL, *supra* note 2, art. 53.

⁷⁵ *Id.* art. 54.

⁷⁶ *Id.* art. 55.

⁷⁷ Email from anonymous Chinese lawyer to author (Dec. 10, 2008) (on file with author) ("China Civil Procedure Law articles 53-55 make it optional, not mandatory, for the court to consolidate all those cases against Sanlu").

⁷⁸ Consumer Protection Law, *supra* note 42, art. 1.

⁷⁹ *Id.* art. 11..

⁸⁰ *Id.* However, it should be noted that the operator is the retailer, which is a separate legal identity from the manufacturer. In the Sanlu Milk Scandal, holding the retail operators responsible for tort liability would essentially force the local food stores into bankruptcy, especially considering that retailers carrying Sanlu products subject to the mandatory recall already sustained losses for that inventory. If the retail operators did not know and had no reason to know of the contamination, it is arguably inefficient to hold them accountable since they could not have acted with a greater level of care, since the operator is not their responsibility to test the products it sells. Since the Consumer Protection Law only covers the operator's liability, rather than the manufacturers' liability, the law itself is of little value to the consumer. Despite the apparent inefficiency of holding operators liable, article 40 of the Consumer Protection Law seems to hold operators strictly liable, *id.* art. 40. ("Except where this Law provides otherwise, an operator who provides the commodity or service shall assume civil responsibility in accordance with the provisions of the Product Quality Law of the People's Republic of China and other relevant laws and regulations if the operator is under one of the following circumstances: . . . (3) where the commodity is inconsistent with the product standards marked on the commodity or its package.").

⁸¹ *See id.* art. 30, 34.

Since personal and subject matter jurisdiction are both prerequisites to filing a lawsuit, it is noteworthy that the CPL specifically addresses multi-party lawsuits. Thus, by providing jurisdiction under the CPL to initiate class action lawsuits, the government seems to encourage, or at minimum, permit lawyers to accept such cases. Furthermore, Article 6 of the Consumer Protection Law states that “the protection of the consumers’ rights and interests is a common responsibility of the whole society. The state encourages and supports all organizations and individuals to carry out social supervision over any infringement act of the lawful rights of the consumers.” While the text is broad in meaning, its general purpose is clearly to encourage and facilitate consumer protection rights.

However, Article 34 of the Consumer Protection Law requires a closer reading to ascertain the underlying intent of the NPC. Article 34 states that “a dispute of the rights and interests of the consumer arising between the consumer and the operator may be settled through the following channels: (1) mediation (2) consumer association mediation (3) make a complaint to the relevant administrative department (4) to apply to the arbitration organ for arbitration according to the arbitration agreement with the operator, and (5) to bring a suit to the people’s court. Although these options are not legally hierarchical, in practice they are listed in terms of legislative preference.⁸² The clear preference is thus for mediation, with lawsuits as the choice of last resort. It could further be implied that the courts prefer single party lawsuits over class actions.⁸³ Thus, despite the apparent legislative encouragement for consumers to use the law to protect their rights, impliedly the courts are not the preferred venue to enforce rights and resolve claims.⁸⁴ Significantly, considering the massive suffering caused by nationally marketed poisonous food or products, class action lawsuits are often the only feasible way to adjudicate hundreds of thousands of claims arising out of the same offense. Since many businesses are

⁸² Email from anonymous Chinese lawyer to author (Dec. 10, 2008) (on file with author).

⁸³ This is not surprising, as it is both economically efficient for individuals and the judiciary to encourage out of court settlements.

⁸⁴ This preference extends consistently across Chinese law. See 劳动法 *Lao dong fa* [Labor Law] (promulgated by the Standing Comm. of the Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995), ch. 10, LEHMANLAW (last visited Feb. 4, 2009) (P.R.C.).

implicitly or explicitly linked to the government, harms caused by such businesses often turn into a political, rather than legal issue, as was the case in the Sanlu incident. Thus, considering the political pressure to reject even single party lawsuits that implicate government interests from legal adjudication, class action lawsuits are likely an impractical method to resolve multi-party disputes at this point in China's legal development.

Adding to the lack of clarity about the proper role of courts and lawyers in resolving class action tort liability cases, in 2001 the Supreme People's Court (SPC) issued an interpretation of "problems regarding the ascertainment of compensation liability for emotional damages in civil torts, suggesting that the courts should expand their role in tort cases."⁸⁵ While SPC Interpretations are not legally binding, they have a precedential value that is meant to be followed by lower courts. Even more significantly, the Standing Committee is considering passing a tort law that would allow compensation for mental distress in cases involving death or injury, which is meant to go further than the 2001 SPC Interpretation in both its scope and legal effect. Potentially, the new law will allow for punitive damages if companies "knowingly produce and sell defective products." Yang Lixin, a law professor at Renmin University and drafter of the new tort law, stated that "the provisions are directly linked to the Sanlu scandal" and that "the law could be applied in compensation cases involving victims of the Sanlu scandal."⁸⁶

⁸⁵ Proclamation of the Supreme People's Court (adopted by the Judicial Comm. of the Sup. People's Ct., Feb. 26, 2001, effective Mar. 8, 2001) ISINOLAW (last visited May 19, 2010). Assisting lower courts in "ascertaining compensation liabilities for emotional damages when trying civil cases according to the provisions of relevant laws such as the "General Principles of Civil Law of the People's Republic of China," and combined with the practical experience of adjudication, relevant problems are interpreted as follows: Article 1: The people's court shall accept according to law cases brought forth claiming emotional damages for illegal infringement of any of the following rights of personality: (1) the right of life, right of health, right of body [A]rticle 2: The people's court shall accept according to law cases arising from any illegal act that separates a ward from his guardian and so causes grave damage to relations between parents and children or that between close relatives, and brought to the court by the guardian for claiming emotional damages. . . . [A]rticle 7 allows a parent, spouse or children of a deceased natural person to recover emotional damages as a plaintiff, where the natural person's death was caused by a tortious act. . . . [A]rticle 9 states that compensation shall include where relevant: (1) disability compensation, (2) death (3) compensation, compensation for money damages in other forms. . . . Article 10 states the factors to consider when making an award for emotional damages: (1) seriousness of infringer's wrongdoing (5) economic capability of infringer; (6) the average standard of living in the area where the court trying the case is located.

⁸⁶ See Xinhua News Agency, China to Include Mental Distress in Civil Rights Law, BEIJING REV., Dec. 23, 2008, http://www.bjreview.com.cn/health/txt/2008-12/23/content_171862.htm. The revised tort law

Thus, both the current law and the legal reform movements within the top leadership exemplify official encouragement of pursuing an expanded scope of damages in tort liability cases. However, despite encouraging developments in tort law reform, there are no corresponding developments in promoting the role of the courts in accepting class actions. Thus, it can be assumed that Yang Lixin is referring only to individual victims, rather than a class of victims.

Despite general encouragement, the underlying reasons for this encouragement is not to increase litigation, but rather to maintain social order by holding companies who create harms responsible for paying for them, which theoretically increases market efficiency and plays an important role in maintaining social harmony. The All China Lawyer's Association, which is directly regulated by the CCP, "strongly discourages class action lawsuits. In March 2006, the association put out a guiding opinion aimed at curbing cases involving 10 or more plaintiffs. There was no outright ban on class action lawsuits, but the association put in place onerous rules, including a requirement that lawyers report conversations with clients to the judicial bureaus."⁸⁷ However, in addition to promoting efficiency, an even greater ideal is political stability. As Teng Biao, a lawyer in Beijing accurately stated, "To protect Sanlu is to protect the government itself. It involves many officials from authorities in the city of Shijiazhuang up to the central government. It involves media censorship, the food quality regulatory system and the corrupt deal between commercial merchants and corrupt officials."⁸⁸ Thus, politics and law are inseparable in China: the role of the judicial system in resolving disputes can only be understood within the political context of a specific incident.

Thus, where the CCP determines to remove a case from the judicial branch, lawyers are in the unenviable position of accepting the government's decision and dropping their clients' claims, or choosing to challenge official actions, thus creating an adversarial relationship between themselves and their professional patron, the government. Both lawyers and victims who decide to proceed with

has not yet been passed, perhaps indicating internal debates between the drafters and the Standing Committee, or among the Standing Committee members themselves.

⁸⁷ Stated by Jerome A. Cohen, a professor of law at New York University who specializes in the Chinese legal system. Wong, *supra* note 36.

⁸⁸ Wong, *supra* note 36.

sensitive cases in the courts are mindful that their actions may be perceived as seeking to undermine social stability and inciting political unrest. There is evidence that political agents have harassed and arrested volunteer lawyers and organizers.⁸⁹ For example, “in the first weeks of the scandal, more than 100 lawyers put themselves on a list of lawyers volunteering to dispense legal advice to the families. But at least two dozen have since dropped their names from the list, of whom most are from Henan Province, where lawyers have complained of subtle pressure from local officials.”⁹⁰ This report shows the tension between legal activism and official restraint. Despite initial enthusiasm to volunteer legal services, at least 25% of lawyers within this specific group decided to withdraw their support out of fear of official retaliation. If this report is accurate, it is also significant to observe that 75% of these lawyers remained either actively or passively on the list, despite harassment or potential retaliation. This is an important

⁸⁹ See Joseph Kahn, *Advocate for China's Weak Crosses the Powerful*, N.Y. TIMES, July 20, 2006, <http://www.nytimes.com/2006/07/20/world/asia/20blind.html>. A blind man who taught himself law became famous when he organized a class-action lawsuit against the local government in Shandong for forcing peasants to have late-term abortions and undergoing forced sterilization. He was first put under house arrest and then sent to jail. “Local Communist Party officials control prosecutors and judges in their domains, and they can use the legal system to carry out political persecutions.” Distraught parents of a child sickened by melamine, began a website called ‘kidney stone babies’ to raise public awareness, which was shut down by Chinese authorities, the couple also received harassing phone calls from the public security bureau as a warning. A lawyer who attempted to help victims pro bono received phone calls from the Beijing Lawyer’s Association (which is controlled by the CCP) and the Justice ministry. Malcolm Moore, *China Milk Scandal: Families of Sick Children Fight to Find Out True Scale of the Problem*, THE TELEGRAPH, Dec. 3, 2008, <http://www.telegraph.co.uk/news/worldnews/asia/china/3545733/China-milk-scandal-Families-of-sick-children-fight-to-find-out-true-scale-of-the-problem.html>.

⁹⁰ Edward Wong, *More Lawsuits Filed Over Tainted Milk in China*, N.Y. TIMES, Oct. 31, 2008, at A13, available at <http://www.nytimes.com/2008/10/31/world/asia/31milk.html>. Also, “[i]n the milk crisis, officials in several provinces have put pressure on many involved, including parents, lawyers and judges, to drop the issue, said legal scholars and lawyers who have volunteered to help the parents.” . . . “Li Fanping, a human rights lawyer, said officials from the Beijing lawyers association met with lawyers in the capital last month to discourage them from filing milk lawsuits, especially suits with plaintiffs from multiple provinces. . . . Many lawyers find it hard to ignore entreaties of provincial judicial bureaus or lawyers associations, which they are required to join. Those groups are controlled by the Ministry of Justice, which ultimately makes the rules for licensing lawyers.” Wong, *supra* note 36. Similar trends can be seen from the official handling of the Sichuan Earthquake investigation. The human rights activist, Huang Qi, was arrested on charges of “illegally possessing state secrets” for demanding through posting parents’ demands for an investigation into construction negligence. The courts refused to accept civil cases and pressured the victim’s families to accept the official compensation package, thus leaving grieving families with no viable option but to accept compensation or risk official harassment. Edward Wong, *China Presses Hush Money on Grieving Parents*, N.Y. TIMES, July 24, 2008, at A1, available at <http://www.nytimes.com/2008/07/24/world/asia/24quake.html>.

development that exemplifies the potential for lawyers to strengthen the rule of law through promoting its use by consumer victims. While such a small sample is not methodically indicative of a national trend, it may suggest that Chinese lawyers are increasingly identifying their interests with the masses or specific social groups rather than having strict allegiance to elite government interests.

Despite harassment, some lawyers continue to appeal the government's compensation plan, not only to gain greater compensation for their clients, but also to uphold the plaintiffs' procedural due process rights.⁹¹ A team of ten lawyers have agreed to represent more than 240 families in a class action suit against the government compensation plan. The lawyers stated that "they prefer that the court listen to their clients' case and arrive at a legal decision—rather than accept an arbitrary and insufficient compensation package set by the government."⁹² In another attempted class action representing 152 victims on March 4, 2009, the Middle People's Court of Shijiazhuang, Hebei notified the pro-bono legal team that it would not accept group litigation civil compensation lawsuits against Sanlu. The court asked the lawyers to try each case separately by providing adequate documents to file each case. The first of these lawsuits was accepted by the case filing division on March 25, 2009 "signifying that the civil compensation suits have already been formally accepted."⁹³ However, as of June 1, 2009, there has been no further media coverage about the outcome of this particular suit, or the filing of the other 151 suits from this 'class.' The court's explicit rejection of class action litigation further exemplifies the limitations on developing this area of tort law.

In conclusion, despite general encouragement of public interest law in the field of tort claims, that encouragement only exists where it facilitates the government's interest in dispute resolution. Lawyers' right to represent clients and file cases in the courts is dependent upon the courts' acceptance of these cases. Lawyers that attempt to file cases where the government has clearly signaled its

⁹¹ 117 Sanlu Victims are filing a lawsuit again for 25 million RMB, *supra* note 67.

⁹² Schiller, *supra* note 13.

⁹³ 叶, Ye, *supra* note 18.

disapproval may challenge the scope of litigation rights that the courts are willing to recognize..⁹⁴

V. JUDICIARY'S DEBATABLE LEGAL COMPETENCE TO PRESIDE OVER CLASS ACTIONS

China's court system is a politically integrated organ of the Chinese government.⁹⁵ This section first considers whether China's skeletal class action procedures are adequate to ensure the integrity of class action litigation. However, to make this analysis practically relevant, it must be acknowledged that the Milk Scandal case clearly exemplifies that government interests trump procedural due process rights. Thus, when considering the court's competence to adjudicate class action claims, the role of political interference throughout the trial process must also be taken into account when analyzing statutory due process protections.⁹⁶ The government's position in interfering in civil cases is further complicated by CPL Article 14, which provides that "the people's procuratorates shall have the right to exercise legal supervision over the civil proceedings."⁹⁷ The meaning of "legal supervision" is not the same as participation, but it is noteworthy that the role of the procuratorate

⁹⁴ Press Release, HRIC, Beijing Law Firm Faces Six-Month Shutdown for Attorneys' Support of Direct Bar Election February 19, 2009 (Feb. 19, 2009), <http://iso.hrichina.org/public/contents/press?revision%5fid=149342&item%5fid=132331> (explaining that a Beijing law firm was forced by Haidian District Bureau of Justice to suspend business for 6 months on February 18, 2009, after taking 3 hours to reach its verdict, which violated the lawyers' constitutional right to freedom of association, in retaliation for advocating direct elections for leadership positions of the Beijing Lawyers Association in 2008 taking on sensitive political rights cases, such as defending prominent dissidents).

⁹⁵ For a comprehensive analysis of recent reforms and limitations of China's judiciary, see Liebman, *supra* note 28. Furthermore, the highest organ of the CCP, the Standing Committee, is also the highest official in the Chinese government, including Hu Jintao, Wu Bangguo and Wen Jiabao. Since CCP membership is also well understood as a prerequisite to promotion in the bureaucracy, loyalty to the CCP is entrenched throughout all branches of the government.

⁹⁶ *But cf.* CPL, *supra* note 2, art. 6. ("[T]he adjudication authority over civil cases shall be exercised by the people's courts only. The people's courts shall adjudicate civil cases independently according to law, and shall not be subject to any interference from an administrative organ, public organization, or individual.") Theoretically, the Standing Committee and the NPC are above administrative organs, which are not specifically precluded from interference. In any event, such distinctions are futile because it is widely known that CCP interference is institutionalized within the judicial system. The dichotomy between law and practice is so common in China that it is unproductive to make a formalistic textual argument without taking political interests and practice into account.

⁹⁷ *Id.* art. 14. People's procuratorates have essentially the same functions as a U.S. Prosecutors Office. They work with the police and security bureaus to investigate and prosecute cases. However, while prosecutors are limited to criminal law, the people's procuratorates have broad jurisdiction.

has been increasing in civil cases in the last several years.⁹⁸ The procuratorate's presence is meant to ensure that judges respect civil procedure requirements and to deter outright corruption.⁹⁹

CPL Article 15¹⁰⁰ theoretically prevents a plaintiff from hiring a private attorney to represent him or her in a civil rights action. A broad definition of "civil rights" could involve most kinds of tort cases involving the right to life, health, etc. The original Chinese suggests a broad interpretation encompassing all acts constituting infringements to civil interests and civil rights.¹⁰¹ A law firm is considered a public organization, and thus falls within the acceptable statutory scope of representation for a civil rights action. However, if the law firm claimed that it is a public organization, it would be prohibited from accepting money for profit.¹⁰² Thus, under Article 15, lawyers can only accept a civil rights case pro bono.¹⁰³ It is conceded that this statute is not widely enforced in practice, but has the potential to prevent private lawyers from accepting certain sensitive "rights" based cases.

A. It is Unclear which Court has Proper Jurisdiction to Accept Sanlu Class Actions

CPL Article 16 provides that parties have the option to mediate private civil disputes with a People's Conciliation Committee, which is under the supervision of both the basic people's court and lowest level of the government. This option essentially gives the parties direct access to both the judicial and executive branches

⁹⁸ Interview with Zang Dongsheng, Prof., Univ. of Wash. Sch. of Law.

⁹⁹ *Id.*

¹⁰⁰ CPL, *supra* note 2, art. 15. ("If the civil rights and interests of the state, a collective, or an individual have been infringed, a *state organ, public organization, enterprise, or institution* may support the injured unit or individual to initiate legal action in a people's court") (emphasis added).

¹⁰¹ Therefore, civil rights should not be read as the U.S. equivalent to fundamental rights, but rather within the Chinese context of civil rights and interests.

¹⁰² Online Interview with anonymous Chinese lawyer (February 18, 2009) (transcript on file with author).

¹⁰³ However, this lawyer also stated that this law is not respected in practice, citing hospitals as an obvious example of a public institution that accepts money for profit despite legal provisions against such enterprise. *See id.*

simultaneously.¹⁰⁴ While the parties have the option to refuse mediation and proceed to litigation, there is evidence that parties are pressured to settle at this stage.¹⁰⁵ Furthermore, the statute suggests that a class action that has a “major impact on the whole country” should be filed in the Supreme People’s Court,¹⁰⁶ which is the most politically sensitive and visible court in the country.

However, CPL Article 22 states that a lawsuit brought against a legal person or organization can be filed in a people’s court where the defendant is domiciled, and to make matters even more complicated, CPL Article 29 states that a lawsuit brought for a tortious act should be brought to a people’s court where either the infringement took place, or the defendant is domiciled. Since the Supreme Court is only in Beijing, CPL Articles 22 and 29 suggest that other options are available, especially where the allegation is for tort damages. CPL Article 35 resolves this conflict by allowing the plaintiff to choose where multiple courts can have jurisdiction. Article 39 allows lower courts to request a transfer to a higher court. At the beginning of the Sanlu Milk Scandal, hundreds of parents of injured infants attempted to file lawsuits among various courts throughout the country. The courts generally chose not to act, instead of either challenging their jurisdictional competence or attempting to transfer the case to a higher court. Since the lower courts had reason to know that this issue would be determined by the political branches, it would arguably not have been effective to transfer the case. The uniformity of court action suggests that the courts were given instructions from the government on how to handle rejecting the cases.

For example, the first lawsuit was by a father from Guangdong province whose son fell seriously ill from ingesting the tainted milk formula.¹⁰⁷ He filed a civil suit against Sanlu at the Guangzhou city’s middle people’s court, asking for compensation of 90,000

¹⁰⁴ This paper has consistently argued that the judiciary is subordinate to the executive political branch. The intertwined political and judicial oversight of the People’s Conciliation Committee further exemplifies the level of political involvement in the justice system.

¹⁰⁵ See HL Fu, *The Politics of Mediation in a Chinese County: The Case of Luo Lianxi*, 5 AUSTL. J. ASIAN L. 107, (2003).

¹⁰⁶ CPL, *supra* note 2, art. 21. (“The Supreme People’s Court shall have jurisdiction as the court of first instance over civil cases that have major impacts on the whole country.”).

¹⁰⁷ There were no reports of the child’s subsequent death.

RMB.¹⁰⁸ The first fatality of the tainted milk was Yi Kaixuan, a five month old from Gansu. His parents filed a lawsuit at Lanzhou¹⁰⁹ middle people's court for wrongful death against Sanlu. Sophisticated pro bono lawyers acting on behalf of a class of 100 families stated their intent to file a lawsuit at the Hebei High People's Court, where Sanlu's principle place of business is located.¹¹⁰ In another action, Gong Meng, a legal aid group, also attempted to file a lawsuit at the Hebei High People's Court on behalf of a class of over 220 victims from more than 20 provinces.¹¹¹ In all of these cases, the case filing divisions of the various courts refused to either accept the cases or formally reject the cases. Without a formal rejection, the parties could not appeal.

After the Chief Justice of the Supreme People's Court announced on March 2, 2009 that the courts were now prepared to immediately accept the milk scandal compensation cases, activist lawyers regained some hope that their clients' cases would finally be accepted. However, the vague announcement, made during an internet public relations event, failed to specify which courts would be accepting the cases, and which parties could be properly included as defendants. On March 1, 2009, a public interest lawyer from the Open Constitution Initiative filed a lawsuit in Qingdao Middle People's Court for a joint action on behalf of 54 plaintiffs. The lawsuit was directed against a Qingdao Shengyuan Milk Products LLC, which was found to have contaminated products after submitting to mandatory inspection in September 2008. While further developments of the lawsuit were unavailable as of May 28, 2009, the article also states that the plaintiffs' lawyers may settle the suit privately out of court.¹¹²

¹⁰⁸ 李, Li, *supra* note 36.

¹⁰⁹ Lanzhou is the provincial capital of Gansu. .

¹¹⁰ Associated Press, *supra* note 34.

¹¹¹ 田磊, 三鹿奶粉案再调查: 法治精神已深入人心, Tian Lei, Sanlu nai fen an zai diao cha: fa zhi jing shen yi shen ru min xin [A Survey of the Sanlu Milk Cases: Rule of Law Consciousness has Already Penetrated Popular Sentiment], Jan. 20, 2009, <http://www.dac.org.cn/view.php?articleid=1668944&sortid=61>.

¹¹² 青岛三元营养食品有限公司声明, Qingdao Sanyuan ying yang shi pin you xian gong si sheng ming [Announcement by Qingdao's Sanyuan Nutritious Food LLC] (Sept. 19, 2008), <http://county.aweb.com.cn/2008/9/19/480200809191342840.html>.

B. Political Sensitivity of Class Actions Supports Minimal Discretionary Use by the Courts

At this point it is constructive to consider the differences between U.S. class actions and Chinese “representative joint litigation.” While the term “class action” has been loosely applied to the Chinese equivalent, certain distinctions should be understood. The purposes of Chinese class actions are to maintain social order and reduce the costs of litigation, both to the court and the plaintiffs. In the U.S. system, any member of a class is allowed to participate in the litigation process, and each party has the choice to appoint multiple legal representatives. In contrast, Chinese courts prefer for less than ten plaintiffs and defendants to be present during any legal proceeding.¹¹³ While this is not law, custom allows the judge to make this kind of decision. Similarly, each plaintiff or defendant may have a maximum of two legal representatives.

The reasons for such regulations are both practical and political. One unpersuasive reason is that many courts in China are, perhaps intentionally, small and cannot accommodate more people. In addition, judges fear that large numbers of litigants will decrease judicial efficiency and possibly lead to manifestations of social unrest, either within or outside the court. According to Randy Peerenboom, “the major concern of the government in not accepting these mass plaintiff cases is that people tend to then get all excited and then take to the streets and protest if it doesn’t seem to be going their way.”¹¹⁴ In order to commence a class action in Chinese courts, the plaintiffs should first choose less than ten class representatives.¹¹⁵ The other members of the class register their personal information with the court, and will share in the compensation award, according to the court’s distribution requirements. However, they are not permitted to attend the proceedings.¹¹⁶ The legal representatives are appointed by the entire class of plaintiffs, and the legal representatives must consult

¹¹³ Online Interview with anonymous Chinese lawyer, *supra* note 102.

¹¹⁴ Randy Peerenboom is a law professor at the La Trobe University in Melbourne, Australia. Associated Press, *supra* note 34.

¹¹⁵ Online Interview with anonymous Chinese lawyer, *supra* note 102.

¹¹⁶ The reason is essentially the same as that expressed by Peerenboom, the courts are simply trying to minimize the possibility of disorder in the courtroom.

the entire class before making a “substitution of representatives, relinquishing claims, acceptance of claims of the opposing party, or negotiating settlement.”¹¹⁷ Nevertheless, legal representatives can use a power of attorney to act on the class’ behalf without further consultation.

A Beijing-based lawyer, Zhang Xinkui, argued that “In this case, there are numerous victims. If everyone goes in for a lawsuit, it will be a real waste of legal resources. The government ought to find a more humanitarian way.”¹¹⁸ Another Chinese scholar stated that the problem is not the court’s competence to preside over complex class action litigation, but rather whether or not the government wants to resolve the problem legally or using alternative political methods, such as the “political insurance method” where the government establishes a compensation fund rather than the defendant.¹¹⁹

The removal and resignation of nine government officials in connection with the Scandal illustrates the government’s consciousness of its responsibility and administrative failure. These officials include: (1) Zhang Fawang vice-mayor of Shijiazhuang city in charge of agricultural production; (2) Sun Renhu chief of animal husbandry administration in Shijiazhuang; (3) Zhang Yi director of Shijiazhuang Municipal Food and Drug Administration; (4) Li Zhiguo director of Shijiazhuang Municipal Bureau of Quality and Technical Supervision; (5) Ji Chuntang mayor and deputy party secretary of Shijiazhuang; (6) Wu Xianguo Shijiazhuang party secretary; (7) Li Changjiang director of the General Administration of Quality Supervision, Inspection and Quarantine; (8) Zhao Xinzhaoy deputy mayor of Shijiazhuang; and (9) Jiang Hongjiang deputy mayor of Shijiazhuang.¹²⁰ However, social responsibility and administrative failure do not equal legal liability under the State

¹¹⁷ CPL, *supra* note 2, art. 54.

¹¹⁸ This lawyer is thus suggesting that the government, rather than the legal system, would be the more efficient and “humanitarian” forum to resolve compensation for Milk Scandal victims. Associated Press, *supra* note 34.

¹¹⁹ As an example of successful class actions in the sense that the court both accepted the case and ruled in the plaintiffs’ favor, “residents in Shanghai have won compensation from an airline for property damage caused by a plane crash, while farmers in Beijing have sued their village committee over a land dispute.” *Sanlu Facing Class Action Lawsuit*, *supra* note 34.

¹²⁰ See *Who lost their post in connection with the scandal?*, CAIJING, Jan. 6, 2009, available at <http://english.caijing.com.cn/2009-01-06/110045399.html>.

Compensation Law, which only provides for a limited scope of criminal infringements.¹²¹ Despite failing to accept legal liability, Premier Wen Jiao Bao stated that “his government is partly responsible for the tainted milk incident, particularly concerning industry regulation.”¹²²

However, concerns about the competency of the judicial system have also been raised as a justification for removing the Milk Scandal cases from the judiciary. In a meeting with law professors and judges from the Supreme People’s Court, Judge Chen Xianjie warned that since “China’s courts had little experience with class-action suits, if the court accepts the Sanlu case as a collective lawsuit, consumers would end up with no legal protection.” Judge Chen then argued that “it would be better for the parents’ complaints to be treated in the traditional manner. The government should handle them as an administrative issue and dole out compensation.”¹²³ Since the government is theoretically responsible for taking care of the people according to socialist ideology, the government’s actions have political legitimacy.¹²⁴ While it is unclear if this is Judge Chen’s true opinion or if this opinion was politically motivated, it is at least interesting to consider that even accomplished judges may perceive the government as the more fair and legitimate body to decide injured consumers’ rights to compensation. However, if this assumption is correct, it is also interesting to consider that the political leadership, and by extension the judiciary, believed that judicial dissolution of Sanlu by means of bankruptcy was nevertheless an appropriate use of judicial power. Clearly, the judicial and political handling of the Sanlu Milk Scandal further illuminates the CCP’s preference to strengthen the judicial branch’s role in regulating business activity, while limiting its role in tort litigation and compensation.

Understanding how the Chinese government perceives the legal system’s potential to uphold or undermine social stability in sensitive

¹²¹ See 国家赔偿法, Guo jia pei chang fa [Law on State Compensation] (promulgated by Standing Comm. of Nat’l People’s Cong., May 12, 1994, effective Jan. 1, 1995), art. 3, LAWINFOCHINA (last visited May 19, 2010) (P.R.C.).

¹²² *Chinese Premier Says Government Responsible in Tainted Milk Incident*, XINHUA, Oct. 18, 2008, http://english.gov.cn/2008-10/18/content_1124277.htm.

¹²³ Wong, *supra* note 36.

¹²⁴ Email from anonymous Chinese lawyer to author, *supra* note 4.

circumstances is essential to analyzing the usefulness of encouraging the development of class action litigation in Chinese courts. Class action litigation requires well-developed procedural due process rules to ensure that all members of a class meet the statutory requirements of joining the class and are equally represented within the class once litigation is underway.¹²⁵ There must also be secure procedural due process rights to receive proper notice to give all potential plaintiffs the opportunity to join a class action, as well as the rights of an individual who is refused access to the class but is later found to qualify for relief. The CPL addresses all of these procedural issues, and thus the question remains if they are adequate to support a class action system. CPL 53-56 explains the procedures specifically governing class action lawsuits.¹²⁶ These three articles concisely consider the main concerns that are addressed in the US Federal Code of Civil Procedure Article 23, stipulating requirements for joining a class, notice, appointing representatives,

¹²⁵ Shi Xianyu, 集团诉讼若干问题研究, 3 高等函授学报 (哲学社会科学版) (1999), Ji tuan su song ruo gan wen ti yan jiu [A Study of Certain Problems with Group Litigation], 3 GAO DENG HAN SHOU XUE BAO (ZHI XUE SHE HUIKE XUE BAN) [JOURNAL OF HIGHER CORRESPONDENCE (PHILOSOPHY AND SOCIAL SCIENCE ED.)] (1999).

¹²⁶ CPL, *supra* note 2, art. 53. ("When one party or both parties consist of two or more persons and the subject matter of the action is the same or under the same category, the people's court may adjudicate them together upon the consent of all the parties. Such adjudication is called joint litigation. If a party of two or more persons of a joint litigation who have the common rights and obligations with respect to the subject matter of action and the act of any of them is recognized by the others of the party, such an act shall bind the rest of the party; if a party of two or more persons have no common rights and obligations with respect to the subject matter of action, any acts taken by any one of them shall not bind the rest of the party."). *Id.* art. 54. ("A joint litigation in which one party has numerous litigants may be brought by the representatives elected by the litigants of the party. The act of litigation taken by these representatives shall bind all litigants of the party whom they represent. However, any substitution of representatives, relinquishing claims, acceptance of claims of the opposing party, or negotiating settlement shall be approved by the litigants of the party."). *Id.* art. 55. ("Where the subject matter of an action is under the same category and one of the parties has numerous litigants but the exact number of the litigants is uncertain when the lawsuit is filed, the people's court may issue a public notice to explain the nature of the case and the claims of the litigation and informing those interested persons who are entitled to the claim to register their rights with the people's court within a fixed period of time. Those who have registered their rights with the people's court may elect representatives from among themselves to proceed to litigation; if the election fails its purpose, such representatives may be determined by the people's court through consultation with those who have registered their rights with the court. The acts of litigation taken by these representatives shall bind all litigants of the party whom they represent.") However, any substitution of representatives, relinquishing claims, acceptance of claims of the opposing party, or negotiating settlement shall be approved by the litigants of the party. *Id.* art. 55. ("The judgments or written orders rendered by the people's court shall bind all those interested persons who have registered their rights with the court. Such judgments or written orders shall apply to those who have not registered their rights but have instituted legal proceedings during the time of the statute of limitation.").

and binding an award on all parties. Despite possible problems of providing proper notice to individuals in remote areas, the procedural statutes do address the essential functions to safeguard procedural due process rights in class action proceedings. Considering the rapid increase in product quality and consumer protection cases, it is at least curious that class actions have not been popularized.

Chinese scholars who support the development of class action litigation in China believe that objectively, such proceedings are necessary for judicial efficiency and fairness to all victims who suffered from the same harm. Professor Shi believes that class action litigation is beneficial to plaintiffs because it lowers their individual financial litigation burden, and is indispensable for courts to avoid issuing disparate rulings on the same claims.¹²⁷ However, while Professor Shi makes a logical argument that class actions increase efficiency when the harm is the same, the statutory provision concerning whether “the subject matter of the action is the same or of the same category”¹²⁸ fails to define the range of actions acceptable to form a single class. For example, in the Milk Scandal, would a child who was hospitalized for kidney stones be within the same class as a child who died from the same contaminated formula? While such issues may be decided by case law in common law jurisdictions, no such precedent exists in China as a civil law country. Thus, a court has wide discretion to determine the parameters of a class. Several Chinese lawyers have reported that CPL 53 is often used to reject class action suits.¹²⁹ However, the courts do have the authority to establish “groups” within the class to facilitate efficient adjudication and differentiate compensation for members within one class.¹³⁰

Even if a class is formed, in order to join the class, a potential litigant must provide sufficient evidence of causation. In the Milk Scandal case where parents have long thrown away the milk formula packaging, producing evidence to prove causation can be a high

¹²⁷ Shi, *supra* note 125.

¹²⁸ CPL, *supra* note 2, art. 53.

¹²⁹ Interview with anonymous China Mainland lawyer, *supra* note at 71; *See also Sanlu Facing Class Action Lawsuit*, *supra* note 34 (“In practice, however, courts often turn down group suits, preferring to deal with cases one-by-one to look more productive and avoid running afoul of Communist Party officials, who ultimately control the judiciary.”).

¹³⁰ Chen, *supra* note 5.

burden, despite a clear presumption of causality. This is especially true for victims who fall sick at a later date after the period of high risk has passed.

VI. ALTERNATIVE DISPUTE RESOLUTION: AN IMPERFECT SOLUTION TO PROTECT DUE PROCESS RIGHTS AND THE POTENTIAL FOR REPRESENTATIVE MEDIATION

A. Mediation and Direct Negotiation Not Available to Victims

This essay has illustrated how formal procedural due process is subject to political interference, and thus access to the courts in practice is discretionary. However, a party's ability to obtain a remedy is not limited to the court system. Especially in cases such as the Milk Scandal where it is clear that political interests in efficient settlements are high, it would be logically more rational for parties to consider alternative dispute resolution methods where they have a greater likelihood to be included and heard in settlement decisions. One group of lawyers recognized the value of out of court settlement and attempted to directly contact Sanlu officials to receive adequate compensation on behalf of a large class of victims.¹³¹ However, the Sanlu representatives refused to negotiate with the lawyer. It is unclear if it was an internal management decision or if they were simply following government orders. Scholarship suggests that it is difficult to access neutral mediation mechanisms, as mediation is institutionally controlled by government officials, especially in the rural areas.¹³² Thus, in cases where the government seeks to control the outcome of a dispute, mediation

¹³¹ Wang Biqiang, *Lawyers Rally Victims Against Milk Producer Sanlu*, ECON. OBSERVER, Nov. 4, 2008, <http://www.eeo.com.cn/ens/Industry/2008/11/28/121847.shtml> ("[O]n November 24, a small group of three attorneys led by Xu Zhiyong paid a visit to Sanlu Group's Shijiazhuang, Hebei Province office. . . . [T]hey handed over three documents: a list of names of victims they represented, a letter urging compensation for victims affected by Sanlu's tainted milk, and a proposal on how they should be compensated. . . . [A]ccording to Xu, the letter they handed over to Sanlu was a demand for fair negotiation and settlement out of court to avert court action.") .

¹³² "Mediation in Anxiang County is principally an exercise of state power by the local bureaucrats under the guise of tradition. It is imposed on peasants by the village and township authorities. Mediators are appointed by the government and are expected to carry out government policies in mediation. They are assessed, awarded, or punished by the government according to performance standards set by the government. In that sense, they are agents of the state who are fulfilling political stipulations that they must maintain stability." Fu, *supra* note 105 at 122.

would only reinforce the result of a predetermined government plan or outcome.

B. Inadequacy of the Petition System

Parties have an unlimited right to petition branches of the government and the courts for assistance. The Petition System is not governed by law, but is rather a vestige of historical custom. Despite recent reforms to “institutionalize” and “legalize” the Petition System, it still remains a flexible, multipurpose governing tool beyond the control of formal law. A petition can contain both legal and extralegal arguments and demands. Parties subject to an unfavorable legal judgment can even appeal the judgment to a higher court and to government officials simultaneously. Parties are free to choose the course of their petitioning strategy, and its lack of finality enables parties to petition for prolonged periods of time.¹³³ Thus, when the courts refused the victims’ lawsuits, it is not surprising that some of these parties determined that their alternative course of action should be to petition the government to intervene directly. When the legal system either fails to provide adequate remedies, or is politically barred, the public expects the government to fill the legal void by providing an adequate remedy.¹³⁴ The government’s ultimate power to alter judicial decisions or to interfere directly reinforces the subordinate role of the judiciary to the political branches.

Since the Administrative Law substantially limits plaintiffs’ right to challenge government policy, and the government did not admit legal liability in the Sanlu cases,¹³⁵ the petition system is practically

¹³³ For a complete analysis of the petition system see Minzner, *supra* note 31.

¹³⁴ “A group of Chinese parents whose children were poisoned by tainted domestic dairy products said they would reject a government-sanctioned compensation package. Instead, they said they would press for long-term health care for the victims and demand medical research into the illnesses that still afflict tens of thousands of children. The parents, who have gathered 250 signatures since Sunday [Jan. 11, 2008], have become an irksome challenge to officials seeking to quell public anger over the widespread contamination of the nation’s dairy supply. . . . Zhao Linhai, 37, the father of a 4-year-old boy made ill by the milk, said the \$160 million compensation plan announced last month was inadequate and failed to address the medical needs of children whose health had been profoundly damaged.” Andrew Jacobs, *Parents Reject China Milk Settlement*, N.Y. TIMES, Jan. 14, 2009, at A9, available at <http://www.nytimes.com/2009/01/14/world/asia/14china.html>.

¹³⁵ The removal and resignation of several government officials in connection with the Scandal illustrates the government’s consciousness of its responsibility and administrative failure. However,

the only mechanism through which individuals can attempt to challenge government policy. In the Sanlu cases, since the victim's compensation was established as a matter of policy, rather than as a legal judgment through the court process, the victims can only appeal to the government directly to amend their policy. The following example illustrates how the petition system was used by Sanlu victims.

Zhao Linhai, a father of a three year old, who was among the nearly 300,000 children made ill by milk formula, was among four parents who handed the Ministry of Health a petition with hundreds of parents' names attached. A Health Ministry official told reporters that his office was talking to the parents, and would let them know within two weeks if their petition would be formally accepted for passing on to government officials. They would then get a full written reply within two months, under China's traditional "letters and petitions" system for reporting grievances.¹³⁶

While a complete analysis of the petition system is beyond the scope of this article, it should be noted that very few petition claims are actually successful. The petition system is arguably most successful when higher authorities have an interest in resolving a

social responsibility and administrative failure does not equal legal liability under the State Compensation Law, which only provides for a limited scope of criminal infringements. See Xinhua, *Officials, Company Manager Sacked Following Baby Milk Powder Scandal*, CHINA VIEW, Sept. 17, 2008, http://news.xinhuanet.com/english/2008-09/17/content_10046973.htm ("Zhang Fawang, vice mayor in charge of agricultural production of Hebei provincial capital Shijiazhuang, and Sun Renhu, the city's animal husbandry administration chief, were fired late Tuesday following legal procedures, according to a decision made by the city's legislative body. Shijiazhuang Food and Drug Administration Bureau director Zhang Yi and the city's Quality and Technical Inspection Bureau chief Li Zhiguo were also dismissed from their posts for loose supervision on the milk suppliers. Tian Wenhua, the board chairwoman and general manager of Shijiazhuang-based dairy giant Sanlu Group, was also fired from her posts. She was also removed from her post as the secretary of the corporation committee of the Communist Party of China (CPC), according to Party authorities of Hebei Province and Shijiazhuang City."); Lee Spears, *China Revokes 'Inspection-Free' Right Amid Milk Scare*, BLOOMBERG, Sept. 18, 2008, <http://www.bloomberg.com/apps/news?pid=20601080&sid=a1rfKvOp3xwc&refer=asia> ("[T]he mayor of Shijiazhuang Ji Chuntang resigned as a result of the scandal."); *More Officials Punished over Sanlu Scandal*, Xinhua, Mar. 20, 2009, http://www.china.org.cn/government/central_government/2009-03/20/content_17477922.htm ("Wang Bubu, director-general with the law enforcement and supervision department of AQSIQ, was removed from his official and party posts. Lu Yangang, deputy director-general with SAIC's food circulation supervision department, was removed from his job.") Despite failing to accept legal liability, Premier Wen Jiao Bao reportedly stated that "his government is partly responsible for the tainted milk incident, particularly concerning industry regulation." *Wen Wants Basic Research Beefed up*, CHINA DAILY, Oct. 17, 2008, at A1, available at http://www.chinadaily.com.cn/china/2008-10/18/content_7118614.htm.

¹³⁶ Emma Graham-Harrison, *China Parents Press Demands in Wake of Milk Sentences*, REUTERS, Jan. 23, 2009, <http://uk.reuters.com/articlePrint?articleID=UKTRE50L0ZG20090123>.

dispute to maintain social stability in a certain area or among a certain group. The petition serves as a means for higher officials to gain knowledge of local situations. In the case of the Sanlu settlement, the government was aware of the victims' demands when establishing the compensation scheme. Similar petitions were attempted in response to discontent with the Sichuan Earthquake compensation scheme, which were all unsuccessful. The petition system is not likely to be an open channel for 'appellate review' for the Milk Scandal victims.

Despite its limited role as an arbitrator, extensive use of the petition system by a large group of people has the potential to exert pressure on the government to respond to a specific issue. The Sanlu Case suggests that prolonged substantial pressure on the Ministry of Health did procure this intended result. In late February, the Ministry of Health issued its "Response to Petitioners' Questions Concerning the Sanlu Milk Scandal." Significantly, the Ministry asserted that if a plaintiff does not accept the State compensation, it can initiate a lawsuit according to law.¹³⁷ The petitioners' response was thus to obtain an official response, but even a formal response does not have binding legal effect. Thus, the ministry's 'clarifications' do little to assure victims that the courts will accept their cases according to civil procedure law.

VII. THE INTERNET HAS POTENTIAL TO PRESSURE THE GOVERNMENT TO IMPROVE PROCEDURAL DUE PROCESS

Both the government and the public have recognized the media as the most powerful forum to spread knowledge, shape public opinion, and call for collective action. The government and public's often intense struggle to control the media illustrates that the media's potential is well understood by all concerned parties. There is evidence that as early as June 30, 2008, customers posted messages "on the website of the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), complaining of

¹³⁷ 广州卫生部: 问题奶粉患儿家长不接受赔偿可起诉, 公盟, Guangzhou wei sheng bu: wen ti nai fen huan er jia zhang bu jie shou pei chang ke qi su [*Health Department: Worried Parents of Children Sickened by Milk Powder Refuse Compensation and Begin a Lawsuit*], GONG MENG [OPEN CONSTITUTION INITIATIVE], Feb. 27, 2009, http://www.gongmeng.cn/sub_r.php?zyj_id=2275.

five babies with kidney stones in Hunan Children's Hospital."¹³⁸ The government's censorship role to "maintain social stability" and protect China's public image during the Olympics came at the expense of the health of China's youngest citizens. The government effectively censored "all food safety issues" during the Olympics, and the story did not go public until September 10, 2008.¹³⁹

Perhaps in its greatest public relations event was when Premier Wen Jia Bao visited the victims of the Sichuan Earthquake, when both Premier Wen and the Chief Justice of the Supreme People's Court held their first internet forum with the public on February 26. The forum was held through a popular blog, and enabled any person who registered with the site to post a question. The questions directed to the Chief Justice were remarkably candid. One netizen asked: "what are the restrictions to a judge's power? What is the nature of a judge's independence?" In a similar question, another netizen asked: "The CCP also must respect the law, this is common knowledge from constitutional law, I would like to ask what is the relationship between the CCP officials and judicial independence in decision making?"¹⁴⁰ Significantly, one netizen directly asked the chief justice about the status of accepting the milk cases: "Last year there were natural and man-made disasters. After the Sanlu Milk Scandal, with regard to the civil compensation cases, the public does not understand what happened. Could you please explain?" The Justice's answer was immediately copied throughout the Chinese internet, and was coordinated by two major articles titled: "The Supreme People's Court has Already Prepared to Accept the Sanlu Milk Scandal Compensation Cases."¹⁴¹ The other article was

¹³⁸ *Timeline of China's Tainted Milk Scandal*, CAIJING MAGAZINE, Dec. 31, 2008, <http://english.caijing.com.cn/2008-12-31/110044273.html>.

¹³⁹ Phelim Kine, *Censorship Isn't Good for China's Health*, WALL ST. J., Oct. 11, 2008, <http://www.hrw.org/en/news/2008/10/11/censorship-isnt-good-chinas-health>.

¹⁴⁰ 人民网强国社区, 最高人民法院常务副院长沈德咏做客强国论坛谈着力加强法院自身建设, Zui gao renmin fa yuan chang wu fu yuan zhang Shen Deyong zuo ke qiang guo lun tan zhe li jia qiang fa yuan zi shen jian she [Vice President of Supreme People's Court, Shen Deyong, Was a Guest on Internet Forum Discussing How to Naturally Strengthen the Court], BBS.PEOPLE.COM.CN, March 2, 2009, <http://www.people.com.cn/GB/32306/33093/147418/index.html>.

¹⁴¹ 高法副院长: 法院已做好准备受理三鹿奶粉赔偿诉讼, 中国网, Gao fa fu yuan zhang: Fa yuan yi zuo hao zhun bei shou li Sanlu nai fen pei chang su song [Vice President of the Supreme People's Court: Court has Already Prepared to Accept Sanlu Powdered Milk Compensation Cases], CHINA.COM.CN, Mar.3, 2009, http://www.china.com.cn/news/txt/2009-03/03/content_17361404.htm.

similarly titled “The Chief Justice of the Supreme People’s Court Responded to the Public: The Court will Immediately Accept the ‘Poison Milk’ Civil Compensation Case.”¹⁴² The Supreme Court Justice explained that due to the complexity of the issues, the court was not prepared to accept the cases until it had done thorough research. The response further stated that the courts were now prepared to accept the cases, but acknowledged that 95% of the victims had already accepted compensation and hence litigation would be limited. In choosing to answer this question, the Chief Justice clearly intended to use this opportunity to improve its image on the internet, where it has been most deeply criticized among discontented bloggers. While it must be acknowledged that it is unprecedented for the Supreme People’s Court to use the internet to directly answer critical questions about sensitive topics that have thus far been masked by government secrecy, this internet campaign should also not be overestimated. The officials chose which questions to answer, and used the forum to increase its own legitimacy concerning how it has handled both sensitive issues and its dual role as a legal arbiter and a political organ. Despite its use as a propaganda tool, this event signifies that the government realizes that its legitimacy in a networked world of instant communication requires officials to be more accessible and responsive to public concerns. The availability of information and citizens’ willingness to question its’ leadership’s management suggests that the government may consider increasing its reliance on law as a tool to protect itself from public criticism. The development of procedural due process may hinge on public demand for greater official respect for not only substantive justice, but also for a predictable and reliable judicial process.

It is unclear how Beijing lawyers and victims throughout the country were able to find each other. Some Chinese lawyers have suggested that the lawyers likely went to local hospitals to find victims and offer support. However, there is also evidence on the

¹⁴² 徐博 & 周婷玉, 最高人民法院常务副院长沈德咏公开回应: 随时受理“毒奶粉”民事赔偿, 齐鲁晚报, Xu Bo & Zhou Tingyu, Zui gao ren min fa yuan chang wu fu yuan zhang Shen Deyong gong kai hui ying: Sui shi shou li “du nai fen” min shi pei chang [*Vice President of Supreme People’s Court, Shen Deyong, Made Public Response that Courts Would Accept “Poisonous Milk” Civil Compensation Cases at any Time*], QI LU WAN BAO, Mar.3, 2009, at A16-18, available at <http://www.qilwb.com.cn/display.asp?id=383058&fd=2009-03-03>.

internet that suggests plaintiffs' use of the internet to share information and coordinate actions. A father of a three year old victim created a Google groups website to enable victims from across the country to contact each other. The website is quite extraordinary in that over 100 parents have left their personal information such as their child's medical diagnosis, in addition to cell phone numbers, sms, Skype and email contact information. This forum commenced on January 1, 2009 and continues to be used, despite censorship crackdowns.¹⁴³ At the time of this writing, 393 people signed an online petition to support a civil action to "Reject Current Compensation."¹⁴⁴ While it is unclear whether this website is a reliable source, it does suggest that victims attempted to use the internet to share information, coordinate action and generally contact each other.

After the scandal was announced in September, both domestic and international official media, scholars, and bloggers used the internet to share both intellectual ideas and emotional responses. The response has been so overwhelming such that a search for "Sanlu" in English or Chinese in nearly any relevant blog or news source will produce numerous results. There are even Youtube videos of official Chinese reports, international reporters' coverage, and dissenters' views. The widespread use of the internet in China suggests that it is becoming increasingly easier for individuals to access a wide range of information beyond official TV and newspaper reports. The public dialogue and intense scrutiny of the government's response may pressure the government to accelerate legal reform in civil tort litigation, food safety and further clarify ambiguities between procedural and substantive laws. Even Premier Wen Jiao Bao has embraced the internet in a recent PR activity to communicate directly with Chinese "netizens" to hear their concerns and grievances, where over 300,000 questions were posted in one morning.¹⁴⁵ The significant use of the internet and

¹⁴³ See 国务院令 第292号, Guo wu yuan ling di 292 hao [State Council Order No. 292] (promulgated by the Standing Comm. St. Council, Sept. 20, 2000, effective Sept. 25, 2000) 4 国务院令: 1949.10-2001.4, GUO WU YUAN LING: 1949.10-2001.4 2685 (P.R.C.).

¹⁴⁴ See Posting to 结石宝宝之家, Jie shi bao bao zhi jia [Kidney Stone Babies Blog] , <http://www.jieshibabao.com/bbs/thread-3622-4-1.html>.

¹⁴⁵ 姚大伟, 温家宝网聊推进网络民主, Yao Dawei, Wen Jiabao wang liao tui jin "wang luo min zhu" [Wen Jiabao Chatted Online to Promote "Internet Democracy"], GUO JI XIAN QU DAO BAO [INT'L

extent of government censorship in the Sanlu case would be an interesting topic for further research, but is beyond the scope of this paper.

VIII. CONCLUSION

The enormous scale and seriousness of harms caused by the Sanlu Milk Scandal posed both legal challenges for the judiciary and political challenges for the government leadership. A balance between protecting the economic interests of the creditors and satisfying the demands for victims' compensation could only be achieved through a carefully coordinated government plan. Perhaps the greatest "winner" in this tragedy is Sanyuan Company, who was able to purchase Sanlu's assets without its liabilities. Similarly, for those victims who only suffered minor injuries, free medical care and a small stipend might be considered adequate compensation. Considering the difficulties in enforcing legal judgments and the urgency for medical attention, many rural victims might have been satisfied by the government response. Such public opinion polls are hard to obtain in China, and the internet is a biased forum since certain social groups are more likely to have access to it than others. However, by circumventing the legal process, the Chinese government has again discredited the vital function of the legal system and the role of lawyers in civil society. Thus, perhaps by attempting to maximize substantive justice for the greatest number of victims in a practical manner, some government officials have inadvertently or intentionally undermined procedural due process reform, which is a prerequisite to effective reform in substantive tort law.