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## **Class Wars: The Dilemma of the Mass Tort Class Action**

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## CLASS WARS: THE DILEMMA OF THE MASS TORT CLASS ACTION

*John C. Coffee, Jr.\**

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### INTRODUCTION

Legal change—like organic evolution—can occur at varying paces.<sup>1</sup> Long periods of gradual evolution are sometimes punctuated by brief moments of rapid, irregular change. Recent developments in class action practice bear witness to this phenomenon: during the 1990s, evolution has given way to mutation. At least with respect to mass torts, the development of the class action had been slow and halting. Well into the 1980s, federal courts uniformly resisted attempts to certify such mass tort class actions, largely out of concern that the interests of the individual litigant would be submerged within any large-scale proceeding.<sup>2</sup> By the

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1. Modern evolutionary theory sees evolution as characterized by "punctuated equilibria": long periods of stasis interrupted by events causing rapid change. See Niles Eldredge & Stephen J. Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *Models In Paleobiology* 82, 82-115 (Thomas J.M. Schopf ed., 1972); Stephen J. Gould, *The Panda's Thumb: More Reflections in Natural History* 179-85 (1980).

2. See Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 *Tex. L. Rev.* 211, 212-13 (1991) (discussing cases). For a fuller discussion of the case law up to the 1990s, see *infra* text accompanying notes 37-51. Today, however, federal courts appear to be moving from hostility to receptivity, at least with regard to proposed settlements of mass tort class actions. For examples of recent decisions in which courts have certified a mass tort class action for personal injuries, see *Ahearn v. Fibreboard Corp.*, No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062, at \*5 (E.D. Tex. July 27, 1995) (approving settlement of asbestos-related claims under Rule 23(b)(1)(B)); *In re Copley Pharmaceutical, Inc., "Albuterol" Prods. Liab. Litig.*, 161 F.R.D. 456 (D. Wyo. 1995) (denying motion to decertify Rule 23(b)(3) nationwide personal injury class action for drug contamination with unknown effects); *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995) (certifying Rule 23(b)(3) nationwide class action for tobacco-related illnesses); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (certifying class of breast implant recipients); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (approving settlement of asbestos class action); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 911 (E. & S.D.N.Y. 1991) (certifying class of beneficiaries of asbestos settlement trust pursuant to Rule 23(b)(1)(B)), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993). The leading decisions upholding personal injury mass tort class actions when the class members were exposed and/or injured at widely varying times and under widely

end of the 1980s, however, the tide began to turn in favor of class certification, as the advocates of aggregative techniques increasingly gained the upper hand over the defenders of individual litigant autonomy. Already, some have described this transition as a paradigm shift, signaling a fundamental movement away from the traditional bipolar organization of litigation to a new, more collectivized structure.<sup>3</sup>

While acknowledging this transition, others have expressed normative reservations about it.<sup>4</sup> Their concerns have focused largely on "process values": in particular, whether the shift from an intellectual rationale based on "individual rights" to one focused on "group interests" abandons the "deep-rooted historic tradition that everyone should have his own day in court."<sup>5</sup> So framed, the debate may seem to pose the usual

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varying circumstances are *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989), and *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163-67 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Nonetheless, federal courts remain largely unresponsive to mass tort class actions that are not presented to them as pre-arranged settlements in the form of "settlement classes." Attempts to certify a mass tort class action over the objections of defendants still regularly fail. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) (granting mandamus and reversing certification of nationwide class action of hemophiliacs infected by the AIDS virus); *Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 721 (modifying district court's certification of asbestos litigation trust claimants); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (granting mandamus and reversing certification of class of individuals exposed to asbestos); *Kurcz v. Eli Lilly & Co.*, 160 F.R.D. 667 (E.D. Ohio 1995) (declining to certify class composed of women exposed to DES).

As a definitional matter, personal injury mass tort class actions need to be distinguished from property damage class actions. The latter have been more frequently certified and inherently tend to involve both greater homogeneity among class members and greater commonality in their factual issues. See, e.g., *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992) (conditionally certifying class of some 480 potential class members with friable asbestos in their buildings on eight common issues), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

3. See Judith Resnik, *From "Cases" to "Litigation,"* 54 *Law & Contemp. Probs.*, Summer 1991, at 5; Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 *Brook. L. Rev.* 659 (1994). For a general overview of the modern development of the class action, see Arthur R. Miller, *Comment, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 *Harv. L. Rev.* 664 (1979).

4. See Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 *B.U. L. Rev.* 213, 287-304 (1990) (reviewing Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987)); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *Cornell L. Rev.* (forthcoming 1995) (manuscript at 104-05, on file with the Columbia Law Review); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 *Cornell L. Rev.* 779, 820-22 (1985) [hereinafter *Trangsrud, Joinder Alternatives*]; Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 *U. Ill. L. Rev.* 69 [hereinafter *Trangsrud, Mass Trials*]; Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 *U. Ill. L. Rev.* 43, 44; see also Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 *J.L. & Com.* 1 (1990) (criticizing ALI proposals for consolidation and claim aggregation).

5. *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Charles A. Wright et al., *Federal Practice & Procedure* § 4449, at 417 (1981)).

clash between efficiency and fairness, between those concerned with the high public and private costs of duplicative litigation and those committed to an individual's right to control litigation involving important personal interests.<sup>6</sup>

The problem with this supposed tradeoff is that it distorts the "real world" of mass tort litigation by making unwarranted assumptions. In fact, the dilemma in mass tort reform arises precisely because neither efficiency nor fairness, taken alone, is easily realizable. On the one hand, the efficiency claims made for the mass tort class action are problematic because, as this Article will argue, claim aggregation through class actions systematically tends to disfavor certain identifiable, but under-represented, classes of tort victims. On the other hand, litigant autonomy in the mass tort context may be an illusory goal. Without discounting the urgency or uniqueness of the ethical issues that arise in mass tort class actions,<sup>7</sup> this Article recognizes that individual plaintiffs have weak to nonexistent control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation. Accordingly, proposals for the return to a traditional system of individual case litigation are apt to be as quixotic as they are costly.

All that is certain about mass tort litigation is that it places a heavy burden on the federal courts, while producing often modest and delayed benefits to plaintiffs. As a result, "a consensus has now emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process."<sup>8</sup> This consensus, however, unites strange bedfellows. For some academics, the seductive appeal of a "public law" vision of litigation, stressing communitarian values and alternative modes of dispute resolution, has led them to reject the traditional bipolar model of litigation in favor of a more bureaucratic, problem-solving model in which courts negotiate and impose a solution.<sup>9</sup> For "law and economics"-oriented academics, aggregation

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6. Indeed, some have framed the debate in exactly these terms. See Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 *Yale L.J.* 745, 759-61 (1990). Others define the current debate as between "reformers" and "preservationists." See Stempel, *supra* note 3, at 688. This seems essentially the same debate.

7. For the best statement of these issues, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L. Rev.* 469 (1994).

8. Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 *U. Ill. L. Rev.* 89, 89-90; see also David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 *Harv. L. Rev.* 851, 854 (1984) (advocating a model for handling mass torts that would rely on class actions, use probabilistic determinations of causation, allocate liability proportionately among defendants, and award scheduled damages to class members).

9. For the fullest and best statement of this vision, see Rosenberg, *supra* note 8; see also David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 *Ind. L.J.* 561, 569-74 (1987) (advocating "public law" tort model); Leon E.

makes sense because of the high costs of individual civil litigation.<sup>10</sup> Proceduralists and judges in turn often favor consolidation and class resolution of mass torts over the "old" individual case system because of the growing burden on the federal judiciary.<sup>11</sup> The one common denominator in this new genre is that the vast majority of commentators agree that there is a crisis, one characterized by high costs and unjustified fees, threatening recurrent corporate bankruptcies, and requiring some form of radical remedy or another.<sup>12</sup>

Unfortunately, this consensus frames the mass tort dilemma, rather than resolves it. Easy as it is to point out that mass tort litigation involves high transaction costs, one must move on to the inevitable next question: "compared to what?" Here, the costs (both private and public) of alternative approaches must be evaluated in terms of their likely actual operation, not their utopian potential. To date, few have done so. In the race to a new system of group litigation in which lawyers represent "interests," rather than individuals, few in particular have looked for the perverse incentives that almost inevitably arise at such junctures when client control over attorneys is weakened. No opening generalization about the modern class action is sounder than the assertion that it has long been a context in which opportunistic behavior has been common and high agency costs have prevailed.<sup>13</sup> If not actually collusive, non-adversarial

Trakman, *David Meets Goliath: Consumers Unite Against Big Business*, 25 *Seton Hall L. Rev.* 617, 628-40 (1994) (favoring mandatory class actions).

10. See, e.g., Peter H. Schuck, *Agent Orange on Trial 5-7* (1986); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 *Va. L. Rev.* 845, 884 (1987); Rosenberg, *supra* note 9, at 563, *passim*; see also Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 *Yale L.J.* 813, 814, 820-22 (1989) (book review) (noting the "intolerable consequences of relying on the tort system in mass toxic disaster cases"). Professor Rabin is, however, equally skeptical of the class action as an alternative and prefers non-tort alternatives such as administrative compensation schemes. See *id.* at 824-26. Social insurance systems are beyond the scope of this Article (although bankruptcy proceedings, which are discussed, do represent a non-tort alternative).

11. See, e.g., Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 *Tex. L. Rev.* 1039 (1986) (recommending statutory change to increase use of mass tort class actions); Jon O. Newman, *Comment, Rethinking Fairness: Perspectives on the Litigation Process*, 94 *Yale L.J.* 1643, 1644-46 (1985) (advocating reforms of litigation system to reduce costs and delay); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 *Ga. L. Rev.* 429, 434-35 (1986) (describing litigation crisis imposed by mass tort cases and impact on the tort system); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 *Ind. L.J.* 507, 507 (1987) (advocating use of injunctions against duplicative litigation and restrictions on opt out rights to increase efficiency of class action).

12. For examples of this genre, see Rabin, *supra* note 10, at 820-22; Rubin, *supra* note 11, at 434-38, 441; Paul C. Weiler & Christopher F. Edley, Jr., *Asbestos: A Multi-Billion Dollar Crisis*, 30 *Harv. J. on Legis.* 383, 392-95 (1993).

13. For discussion of the agency costs in class action litigation, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. Chi. L. Rev.* 877, 883-89 (1987) [hereinafter *Coffee, The Regulation of Entrepreneurial Litigation*]; John C. Coffee, Jr., *Understanding the*

settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members. A second generalization may be more controversial but also rests on an empirical foundation: courts have little ability or incentive to resist the settlements that the parties in class action litigation reach.<sup>14</sup> Thus, if the court's most powerful sword (namely, its authority to reject the settlement in a class action) will typically remain in its scabbard, the quest for accountability must look to other weapons and remedies.

Still, the possibility of opportunistic behavior and collusive settlements is not, standing alone, a sufficient basis for rejecting mass tort class actions. In truth, individual tort litigation is notoriously expensive<sup>15</sup> and

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Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 *Colum. L. Rev.* 669, 701-20 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *U. Chi. L. Rev.* 1, 12-27 (1991).

14. Few in-depth studies have examined the process by which the fairness and adequacy of a class action settlement is reviewed by the court. However, one recent study by staff members of the Research Division of the Federal Judicial Center provides some revealing insights. Studying all class actions closed between July 1, 1992 and June 30, 1994 in two federal district courts, these researchers found that the rate of settlement approval was very high. In one of the two studied courts (the Eastern District of Pennsylvania), preliminary data indicate that approximately 34 out of 38 proposed class action settlements (or 89%) were approved without changes (and two others were approved with changes); in the other district court (the Northern District of California), 26 out of 30 class actions (87%) were approved without changes, and the remaining four were approved with changes. See Thomas E. Willging et al., *Federal Judicial Center, Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992 and June 30, 1994* at 57-58 (Apr. 1995) (unpublished manuscript on file with the Columbia Law Review). Standing alone, these data could be consistent with either the conclusion that most settlements are fair and reasonable or the conclusion that courts are passive and accepting. Two other preliminary findings in their study, however, point to the latter conclusion. In the cases for which information was available (12 in the Eastern District of Pennsylvania and 5 in the Northern District of California), the median length of the fairness hearing on the class action settlement was 38 minutes in the first district and 40 minutes in the second district. See *id.* at 57. Such expedition seems inconsistent with careful judicial scrutiny of the settlement's fairness. Similarly, in approximately 83 to 84% of the cases studied in the two districts, the court awarded the exact amount of attorneys' fees requested by the plaintiffs' attorneys. See *id.* at 79-82. Again, because such deference in turn invites attorneys to make excessive demands, this finding in particular suggests a pattern of judicial passivity at the settlement stage.

15. One much cited estimate, based on asbestos litigation, is that transaction costs consume \$.61 of each asbestos litigation dollar (of which \$.37 is attributable to defendants' litigation costs). The plaintiffs therefore receive only \$.39 from each litigation dollar, and plaintiffs' attorneys only \$.24. See *Cimino v. Raymark Indus.*, 751 *F. Supp.* 649, 651 (E.D. Tex. 1990); see also Rubin, *supra* note 11, at 434 (citing Rand study and other studies showing that majority of payments made in product liability cases are for legal services). Even if these factual assumptions are correct, they imply that defendants' litigation expenses (\$.37) exceed plaintiffs' expenses (\$.24) by slightly more than 50%. The impact of these data on the case for mass tort actions is problematic, because "reform" may produce a wealth transfer from plaintiffs to defendants. It cannot safely be assumed that

arguably threatens to inundate the federal docket.<sup>16</sup> Mass tort class actions could then be a more effective system, at least viewed in terms of their ability to deliver compensation to victims, even if they are characterized by much self-interested attorney behavior and a resulting high rate of suspicious settlements.

Against this backdrop, this Article does not propose to eliminate mass tort class actions, but rather to restructure them by placing prudential limits on the problems that courts can competently handle. A balance must be struck between pragmatism and idealism, and, to do so, this Article will offer what it terms a "constrained autonomy" model for reconciling group litigation with individual rights. It does so because, whatever the plight of mass tort victims, there is today more reason to believe that group litigation and a public law approach aggravates, rather than alleviates, their problems.<sup>17</sup> The mass tort class action occupies a polar position at the extreme end of the continuum in terms of its relative vulnerability to abuse and exploitation. Although agency costs are inevitably high in all class actions, the mass tort class action is uniquely vulnerable to the danger of collusion and thus needs special safeguards. Increasingly, defense counsel have come to understand that the mass tort class action can be utilized to obtain cheap settlements that pay little attention to the interests of certain structurally underrepresented classes of claimants.

Other scholars have begun to note this dark underside to the mass tort class action,<sup>18</sup> but none has yet placed it in its fuller context. Originally, the class action was viewed by both sides as the plaintiffs' weapon, a technique for extorting settlements even in non-meritorious cases.<sup>19</sup> Throughout the 1980s, corporate defendants vigorously resisted the use of the mass tort class action, preferring even the alternative of a bank-

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reducing defendants' litigation costs will increase the recoveries to plaintiffs (although it will reduce the deterrent impact, if any, of mass tort litigation). Nor, if corrective justice considerations are taken into account, is it clear that plaintiffs should lose their opportunity to receive individualized damages because of the costs to defendants.

Mass tort litigation is, however, considerably less expensive when sampling techniques and consolidated trials are used, and in such cases there may not be the same reduction in settlement value that seems to accompany the mass tort class action. See *infra* text accompanying notes 156-162.

16. For data on the impact of mass torts on federal and state dockets, see *infra* notes 63-72 and accompanying text.

17. Some recent academic voices have also seen the problems with a "public law" vision. See, e.g., Linda S. Mullenix, *Mass Tort As Public Law Litigation: Paradigm Misplaced*, 88 *Nw. U. L. Rev.* 579, 580-82 (1994).

18. See Koniak, *supra* note 4 (manuscript at 104); Mullenix, *supra* note 17, at 580; John A. Siciliano, *Mass Torts: The Case Against a Special Case*, 80 *Cornell L. Rev.* (forthcoming 1995) (manuscript at 17-20, on file with the Columbia Law Review).

19. For the classic statement of this view, see Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 *Colum. L. Rev.* 1, 8-9 (1971). This same suspicion of an extortionate motive clearly runs through Judge Posner's decision in *In re Rhone-Poulenc Rorer Inc.*, 51 *F.3d* 1293, 1297-1300 (7th Cir. 1995).



ruptcy reorganization.<sup>20</sup> But with the 1990s, their perception of the class action has changed dramatically. Defendants have not only adopted the class action as their preferred means of resolving their mass tort liabilities, but have also actually begun to solicit plaintiffs' attorneys to bring such class actions (as a condition of settling other pending litigation between them).<sup>21</sup> Behind this transition lies defendants' discovery of a variety of procedures for minimizing their tort liabilities. Collectively, these amount to a new legal technology, the impact of which uniquely disadvantages future claimants. Most importantly, these techniques can be implemented only through the use of a mass tort class action.

In overview, this transformation is of historic significance: once a sword for plaintiffs, the modern class action is in some contexts increasingly becoming a shield for defendants.<sup>22</sup> Rather than serving as a vehicle by which small claimants can aggregate their claims in order to make litigation economically feasible (and thereby also gain negotiating leverage vis-à-vis defendants), the mass tort class action now often provides a means by which unsuspecting future claimants suffer the extinction of their claims even before they learn of their injury.

Why is this happening? The one safe generalization about mass tort class actions is that the traditional safeguards used by courts to guard against collusive settlements have little value or relevance here. Three basic factors explain the unique vulnerability of the mass tort class action:

First, courts themselves are "conflicted" because of the threat of docket inundation from individual mass tort cases, and thus they may be more willing to countenance doubtful settlements that they probably would not otherwise accept.<sup>23</sup> Indeed, the case studies on which this

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20. See *infra* text accompanying notes 163-171.

21. That some defendants today seek class certification, preferring class resolution to repetitive individual litigation, is beyond dispute. See David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 *Rev. Litig.* 1, 8-9 (1990). Defendants also regularly seek to extend the scope of the class action filed by plaintiffs. A good example is the class action filed over the defective Bjork-Shiley heart valve. Brought as a nationwide class action, defendants insisted that it be extended to a global class action. See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 154-55 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993); Michael Schachner, *Global Settlements Draw Praise, Scorn, Bus. Ins.*, Oct. 10, 1994, at 1, 35. Ordinarily, a defendant has no desire to be sued by additional plaintiffs and fights to define the class narrowly.

22. This Article will argue that the mass tort context is the leading such example, but is not the only one. Employment discrimination also represents an area in which individual claims for substantial damages are economically viable, but defendants increasingly prefer a class resolution. See J. Spencer Schuster, *Precertification Settlement of Class Actions: Will California Follow the Federal Lead?*, 40 *Hastings L.J.* 863, 865 (1989) (noting trend toward settlement class actions in variety of litigation contexts).

23. For discussion of the impact of mass tort actions on the federal docket, see *infra* text accompanying notes 63-72. Two distinct claims, however, need to be separated here at the outset.

First, there is the strong possibility that judges frame legal standards with their own self-interest in mind. Several recent procedural commentators have either made or conceded this observation as a starting point for analysis of procedural rules. Compare

Article will concentrate are ones in which activist judges became deeply involved in the negotiation of the settlement—with disastrous consequences for plaintiffs.

Second, the court's primary tool for regulating plaintiffs' attorneys in class actions—judicial control over plaintiffs' attorneys' fees—is less effective in the mass tort context because defendants can (and do) offer inducements to settle that are largely beyond the court's control.

Third, even when individual class members hold legally meritorious claims for significant damages, client passivity may remain the norm because many (and sometimes virtually all) class members are "future claimants"—that is, persons who have not yet experienced any symptomatic illness or disease, but rather share only a statistically enhanced risk of future illness or injury because of their exposure to a toxic product or process. To the extent that future claimants will remain rationally apathetic about a legal proceeding brought in their name (because they may have a low probability on an individual basis of experiencing actual, compensable injury), defendants have a strong interest in resolving such an action at an early stage well before any such class members experience injury and thus have an incentive to monitor their attorneys' conduct.

One other preliminary distinction needs to be understood about class actions. Although there are gray areas at the margin, class actions divide economically into "small claimant" classes and "large claimant" classes. In the former context, individual claimants lack legal claims that would be economically viable if asserted on an individual basis, while in the latter context most class members can attract competent counsel to represent them in individual actions on a contingency basis. Securities and antitrust class actions in particular tend to be thought of as "small

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Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. Legal Stud. 627, 629 (1994) (asserting that judicial behavior in procedural matters is likely to conform to judges' rational self-interest rather than to economic efficiency) with Janet C. Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. Legal Stud. 647, 647-48 (1994) (arguing that although judges' self-interest does play some role, this is not contrary to the public interest). Some judges have come perilously close to admitting that the mass tort litigation crisis is primarily a crisis of mind-numbing boredom, which requires appellate courts to approve the certification of mass tort class actions in order to relieve trial judges of "litigation 're-runs' for those who face a series of identical pending cases." See Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 328 (1983).

Second, there is the tougher empirical question of whether courts are in fact being overwhelmed. Although this Article accepts the proposition that no reform will be accepted with regard to mass tort litigation unless it curbs the exponential growth in case filings, there remains some basis for skepticism about this constantly reiterated claim that courts are about to be overwhelmed by mass torts. The judicial system—state and federal—annually disposes of approximately 500,000 automobile accident cases each year, a number exceeding the claimants in any mass tort case, and does so without any seeming sense of crisis. See James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* 14 (1986). However, it is true that mass tort cases tend to be concentrated in specific areas (e.g., along the Eastern seaboard in the case of asbestos litigation), thus maximizing their congestive impact. See *infra* note 71.

claimant" classes,<sup>24</sup> whose members cannot afford to opt out and pursue individual claims.<sup>25</sup> Personal injury class actions, however, are populated by many class members with large individual claims. This distinction between "small claimant" and "large claimant" class actions helps to explain one other initially puzzling feature of class action practice and behavior: sometimes corporate defendants resist class certification vehemently, and sometimes they rush to embrace it (even soliciting the action). Under closer examination, defendants' behavior is consistent and rational. In "small claimant" class actions, defendants tend to resist class certification (because plaintiffs have no realistic alternative), whereas in "large claimant" classes, defendants increasingly prefer class certification for a variety of reasons, including both their desire to avoid repetitive awards of punitive damages and their hope to reach a "reasonable" global settlement with cooperative plaintiffs' attorneys.<sup>26</sup>

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24. See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 *Rev. Litig.* 79, 99 (1994).

25. See Macey & Miller, *supra* note 13, at 28. This generalization is no longer invariably true given the predominance today of institutional investors (who may hold sizeable stakes). See Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 *Yale L.J.* 2053, 2088-93 (1995). Nonetheless, in my view, institutional investors are likely to continue to prefer passivity (while allowing others to bring and maintain the class action) for extrinsic and reputational reasons. That is, because most institutional investors wish to remain in contact with corporate managements (to receive earnings forecasts and other "soft" information), and some (particularly private pension funds) are deeply conflicted about shareholder activism, the majority will prefer to free ride on the efforts of professional plaintiffs and specialized class action counsel and will not themselves initiate class actions.

26. Defendants also resist class certification in cases where plaintiffs have not been able consistently to win individual actions. Two examples illustrate this tendency. First, in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), the Seventh Circuit granted defendants' application for a writ of mandamus, overruling the district court's certification of a nationwide class of hemophiliacs infected by the HIV virus that causes AIDS. The decision seems to have been motivated chiefly by the circuit court's belief that class certification would give the plaintiffs an unjustified leverage over the defendants, chiefly because the plaintiffs were asserting a novel legal theory that had been generally unsuccessful in individual cases; in fact, plaintiffs had lost 13 out of the 14 individual cases that had gone to trial earlier. See *id.* at 1296. Such a weak track record gave defendants little reason to favor a global settlement.

A second example is furnished by defendants' intense resistance to the certification of a nationwide class action for smoking-related illnesses. See, e.g., *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995); see also Andrew Reidy & Robert Carter, *Tobacco Litigation: Looking for Cover*, *Legal Times* (Washington), Mar. 6, 1995, at S37, S38 (discussing efforts by tobacco industry to avoid the potentially vast liability arising from the *Castano* decision). To date, the only significant award in smoking-related litigation came in *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 505 U.S. 504 (1992), which the Supreme Court reversed and remanded for trial. See Gary T. Schwartz, *Tobacco Liability in the Courts*, in *Smoking Policy: Law, Politics, & Culture* 131, 133, 136-40, 144-45, 150-53 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

Against this backdrop, a roadmap of this Article is now in order. Part I initially will examine the development of, and dynamics within, the mass tort class action and then focus on the new technology for collusion that it has fostered. Three techniques—inventory settlements, settlement classes, and the deliberate definition of the class to cover only future claimants—have become standard and deserve special attention. An additional but still doctrinally uncertain tactic is the certification of a mandatory or “non-opt out” class action in an action that is primarily for monetary damages.<sup>27</sup> Use of this technique would be greatly expanded in a new version of Rule 23 that is now before the Advisory Committee on Civil Rules.<sup>28</sup>

Because the case for reform depends on first recognizing how exposed the position of the future claimant is in a mass tort class action, Part II will examine in detail several recent mass tort class actions involving asbestos, breast implants, mass disasters, and defective products. From these case studies, an attempt will be made to generalize the procedural tactics that facilitate non-adversarial settlements that disadvantage class members.

Part III will turn to the search for remedies. Clearly, the most vulnerable and least protected litigant in mass tort litigation is the future claimant. How should such persons be protected? Arguably, federal courts simply lack jurisdiction over such an “exposure only” class because no justiciable “case and controversy” exists for purposes of Article III. Similar arguments have been made under the Bankruptcy Code as to when future claims are dischargeable in bankruptcy, and Part III suggests that a synthesis is necessary to treat future claims similarly in these related contexts. Part III also explores the non-constitutional limitations on the authority of the class representative to settle future claims and suggests that these limitations may preclude the certification of an exclusively future claimant class action.<sup>29</sup>

The future claimant’s greatest problem is that the recovery in a mass tort class action can be easily eroded by the impact of inflation and by the

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27. A non-opt out class action may be certifiable under Rule 23(b)(1)(B) if there is a “limited fund.” To exploit this technique, defendants have attempted to structure such a “limited fund” by focusing on the insurance policies covering the defendant. See *infra* notes 142–150 and accompanying text.

28. See Bone, *supra* note 24, at 80–86. The proposed revision of Rule 23 greatly increases the discretion of the trial judge by eliminating the separate class certification categories of Rule 23 in favor of a unitary standard. Today, considerably more rigorous requirements apply in the case of a class action brought under Rule 23(b)(3) to seek a monetary judgment than in the case of actions brought under Rule 23(b)(1) or (b)(2). As a practical matter, the proposed unitary standard will grant discretion to the trial judge to relax the notice requirements and to deny any right to opt out in the case of a class action for a money judgment. For the text of the proposed Rule, see *id.* at 109–12.

29. As suggested later, an exclusively future claimant class is more likely to be passive than one which includes “high stake” present claimants. Thus, from a policy perspective, requiring the class to consist of present claimants as well as future claimants increases the possibility that some class members will be in a position to monitor their attorneys actively.

possibility that the actual number of claims made against the settlement fund exceeds that projected. Although courts to date have given little attention to these problems, Part III argues that the "superiority" requirement of Rule 23(b)(3) requires the court to find that a proposed settlement adequately protects the future claimant against those dangers. Such a finding will be difficult to make in lump sum settlements (where the defendant is not responsible if the actual rate of claims exceeds that projected) unless the settlement permits the future claimant to opt out as of the time of the discovery by the claimant of the injury or illness if the real economic benefits will be less than that originally projected. As one means of satisfying the "superiority" requirement, this Article proposes a "limited" class action that combines a mandatory class at the liability stage with an individualized damages determination. However, this right to individualization at the damages stage could be conditioned on restrictions (including the use of an arbitration forum) that save congested federal district courts from inundation. This compromise accomplishes two important things at once: (1) it protects the future claimant; and (2) it spares the courts from endlessly repetitive mass tort trials.

Part III also seeks to redefine the future claimant's right to opt out. Here, a lively debate has begun to surface. Those most anxious to shrink the size of the federal docket have begun to question whether there need be any such right at all. In contrast, Part III will argue that the right to opt out has to be specifically redefined for the mass tort context where long latency periods trivialize the existing right. In the case of future claims, the right should be reformulated as a deferred right, which is triggered by the discovery of the injury. Both the limited class action and the deferred opt out are examples of what this Article will call a "constrained autonomy" model of litigation, which seeks to steer a middle course between the advocates of group litigation and those of individual autonomy. A premise of this approach is that reform must prioritize litigant autonomy interests, protecting those that are most important and compromising those that are not.<sup>30</sup>

The most ethically disturbing problem with the mass tort class action may be its tendency toward "structural collusion." Even in the absence of bad faith, suspect settlements result in large measure because of the defendants' ability to shop for favorable settlement terms, either by contacting multiple plaintiffs' attorneys or by inducing them to compete against each other. At its worst, this process can develop into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant. Here, it is necessary to confront the comparatively new institution of the "settlement" class action. Part III will thus

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30. Elsewhere, I have argued that the damage determination phase triggers a more important litigant autonomy interest than the liability stage because an opt out right at this stage protects the "high stakes" plaintiff from a settlement that pays such claimant only the median value of all claims. See Coffee, *The Regulation of Entrepreneurial Litigation*, *supra* note 13, at 925-30.

consider various approaches that can prevent defendants from choosing plaintiffs' counsel.

Finally, Part III faces the obligation to compare alternatives, rather than simply report imperfections, and contrasts the mass tort class action with the mass tort bankruptcy. In terms of both its fairness to creditors and its ability to rehabilitate a financially strained debtor, the latter wins on all counts—except its ability to preserve management in control.

### I. A PROFILE OF THE MASS TORT CLASS ACTION

At the outset, one obvious and inescapable fact about mass tort litigation must be placed at center stage in any public policy analysis: mass tort litigation typically involves seriously injured persons who lack insurance or substantial financial resources. Immediately, this distinguishes mass tort litigation from most other class action contexts—such as securities or antitrust class actions—where the class members tend to be diversified shareholders or substantial economic entities whose injuries are more modest in proportion to their net worth. In these other contexts, commentators largely have agreed that deterrence, not compensation, should be the rationale of the class action,<sup>31</sup> and they have doubted that compensation is likely to be achieved.<sup>32</sup> Insurance and indemnification statutes, they argue, imply a basic circularity, with shareholders paying the cost of insurance against litigation victories by other shareholders.<sup>33</sup>

In the mass tort context, however, the participants at least perceive compensation to be the primary objective. Not only are the victims often seriously injured (as, for example, in asbestos litigation) and financially dependent on a litigation-funded recovery, but deterrence is a much more problematic objective. Because of the long latency periods associated with most mass tort injuries, the defective or toxic product may well have been removed from the market long before the class action is ever brought.<sup>34</sup> As a result, some commentators have argued that neither the goals of deterrence nor corrective justice are realizable in the mass tort

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31. See Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 *Geo. L.J.* 1733, 1739–41 (1994).

32. See Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 *J. L. Econ. & Organization* 55, 84 (1991) (noting that in most shareholder suits, "settlements provide minimal compensation").

33. See Dale A. Oesterle, *Limits on a Corporation's Protection of its Directors and Officers from Personal Liability*, 1983 *Wis. L. Rev.* 513, 570–73.

34. This was the case in the asbestos, silicone breast implants, and Dalkon Shield class action cases—to give only the examples of the best known recent mass tort class actions. Agent Orange was also infrequently used after the Vietnam War. In the case of asbestos, federal law sharply restricted its use in any products after 1970. See Federal Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1988 & Supp. V 1993). Yet the first important case establishing liability was not until 1973. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

setting.<sup>35</sup> Others warn that deterrence is a blunt sword and fear that what may in fact be deterred is innovation generally.<sup>36</sup> In any event, the focus of both the courts and the litigants in mass tort cases has been almost wholly preoccupied with victim compensation: how to fund at least minimal recovery for desperately injured individuals. But, as will be seen, it is precisely within these terms that they have been least successful.

### A. *The Institutional Backdrop*

Mass tort actions matured during the 1980s. Tabulating the actions brought during that decade, two respected commentators have noted: "Hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices or toxic substances."<sup>37</sup> Those who have sought to explain this phenomenon of mass "claiming" have identified cultural and social factors that may be more important than any legal developments over this period.<sup>38</sup> Whatever the reason, the most important mass torts that arose during this decade—asbestos, Agent Orange, and the Dalkon Shield—each involved nearly 200,000 or more claimants, and collectively they remade both bankruptcy law and the class action. At the beginning of the decade, the mass tort class action was uniformly rejected by appellate courts. By the end of the decade, it was at least provisionally embraced by many.

Some of the reasons for the initial judicial skepticism of the mass tort class action were obvious. First, the Advisory Committee that drafted Rule 23 of the Federal Rules of Civil Procedure had suggested that a " 'mass accident' . . . is ordinarily not appropriate for a class action" be-

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35. See Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 Md. L. Rev. 951, 962 (1993) ("A system designed to achieve corrective justice goals in two-party accidental harm cases simply cannot be accommodated effectively to the demands of mass tort cases [involving] . . . long-latent toxic disorder."); see also Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. Leg. Stud. 779, 785 (1985) ("[T]he deterrent value of legal penalties for managerial error depends heavily on the proximity of the penalties to the actions for which they are assessed.").

36. See Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277, 305-20 (1985); see also Peter Huber, *Liability: The Legal Revolution and Its Consequences* 11 (1988) (claiming that costs associated with legal liability are substantial component of prices paid by consumers for goods and services). But see Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 Stan. L. Rev. 539, 547-51 (1990) (disputing methodology employed by Peter Huber to reach his estimate of \$300 billion as annual cost of civil litigation to the U.S. economy).

37. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961, 961 (1993). In truth, the process began before 1980. Between 1961 and 1984, federal court tort filings nearly doubled. See John G. Fleming, *The American Tort Process* 3-4 (1988).

38. See Hensler & Peterson, *supra* note 37, at 1019-26 (discussing impact of mass media, social networks, physician contacts, and availability of plaintiff law firms on "claiming" behavior of ordinary citizens).

cause of the presence in such cases of significant issues (including causation and possible defenses) that would impact upon the individual class members differently.<sup>39</sup> Individual issues and defenses, it was felt, would likely overwhelm the common questions, and eventually disaggregation would become inevitable. Judicial decisions following the 1966 revisions of Rule 23 were quick to take this hint to decline class certification in mass tort cases.<sup>40</sup>

Even when trial courts did certify a mass tort class, they were usually reversed.<sup>41</sup> In 1981, Judge Spencer Williams certified the first Dalkon Shield class action, but in 1982 the Ninth Circuit reversed him.<sup>42</sup> Also in 1981, after the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri, the victims were certified as a class, but again a year later the Eighth Circuit reversed.<sup>43</sup> Other cases at the time encountered a similar fate.<sup>44</sup> In a little noted development, however, the Hyatt Skywalk cases were subsequently settled by means of a non-mandatory settlement class action.<sup>45</sup> In short, the practical message was that a class action could not be certified over the defendants' objections, but it could be utilized with their consent—that is, if a defendant's self-interest lead it to prefer a class action resolution over repetitive individual litigation.

The breakthrough in the attitude of appellate courts to the certification of mass tort class actions came first with asbestos. In 1986, in affirming class certification in an asbestos mass tort case, *Jenkins v. Raymark Industries*,<sup>46</sup> the Fifth Circuit was explicit about its motivation: "The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."<sup>47</sup>

39. Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). The Rule appears to have been chiefly drafted by Professor Benjamin Kaplan, who has explained his reasoning. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 386, 391-93 (1967). Others have suggested that Professor Kaplan's reasoning may not have reflected that of the Advisory Committee as a whole. See Resnik, *supra* note 3, at 14-15.

40. See, e.g., *Harrigan v. United States*, 63 F.R.D. 402, 407 (E.D. Pa. 1974) (rejecting class certification for class consisting of all paralyzed veterans injured by negligent urological surgery at Veterans Administration hospitals).

41. See Baughman, *supra* note 2, at 213 ("[A]ppellate courts have almost uniformly rejected this approach.").

42. See *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal.), modified, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

43. See *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), rev'd, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

44. See generally Richard A. Chesley & Kathleen W. Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. Cin. L. Rev. 467, 485-90 (1985) (summarizing decisions).

45. See Scott O. Wright & Joseph A. Coluss, *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L. Rev. 141, 142 (1984).

46. 782 F.2d 468 (5th Cir. 1986).

47. *Id.* at 473.



That same year, the Third Circuit also partially upheld a similar certification in another asbestos class action.<sup>48</sup> A year later, the Second Circuit upheld Judge Weinstein's certification of the Agent Orange class action.<sup>49</sup> Finally, in 1989, in the most emphatic victory for mass tort class certification, the Fourth Circuit approved class action treatment for the Dalkon Shield litigation.<sup>50</sup>

What explains this reversal in judicial attitude? A strong hint is supplied by a curious fact: in the early 1980s, the federal courts first refused to certify class actions in simple "inass accident" cases (like the Skywalk collapse), but several years later certified class actions in far more complicated "inass exposure" cases. By any doctrinal test, class certification is easier to justify in the mass accident setting than in the mass exposure context. In the former context, there is little variation in terms of legal claims among those injured (thus making class treatment more appropriate), while in the latter "mass exposure" cases both the facts and the applicable law vary greatly from case to case. Unlike a single accident (such as a plane crash or a building collapse), mass exposure to a toxic product (such as asbestos, the Dalkon Shield, or Agent Orange) implicates the law of multiple jurisdictions. In a nationwide class, it may involve most state jurisdictions and most major participants in the industry. The hypothesis that best explains this puzzling inconsistency is that the burden on the courts from a failure to certify was far greater in the latter context where individual actions would otherwise proliferate. For example, *Jenkins*, the first asbestos mass tort class action to be certified, arose in East Texas, an area that one commentator has called "the fertile crescent of asbestos litigation."<sup>51</sup> Put differently, asbestos cases had a characteristic that a mass accident class action did not: unless resolved on a class basis, they threatened to flood the docket within that district.

### B. *The Dynamics of Mass Tort Litigation*

Every litigation context has its own distinctive traits. Mass tort litigation is characterized by several unique features: (1) a predictable evolutionary cycle during which the value and volume of individual claims starts low and then spirals upward; (2) high case interdependency so that litigated outcomes in any mass tort area quickly impact on the settlement value of other pending cases in that same field; (3) a highly concentrated

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48. See *In re School Asbestos Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part*, 789 F.2d 996 (3d Cir.) (reversing non-opt out provision, but allowing a permissive certification of a class action for property damages), cert. denied, 479 U.S. 852 and 479 U.S. 915 (1986).

49. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

50. See *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

51. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 660 (1989); see also *infra* note 71 (discussing concentration of asbestos cases in certain federal districts).

plaintiffs' bar, in which individual practitioners control exceptionally large inventories of cases, sometimes totaling in the tens of thousands; and (4) a capacity to place logistical pressure on individual courts that is simply unequalled by any other form of civil litigation. As discussed below, each of these factors tends to undercut the traditional ideal of litigant autonomy.

1. *The Mass Tort Evolutionary Cycle.* — For understandable economic reasons, mass torts (other than mass disaster cases) do not appear overnight, but rather evolve in a predictable cyclical fashion that often involves first slow and then later exponential growth in case volume. Early in the cycle, defendants are more likely to win "because of strategic and informational superiority."<sup>52</sup> Later, however, the odds will shift in the plaintiffs' direction, and eventually a stable equilibrium may be reached. Predictably, as a mass tort begins to "mature" into a recognized legal specialization (as asbestos did in the 1980s), individual plaintiffs' attorneys, who have necessarily invested and developed context-specific human capital in this field, will seek to exploit their expertise by searching nationwide for individual claimants to represent. Sometimes this search process can become extraordinarily institutionalized (as, for example, during the 1980s when asbestos plaintiffs' attorneys arranged with labor unions for portable x-ray trucks to screen union workers for telltale lung scars suggesting asbestos).<sup>53</sup>

Both because mass tort cases involve a high commonality of issues and because the mass tort bar is highly concentrated, monetary recoveries tend to be interdependent.<sup>54</sup> Here, the contrast between mass tort litigation and other forms of high volume litigation is important. For

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52. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 482 (1986) (analyzing the normal cyclical evolution of a mass tort litigation); see generally McGovern, *supra* note 51 (analyzing and discussing procedural problems peculiar to "mature" mass tort litigation).

53. The International Sheet Metal Workers Association, a union whose president, Edward Carlough, was originally the lead plaintiff in *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993) (later restyled *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), after his ouster as union president), conducted regular x-ray screening of its members for asbestos and related diseases during the late 1980s and early 1990s. For representative examples, see Chris Green, *Mobile Unit to Test Workers for Asbestos*, State J.-Reg. (Springfield, Ill.), Nov. 20, 1993, at 11, available in Westlaw, STJNLRSI Database; John J. Monahan, *Asbestos-test Results Awaited: Older Sheet Metal Workers Screened*, Sunday Telegram (Worcester, Mass.), May 16, 1993, at A16, available in Westlaw, ALLNEWS Database; *Union Offering Asbestos Tests*, Las Vegas Rev.-J., Nov. 12, 1993, at 7B, available in Westlaw, LVRJ Database.

A more extreme example of entrepreneurial litigation is furnished by two Texas plaintiffs' attorneys, who founded the National Texas Workers Litigation Project and equipped vans with x-ray machines and traveled to various plants of one major asbestos producer (Raymark) in order to screen workers. Hiring three doctors to conduct x-ray screening for them, they identified some 6000 plaintiffs in this nationwide solicitation effort—and also incurred considerable judicial displeasure. See Milo Geyelin & Michael J. McCarthy, *Judge Chides Lawyers in Asbestos Claims*, Wall St. J., June 7, 1990, at B10.

54. See Hensler & Peterson, *supra* note 37, at 967-69.

example, a victory at trial in an automobile accident case does not significantly affect the negotiations in other pending auto accident cases,<sup>55</sup> whereas a litigated victory in a mass tort case, in contrast, markedly affects all other cases involving the same product. Thus, if plaintiffs can develop evidence to demonstrate a causal link between exposure to a particular product and a particular illness in one case, all similar cases will acquire an enhanced settlement value.

Another factor contributing to a high growth rate is the tendency for mass tort injuries to involve long latency periods (sometimes twenty-five years or more) before victims who have been exposed to a toxic product or substance exhibit symptoms or learn that they have been injured. From the defendants' perspective, this tendency means that, even after a dangerous product has been withdrawn from the market, the defendant will likely still face decades of continuing claims as new victims predictably develop illnesses. For plaintiffs' attorneys, this means that an annual crop of new clients is obtainable if they search diligently. Plaintiffs' firms specializing in the field also have a special incentive to search for claimants in order to realize continuing returns from their investment in human capital. The asbestos litigation illustrates this tendency. It has been estimated that fifty or fewer plaintiffs' firms specialize in asbestos litigation, but that they have represented hundreds of thousands of claimants in individual actions in state and federal courts.<sup>56</sup> Hence, the more success these firms have, the greater their incentive to invest in search costs to identify new claimants.<sup>57</sup>

The blunt implication for defendants of these linked factors—the commonality of the issues in mass tort cases, the interdependence of monetary recoveries, and the long latency periods associated with many mass torts—is that they should seek to reach a global settlement of any new mass tort as early as possible in its predictable developmental cycle. Assume, for example, that a new drug is thought to be responsible for a rare form of cancer and plaintiffs' attorneys have finally been able to develop sufficient evidence of causation to win their first litigated judgment

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55. Several reasons explain why recoveries in standard tort cases tend not to be interdependent. Most importantly, the issues in such two-party cases tend to be extremely fact-specific (e.g., the defendant driver was driving too fast, was drunk, or had worn out brakes). Unless there is a claim that the vehicle was inherently defective (as in the classic example of the Ford Pinto), the imposition of liability will have little impact on other automobile cases involving, say, injuries to pedestrians. Mass tort cases, in contrast, tend to turn on scientific issues of causation, which are common to a broad range of cases. In addition, the parties in standard tort cases are not repeat players, whereas both corporate defendants and plaintiffs' attorneys are in mass tort cases. Information also travels quickly within the small and highly specialized mass tort plaintiffs' bar.

56. See Hensler & Peterson, *supra* note 37, at 966.

57. As a practical matter, this process generally involves seeking referrals from local personal injury lawyers who turn over their own clients under some fee-splitting arrangement. In some mass torts, direct advertising for injured victims is used. Plaintiffs' attorneys also develop referral networks with doctors and clinics. Eventually, an informal underground railroad develops to refer victims to specific firms.

(for \$500,000) in an individual case. At this point, few other victims have been identified and a lump-sum settlement of \$50,000,000 (deposited with a newly established mass tort claims facility) might seem sufficient to provide for the unknown number of future claimants. If, however, a global settlement is not reached at this point, the magnitude of the individual recovery and the estimates of future claimants may soon grow.

Early in the "maturation" of a mass tort, defendants can economize on settlement costs by offering a reduced amount per known claim and by seeking to underestimate the number of future claimants expected to develop injuries and thus achieve a low-cost global settlement. Although actuarial techniques for estimation of future claimants exist and have been used in mass tort bankruptcies, different experts have produced widely varying estimates,<sup>58</sup> and even the projections of the most reliable experts come with a fifty percent margin of error.<sup>59</sup> Finally, the parties

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58. Attempts to predict the likely number of future asbestos claims against the entire industry have produced widely varying estimates. The one common denominator is that most projections have already proven too low. In 1982, Corning & Company predicted that between 68,000 and 158,000 asbestos-related personal injury claims would be filed from 1983 forward. By 1993, over 200,000 claims had been filed against the Manville Trust alone. In 1992, another expert estimated 210,000 as the most likely number of claims that would be thereafter filed against the Manville Trust, with a range of between 125,000 and 250,000. Subsequently, one team of experts appointed by U.S. District Judge Jack Weinstein to estimate future claims against the Manville Trust predicted that 560,000 claims would be filed from 1990 forward. In 1994, National Economic Research Associates projected 306,000 claims on the same basis. See Frederick C. Dunbar & Denise A. Neumann, National Economic Research Assoc., Inc., *Estimating Future Asbestos Claims: Lessons from the National Gypsum Litigation 33-34* (1993) (on file with the Columbia Law Review). In any lump sum settlement, the amount actually received by future claimants depends chiefly on the number of claims made. Thus, if 100,000 claims are projected and 200,000 actually materialize, benefits will likely be reduced by half. Worse, because the underestimation of future claims will not be evident at the outset, early claimants may be paid in full, thus depleting the settlement fund and necessitating an even greater reduction in the payments to later claimants. On this basis, the foregoing wide ranges in estimates of total claims indicate that at least the earlier projections would result in settlements that would drastically undercompensate future claimants.

59. An expert panel, which was appointed by U.S. District Judge Jack Weinstein (pursuant to Rule 706 of the Federal Rules of Evidence) to evaluate the Manville Trust, has estimated that as many as 450,000 future claimants with asbestos injuries may be expected between 1990 and 2049. See Hensler & Peterson, *supra* note 37, at 1005 n.239. Note that this estimate is lower than another projection by the same expert panel, see *supra* note 58, which difference is apparently the result of different drafts of the experts' report. This panel cautioned, however, that their projection was subject to a  $\pm 50\%$  margin of error for total claims over this period. See Eric Stallard & Kenneth G. Manton, *Projections of Asbestos-Related Personal Injury Claims Against the Manville Personal Injury Settlement Trust, Males 1990-2049, by Occupation, Date of First Exposure, and Type of Claim 3* (Mar. 8, 1994) (unpublished manuscript, on file with author). After hearing a variety of predictions over the years, Judge Weinstein has been willing to make only the broadest estimates: "My own best estimate of future claims at the moment is somewhere between 300,000 and 600,000 claims into the mid-twenty-first century." See Weinstein, *supra* note 7, at 510 n.164. Others have noted that in some cases the more complex the projection technique used, the greater the margin for error that must accompany the projection. See

have little incentive to use such techniques if they know that their use will only reveal underfunding of that portion of the settlement reserved for future claimants.<sup>60</sup> Both in the bankruptcy and class action contexts, this same tendency for underestimation (and hence undercompensation) of future claimants has been evident.<sup>61</sup>

Other reasons also make early settlements desirable for defendants. At an early stage in the development of a mass tort, the plaintiffs' bar may not have developed the expertise or financial resources that they will later assemble and hence will be at a greater disadvantage *vis-à-vis* defendants. The first litigated victories may be for amounts well below that which will be recovered once more evidence is uncovered (particularly if there is evidence that the defendants suppressed data and knew the risks). Psychological evidence also suggests that courts and fact-finders will feel comfortable in awarding far less in a lump-sum settlement to a "hypothetical" class of future claimants than they would award to actually injured victims appearing before them in individual cases. This phenomenon is known as the "vividness effect."<sup>62</sup> Finally, because only a relatively small percentage of individuals exposed to most toxic substances will actually develop compensable physical injuries, members of the future claimant class can be expected to be rationally apathetic about their future legal rights—until the point at which they themselves develop injuries. Put differently, a rational individual with less than a one percent risk of developing lung cancer from exposure to tobacco products, asbestos, or some other toxic product will understandably invest very little time, attention, or money to protect legal rights that he or she does not expect (or want)

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Michael A. Stoto, *The Accuracy of Population Projections*, 78 J. Am. Stat. Ass'n 13, 13, 18 (1983).

60. In marked contrast to the serious efforts made to estimate future claimants in the Johns-Manville and National Gypsum bankruptcies, no effort was made to develop any actuarial estimate of future claims in the recent asbestos class actions. In *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), which was an exclusively future claims class action, this deficiency seems particularly glaring because the settlement itself imposed "case flow maximums" on the number of claims that would be paid in any year, and these case flow maximums were already "less than the annual new case filings against the CCR defendants." *Id.* at 280. Indeed, the only finding made by the court with regard to the likely number of future claims for specific disease categories was a vague (and questionable) finding "that claims for asbestos-related lung cancer should be on the decline due to the diminished levels of asbestos exposure to the class members in the past few decades." *Id.* This casual disdain for the number of claims likely to be filed again underscores the vulnerability of future claimants in mass tort class actions.

61. See Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 Yale L.J. 367, 382-89 (1994) (discussing underestimation of claims in mass tort bankruptcies).

62. Decisionmakers tend, social psychologists have found, to give excessive weight to concrete and vivid information relative to more abstract information. See Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 59-61 (1980); Smith, *supra* note 61, at 383-84. Present claimants may present such vivid information, while future claimants (even though actuarially inevitable) may not. The result is to distort the allocation of funds between present and future claimants.

to exercise. In any event, the early experience in both bankruptcy cases and class actions has been that future claimants do far less well than present claimants in terms of the per claimant recovery.

2. *The Impact on the Judiciary.* — The concentrated logistical impact of mass torts on the judiciary may be the most important factor in understanding the landscape of mass torts. During the mid- to late 1980s, the perception grew that, unless checked, mass tort cases would soon inundate the federal docket.<sup>63</sup> In some courts, mass tort claims accounted for over twenty-five percent of the entire civil caseload.<sup>64</sup> By 1990, asbestos litigation represented seventy-five percent of all new federal product liability filings<sup>65</sup> and had become the largest single category of personal injury litigation.<sup>66</sup> Little reason existed to believe that the rate of filings would decline substantially in the foreseeable future; rather, by 1990, two new asbestos cases were filed each year for every one case resolved.<sup>67</sup> A sense of crisis clearly pervaded the federal judiciary,<sup>68</sup> as multiple commissions and study groups warned of dire consequences unless the mass tort case explosion could be brought under control.<sup>69</sup> In such an envi-

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63. See Deborah R. Hensler et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts* 24–29 (1985).

64. See Hensler & Peterson, *supra* note 37, at 961.

65. See Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?*, 16 *Just. Sys. J.* 139, 147 (1993). By 1991, however, the rate of case filings fell to 57% of new products liability cases. See *id.*

66. See Baughman, *supra* note 2, at 211, 211–12 n.4 (citing 100,000 Asbestos Cases Ordered Consolidated, *L.A. Times*, July 17, 1990, at D2).

67. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 265 (E.D. Pa. 1994) (citing report prepared by Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist).

68. The frustrations faced by trial courts in the face of a growing asbestos docket are exemplified by *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990). There, Chief Judge Robert Parker observed that if his district court tried asbestos cases at the rate of 30 cases per month, it would take six and one-half years to try all asbestos cases on the existing docket, and at that point the court could anticipate that 5000 new cases would have been filed during the interim. For a very similar estimate in a non-asbestos mass torts case, see *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 & n.3 (S.D. Ohio) (“disposition of the present Bendectin cases at the trial level alone might require 21,000 trial days or the equivalent of 105 Judge years, i.e., one Judge for 105 years or 105 Judges for one year”), mandamus to vacate certification, 749 F.2d 300 (6th Cir. 1984).

69. The leading example in this still-expanding genre was the Judicial Conference's Ad Hoc Committee on Asbestos Litigation, which was established by Chief Justice Rehnquist in September 1990 to search for solutions to the asbestos litigation crisis. It found that “[w]hat has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively.” Judicial Conference of the United States, *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2* (Mar. 1991) [hereinafter *Asbestos Ad Hoc Committee Report*] (unpublished manuscript, on file with the *Columbia Law Review*), reprinted in *Asbestos Litig. Rep.*, Mar. 14, 1991, at 22698, 22699. Based on this perception of an imminent crisis, the 1991 report recommended a “national asbestos dispute resolution scheme that permits consolidation of all asbestos claims in a single forum.” *Id.* at 3, reprinted in *Asbestos Litig. Rep.* at 22700. Months after the release of this report, the Judicial Panel on Multidistrict Litigation transferred all

ronment, some judges and academics came to believe that emergency conditions justified an emergency solution—in short, that the end of saving the federal docket justified means that otherwise might seem improper.<sup>70</sup> In truth, the impact of asbestos litigation was highly uneven and localized.<sup>71</sup> But the decisions legitimizing the mass tort class action came from precisely those courts most under stress.<sup>72</sup>

3. *Concentration and Collusion.* — A characteristic style of mass tort litigation also developed during the 1980s. An important aspect of this style was the high level of concentration within the plaintiffs' bar specializing in these cases. Less than fifty law firms appear to specialize in asbestos litigation, and a handful dominate the field.<sup>73</sup> Some thirty firms represented the majority of the Dalkon Shield claimants.<sup>74</sup> A closer look at the Dalkon Shield litigation reveals still another facet of this picture: individual attorneys acquire large case inventories. Of the approximately 44,000 most seriously injured victims of the Dalkon Shield (a defective intrauterine birth control device which was implanted in approximately 2.2 million American women),<sup>75</sup> one survey found the following levels of client concentration: some six attorneys represented 8039 claimants (or on average 1340 each),<sup>76</sup> and another forty-three attorneys represented some 13,174 claimants (with each attorney handling between 100 and 1000 cases—or, on average, over 300 cases each).<sup>77</sup> As one expert in asbestos litigation has generalized, "[t]ypically an extremely small number of firms represents massive numbers of plaintiffs; it would not be unusual for a single lawyer with four associates to represent over a thousand clients."<sup>78</sup>

To sum up, attorneys specializing in the mass tort field tend to accumulate a large inventory of clients with similar claims; they do so partly by direct advertising and partly through referrals from other attorneys.

pending asbestos personal injury litigation to a single forum. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

70. See *infra* text accompanying notes 128–137.

71. For example, one study in the mid-1980s found that 40% of all federal asbestos filings in the late 1970s and early 1980s occurred in the districts of Massachusetts, Eastern Texas, and Southern Mississippi. In terms of circuits, the district courts in the First and Fifth Circuits accounted for 52% of all asbestos disease case filings. See Thomas E. Willging, *Federal Judicial Center, Trends in Asbestos Litigation* 15 (1987).

72. See *supra* notes 51 and 71 and accompanying text. The *Georgine* class action, discussed *infra* at text accompanying notes 192–214, was consolidated in the federal district with the highest concentration of asbestos cases in the country. See *infra* note 481.

73. See Hensler & Peterson, *supra* note 37, at 966.

74. See *id.*

75. See Morton Mintz, *At Any Cost: Corporate Greed, Women, and the Dalkon Shield* 4 (1985).

76. See Georgene M. Vairo, *Reinventing Civil Procedure: Will the New Procedural Regime Help Resolve Mass Torts?*, 59 *Brook. L. Rev.* 1065, 1075 n.47 (1993).

77. See *id.* There were also 11,443 unrepresented claimants, but only a small minority of the claimants (7101 out of over 44,000) were represented by an attorney having fewer than ten Dalkon Shield claimants.

78. McGovern, *supra* note 52, at 479.

More importantly, they also tend to deal in inventories, settling their cases not on an individual basis, but on an inventory-wide basis with a particular defendant.<sup>79</sup> Here, different styles exist, with some plaintiffs' law firms being characterized as "boutique firms" that screen clients carefully and bring actions only on behalf of severely injured claimants for high damages, and other firms being known as "wholesalers" who seek to represent a large number of claimants but invest little in individual case preparation.<sup>80</sup> In either case, however, litigation decisions are made by attorneys in terms of their impact on the entire portfolio of claims in the firm's inventory.<sup>81</sup> After all, even a boutique firm may invest heavily in scientific evidence for an individual case and take it to trial largely to establish the market value of other cases in its inventory.

The concentration within the plaintiffs' bar is more than matched on the defendants' side. In early cases, a defective product or toxic substance was typically produced by a single manufacturer (for example, A.H. Robins Co. made the Dalkon Shield; Richardson-Merrell manufactured Bendectin; and Dow Corning was the first and by far the largest manufacturer of silicone breast implants.<sup>82</sup>) Even in the case of asbestos, where an industry of about thirty firms manufactured asbestos products, the producer of the asbestos products used at a particular site could usually be identified. Thus, litigation could focus on a principal defendant—and negotiations would be with a single defense counsel. As asbestos litigation developed during the 1980s, asbestos-producing defendants organized into a consortium to pursue common defense and settlement strategies, united behind a single counsel.<sup>83</sup> In practice, therefore, mass tort litigation is reduced to battles between repeat players who have litigated and negotiated settlements in similar cases many times in the past.

During the 1980s, this concentration and familiarity among the litigants was for the first time matched by a corresponding consolidation at the judicial level, as mass tort cases came to be transferred (at least for

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79. This practice of mass settlement of individual cases often results in controversy and may violate ethical norms. See Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. Times, Mar. 24, 1995, at B6 (discussing evidence, including work sheets, showing that aggregate settlements were negotiated, despite compromise of individual claims and possible ethical violations as a result thereof).

80. See Hensler & Peterson, *supra* note 37, at 1042-43.

81. There is also a tendency for plaintiffs' attorneys to file as much of their inventory as possible in the same court. This may clog judicial arteries and slow the progression of the individual case to trial, but it maximizes the plaintiffs' attorney's leverage with the court and certainly inclines the court to favor an aggregate resolution.

82. See Alison Frankel, *From Pioneers to Profits*, Am. Law., June 1992, at 82, 84.

83. Originally, this group was known as the Asbestos Claims Facility. See Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 Clev. St. L. Rev. 375, 387-89 (1984-85). Later, after the bankruptcy of some of its members, a smaller organization, known as the Center for Claims Resolution (CCR) replaced it. The CCR represents 21 firms that are the principal asbestos manufacturers not in bankruptcy. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 Law & Contemp. Probs., Autumn 1990, at 13, 17.



discovery purposes) before a single judge. Either as a result of bankruptcy proceedings (which act as a stay of pending litigation against the insolvent firm) or a transfer order by the Judicial Panel on Multidistrict Litigation (JPML), huge numbers of related mass tort claims came under the control of individual judges. For example, Judge Robert Merhige of the Eastern District of Virginia oversaw the resolution of some 195,000 Dalkon Shield claims,<sup>84</sup> and Judge Jack Weinstein of the Eastern District of New York handled proceedings which resolved over 240,000 Agent Orange claims.<sup>85</sup> In 1991, when the JPML transferred all pending asbestos claims in federal court to Judge Charles Wiener, some 27,000 actions, many of which had been litigated elsewhere for years, were transferred overnight to the Eastern District of Pennsylvania.<sup>86</sup> This pattern of universal transfer contrasts sharply with the pattern in securities or antitrust litigation. There, although a trial judge may have substantial experience with a particular cause of action, no court has ever had all pending securities or antitrust actions consolidated before it.

Nor would any trial court have the same incentive to achieve a global resolution of all pending securities or antitrust actions. Around 300 securities class actions have been filed annually in federal court over recent years. Although often criticized as "strike suits" or "frivolous," such actions do not amount to a significant burden on the federal docket and amount to approximately ten percent of the class actions filed in federal court each year.<sup>87</sup> In contrast, mass tort filings impose a far larger burden, and, as discussed later, decisions made by the JPML to consolidate all such pending actions before a single judge were clearly made with the hope of inducing a global resolution.

These circumstances supply the preconditions for collusion between defendants and a favored plaintiffs' counsel: repeat players, a single fo-

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84. See Richard B. Sobol, *Bending the Law* 106 (1991).

85. See Schuck, *supra* note 10, at 205.

86. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991).

87. See *Private Securities Litigation: Staff Report Prepared at the Direction of Sen. Christopher J. Dodd, Chairman, Senate Subcomm. on Securities of the Comm. on Banking, Housing and Urban Affairs* 64, *in* *Hearings on Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. 166, 234 (1994) (reporting that 315, 299, and 268 securities class actions were filed in 1990, 1991, and 1992, respectively, and that these numbers reflected about 10% of all class actions annually filed). According to the Administrative Office of the U.S. Courts, 290 securities class actions were filed nationwide in 1994 and 298 in 1993. See *Legislation on Securities Fraud Litigation, 1995: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 1st Sess., *Federal News Service*, Jan. 19, 1995 (prepared testimony of William S. Lerach), available in LEXIS, News Library, FEDNEW File. Even these figures may overstate the actual number of securities class actions because of the existence of multiple actions against the same defendant. Mr. Lerach further estimated that only 125 corporations have been sued annually over the last several years—"out of over 14,000 public corporations reporting to the SEC." *Id.*

rum in which the court is eager to achieve a global settlement, and "passive" future claimants. But how is collusion actually implemented? Here, it is critical to distinguish between the traditional techniques (which have long been observed in corporate and securities litigation) and the new techniques that have developed in mass tort litigation.

### C. *The "Old" Collusion*

Collusion within the class action context essentially requires an agreement—actual or implicit—by which the defendants receive a "cheaper" than arm's length settlement and the plaintiffs' attorneys receive in some form an above-market attorneys' fee. The mechanics of such an agreement varies with the litigation context. In the corporate and securities litigation settings, the standard means has been the nonpecuniary settlement: the plaintiff sues for money damages, but the final settlement awards only therapeutic relief—new bylaws, additional disclosure to shareholders, and other frequently cosmetic changes.<sup>88</sup> In return for this bloodless settlement, defendants either pay the plaintiffs' attorneys' fees themselves or agree not to contest the plaintiffs' attorneys' application for court-awarded fees from the corporation.<sup>89</sup> In the latter case, the plaintiff shareholder class suffers twice: first, by the abandonment of their claim for money damages, and second, by the payment of a fee by their corporation to a plaintiffs' attorney who has not performed any valuable service.

In the mass tort and antitrust contexts, a variation on the nonpecuniary settlement (known informally as a "scrip settlement") has become popular, involving discount coupons or certificates granting the injured class the right to buy the defendant's product at a discount.<sup>90</sup> Often, the discount is no greater than what an individual plaintiff could receive for a volume purchase, or for a cash sale, or for using a particular credit card,

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88. See John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 *Law & Contemp. Probs.*, Summer 1985, at 5, 24.

89. If the plaintiff's action has conferred a "substantial benefit" on the corporation, the traditional corporate law rule is that the plaintiff is entitled to an award of reasonable attorneys' fees. See *Bosch v. Meeker Coop. Light & Power Ass'n*, 101 N.W.2d 423, 426 (Minn. 1960). Nonpecuniary benefits can be recognized as conferring such a benefit. See, e.g., *Fischman v. Wexler*, 309 F. Supp. 976, 978-79 (D. Del. 1970) ("corporate therapeutics" found to confer such a benefit).

90. Probably the first case in which this technique was used was *In re Cuisinart Food Processor Antitrust Litig.*, 38 Fed. R. Serv. 2d (Callaghan) 446, 449 (D. Conn. 1983), in which class members received a coupon valued at 50% of a product's list price to purchase one of defendant's products costing up to \$300. In subsequent cases, the percentage value of the coupon in relation to the product quickly declined. See *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 308 (N.D. Ga. 1993) (coupon between \$10 and \$200 for flights costing between \$50 and \$1500); *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (\$5 coupon for video game costing \$100); see also Barry Meier, *Fistfuls of Coupons*, *N.Y. Times*, May 26, 1995, at D1 (describing scrip certificates in class action settlements for a \$25 rebate in airfares, a \$400 credit toward a car purchase, and, amazingly, a "free box of Cheerios").

and typically restrictions are placed on its transferability. In the General Motors "side-saddle" fuel tank case (a mass tort product liability case), the Third Circuit remanded a settlement under which the plaintiff class would receive a scrip certificate in the face amount of \$1000, which would be redeemable against a purchase of a GM light duty truck (worth possibly \$20,000 at retail—or a five percent discount).<sup>91</sup> The Third Circuit panel was concerned not only with the low percentage value of the coupon (i.e., five percent), but also with the restrictions on its transfer, the infrequency of pickup truck purchases by most class members, and the possibility of an inequitable distribution that primarily benefitted major car fleet owners.<sup>92</sup> But such a settlement is predictable, because it maximizes the interests of the defendants, the plaintiffs' attorneys, and the few class members (i.e., the car fleet owners) with sufficiently large economic interests to undertake to monitor the litigation and protest. Ultimately, if the GM settlement had passed judicial scrutiny, the plaintiffs' attorneys would have been able to multiply the \$1000 certificate received by each class member by the 5.7 million customers in the class (who had previously purchased GM trucks with "side-saddle" tanks that were alleged to explode on minor collisions) and claim that they had thereby created a \$5.7 billion benefit for the class (upon which "fund" their attorneys' fees could be based).<sup>93</sup>

Another recent variation, known as a "cy pres settlement," involves making a payment in kind of goods or services, not to the plaintiff class but to a third party (often a charity) for the indirect benefit of the class. A 1994 case, *In re Matzo Food Products Litigation*,<sup>94</sup> illustrates this pattern. Convicted under the Sherman Antitrust Act for fixing the prices of matzo and matzo products, B. Manischewitz Co. was sued in a class action brought by several grocery stores on behalf of all retail stores. Under a quickly negotiated settlement agreement, Manischewitz agreed (1) to create a "Food Products Fund," consisting of matzo products that would be distributed to specific charities for a four-year period; and (2) to pay plaintiffs' attorneys between \$450,000 and \$500,000.<sup>95</sup> The cynically disposed might see this settlement as an excellent way of simultaneously disposing of both stale matzos and a difficult litigation.

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91. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 780-81 (3d Cir. 1995). For another recent decision rejecting a "scrip settlement," see *Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684, 697 (D. Minn. 1994).

92. See *General Motors Corp.*, 55 F.3d at 806-10.

93. See *id.* at 822.

94. 156 F.R.D. 600 (D.N.J. 1994).

95. See *id.* at 602-03. The settlement required Manischewitz to contribute \$1,800,000 of its food products valued at their retail value to the settlement fund. The court was skeptical, however, of the defendant's valuation because it valued their products at three times their cost to the defendant. Thus, on a cost valuation basis, the charitable contribution would cost Manischewitz only \$600,000 (before any tax deduction) and yet would yield the plaintiff's attorneys not less than \$450,000. See *id.* at 603-04.

Although the *Matzo Food Products* court was unable to swallow this settlement, other courts have regularly accepted similar *cy pres* settlements.<sup>96</sup> It may at first seem puzzling that they do so, but several linked factors probably explain this pattern. First, judicial time is a scarce commodity, which courts struggle to allocate sensibly to high priority matters. "Small claimant" class actions are seldom regarded by courts as among their priorities. Securities class actions, for example, almost never get to trial. One important reason for this phenomenon is that trial judges refuse to give them priority on their trial calendar. Yet, unless the "small claimant" class action can somehow be resolved, it will drag on, consuming scarce judicial time. Indeed, such actions can be prolific generators of motions and discovery disputes (whether because plaintiffs sometimes exploit their "nuisance value" or because defendants with deeper financial pockets sometimes believe they can exhaust the plaintiffs' attorneys' financial resources and force a cheap settlement). As a result, courts are eager to see such cases settled and may tend not to examine the basis for settlement with the same skepticism they might bring to cases or matters they deem more important.

Second, most of the cases in which dubious nonpecuniary consideration has been the primary basis for settlement have been "small claimant" class actions. Even if the plaintiffs received a monetary recovery, that recovery would be spread so thinly over a broad plaintiffs' class as to produce little or no meaningful benefit to any individual class member. Usually, these cases have involved either property damage (not personal injuries) or antitrust violations causing small losses to a nationwide class of victims.

Third, the trial court has a limited range of options: basically, it can reject the settlement, or it can approve the settlement but then award only very modest attorneys' fees, thereby signaling its lack of confidence in the outcome.<sup>97</sup> Because the action will still linger on if the settlement

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96. Indeed, the *Matzo Food Products* court, itself, noted that *cy pres* settlements "are, in fact, routinely approved by courts." *Id.* at 605; see also *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 478-79 (N.D. Ill. 1993) (noting increased judicial flexibility in awarding *cy pres* settlements); *Pray v. Lockheed Aircraft Corp.*, 644 F. Supp. 1289, 1303 (D.D.C. 1986) (discussing judicial discretion to apply *cy pres* doctrine); 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.17, at 10-40 to 10-40 (3d ed. 1992) (discussing *cy pres* settlements and citing cases). Where *cy pres* settlements result because funds are not claimed by unidentifiable class members (which is the most common fact pattern), the obvious alternative is to increase the recovery to those class members who do appear (and who seldom receive full compensation in any settlement). See *id.* § 10.17, at 10-40 to 10-41.

97. The Delaware Chancery Court has recently followed the second approach in several cases, approving the settlement but refusing any fee award or radically reducing the fee award sought. See *De Angelis v. Salton/Maxin Housewares, Inc.*, 641 A.2d 834, 836 (Del. Ch. 1993) (approving settlement but denying any fee award), *rev'd sub nom. Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994); *In re MCA, Inc. Shareholders Litig.*, [1993 Transfer Binder] Fed. Sec. L. Rep. (CGH) ¶ 97,749, at 97,577-78 (Del. Ch. Feb. 12, 1993) (reducing fee award sharply).

is rejected, the second option imposes less of a burden on the court. But, over time, a small fee award may in turn only encourage underinvestment by plaintiffs' attorneys in such cases. That is, the low cost plaintiffs' attorney (whom defendants scorn as a "strike suiter") may still be able to earn a positive economic return on such cases—but only if the attorney radically reduces the investment in the case and offers defendants a low cost settlement, which is cheaper to them than further litigation.

In any event, the best and bottom line generalization here is not that courts are incapable of detecting the signs of collusion, but that they will not invest scarce judicial time in monitoring "small claimant" class actions; thus they approve some dubious settlements as the lesser evil when dismissal on the merits is not possible.<sup>98</sup>

One "old" form of collusion is not limited to the "small claimant" class action. It involves what this Article will call a "reverse auction," namely a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations. The first team to settle with the defendants in effect precludes the others (who may have originated the action and litigated it with sufficient skill and zeal that the defendants were eager to settle with someone else). A recent recurring scenario involves an inactively litigated action in state court being brought and settled so as to preclude a decision in a more aggressively litigated federal action. Indeed, several recent cases have upheld releases granted in connection with settlements in state courts as a bar to a federal class action—even where the federal action raised principally federal law claims, which the state court lacked subject matter jurisdiction to adjudicate.<sup>99</sup> Conversely, an important new Ninth Circuit decision has taken the opposite position and refused to grant preclusive effect to such a state court settlement where the federal claims were clearly independent and unrelated to the state claims.<sup>100</sup>

For the moment, the doctrinal tension among these cases is less important than understanding the transactional pattern. Assume a meritorious class action raising federal claims (for example, securities fraud) is brought in federal court and plaintiffs decline to settle it on terms that are attractive to the defendants. At this point, a parallel or "shadow" ac-

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98. Dismissal of the class action would have been hard to justify in the *Matzo Food Products* case because the defendant had already been criminally convicted of price fixing. See *Matzo Food Prods.*, 156 F.R.D. at 601.

99. See, e.g., *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), cert. denied, 115 S. Ct. 480 (1994); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Lowenschuss v. Resorts Int'l, Inc.*, No. 89-1071, 1989 U.S. Dist. LEXIS 7407 (E.D. Pa. June 29, 1989), aff'd without opinion, 947 F.2d 936 (3d Cir. 1991).

100. See *Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir.), cert. granted in part, 115 S. Ct. 2576 (1995). *Epstein* can be distinguished from *Grimes* and *Nottingham Partners* on a variety of grounds, including the important fact that in both the latter decisions the plaintiffs appeared in state court to assert their positions. The Ninth Circuit also did not reach a second claim raised by plaintiffs: that the Delaware settlement violated due process because of inadequate representation by the principal class representative.

tion parroting some of the factual allegations in the federal action may be filed in a state court. Because federal courts have exclusive jurisdiction over the Securities Exchange Act of 1934,<sup>101</sup> a state court cannot adjudicate the federal law issues. Although claim preclusion of the federal claims is thus not possible, issue preclusion poses a grayer question. In principle, issue preclusion applies only to those issues that could have been litigated in the action, but an adverse judgment in the state court on claims that were essentially counterparts to the federal claims would probably bar federal adjudication of claims over which a federal court had exclusive jurisdiction.<sup>102</sup> Thus, if the collusive plaintiff were to draft a complaint that simply parrots the disclosure issues in an earlier filed federal action and were to file this copycat action in state court, the settlement of the state action would seemingly have preclusive effect on the previously filed federal action, notwithstanding exclusive federal jurisdiction over securities fraud claims, at least when the state court had subject matter jurisdiction over a corresponding state cause of action that relied on the same operative facts.

Now comes the final twist: assume that incident to the state court settlement, the class representative in the state class action grants a release covering all possible claims that the class members then hold against the defendants. The Third and First Circuits have recently said that the effect of such a release is broader than an adverse judgment in the state action.<sup>103</sup> Such a release, they have said, can bar all claims that the plaintiff could have asserted against the defendants in any forum (at least if the state court settlement does not violate the Due Process Clause).

The practical impact of this approach is that it allows the defendants to pick and choose the plaintiff team with which they will deal. Indeed, it signals to the unscrupulous plaintiffs' attorney that by filing a parallel, shadow action in state court, it can underbid the original plaintiffs' attorney team that researched, prepared and filed the action.<sup>104</sup> The net re-

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101. Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1994), gives U.S. district courts "exclusive jurisdiction" over suits based on the Securities Exchange Act, or the rules and regulations thereunder (including Rule 10b-5, 17 C.F.R. § 240.10b-5 (1994)).

102. See *Epstein*, 50 F.3d at 663-64; *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17-18 (2d Cir. 1981).

103. See *supra* note 99.

104. A leading Delaware case, *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994) illustrates the basic pattern of a reverse auction. Following the initial public offering of Salton/Maxim Housewares, Inc., certain plaintiffs brought suit in federal court in Illinois for alleged violations of the federal securities laws. Approximately one month later, plaintiff De Angelis filed a federal securities class action in Pennsylvania and, on learning of the pending Illinois action and apparently fearing that his own action would be transferred to the Illinois court, he sought its voluntary dismissal. See *id.* at 918. Shortly thereafter, the same plaintiff's attorney filed a derivative action in Delaware alleging only state law fraud claims. Meanwhile, negotiations in the Illinois action had broken down after plaintiffs had rejected defendants' settlement offer of \$1.2 million. See *id.* Within

sult is that defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously. Much in this scenario resembles game theory's classic "prisoner's dilemma," where the theoretical outcome is that the two prisoners, unable to agree upon a binding deal between themselves, will reach a suboptimal outcome.<sup>105</sup>

In overview, the critical factor essential to collusion is competition among teams of plaintiffs' attorneys that the defendants can exploit. Here, it happens because the parallel action in state court cannot be consolidated by the JPML with the federal action or actions. Once rival plaintiff teams are in competition with each other, and each is able to agree to a binding settlement of a nationwide class action,<sup>106</sup> the "reverse auction" can begin. No explicit agreement among the participants is needed; all that is necessary is that each team of plaintiffs' attorneys sees that it can be divested of any participation in the action unless it reaches a settlement with the defendants first. Already, there have been indications that such an auction, once unique to the corporate and securities arena, is developing in mass tort cases as well.<sup>107</sup> Such "reverse auctions"

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two weeks of filing the Delaware action, the plaintiff entered into settlement negotiations with the defendants. Without plaintiff seeking discovery or defendants filing a responsive pleading, the action was quickly settled for the comparatively modest sum of \$1,225,000 (essentially the same offer that the plaintiffs in the Illinois action had refused). After the stipulation of settlement was signed, the complaint was amended to assert federal securities law claims as well in order even more clearly to bar the Illinois action. See *id.* at 919. Although the Chancery Court approved the settlement, the Delaware Supreme Court rejected it, finding that the plaintiffs were not adequate representatives and that specific findings must be made as to their adequacy. See *id.* at 925. It also noted that the Delaware plaintiff "could not realistically have hoped to try this case, but only to settle it with the further hope of receiving a fee award." *Id.* at 919.

This same pattern seems to have recurred in Delaware, but with a different result, in the earlier-discussed *MCA* litigation. The Delaware Chancery Court approved a settlement, but awarded a minimal attorney's fee because of its clear skepticism about the action's benefit to the corporation. See *In re MCA, Inc. Shareholders Litig.*, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,749, 97,577-78 (Del. Ch. Feb. 12, 1993). The federal district court found that the settlement of the Delaware action barred a federal securities class action, but the Ninth Circuit reversed, and the entire question is now before the Supreme Court. See *Epstein*, 50 F.3d at 666.

105. In the standard example, two individuals, who are factually guilty of a felony, are interrogated by a prosecutor who seeks a confession from each. If neither confesses, the prosecutor will be unable to obtain more than a misdemeanor confession that would result in a one-year sentence for each. If only one confesses, the prosecutor will reward that individual with a plea bargain resulting in a six-month sentence, but the other defendant will receive a ten-year sentence. If both confess, they will each be convicted of a felony and receive five years each. See R. Duncan Luce & Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* 94-97 (1957). Under this structure, it is logical for both prisoners to confess and receive five years each, even though if they both held out they would receive only one-year sentences. Thus, the outcome is Pareto-inferior.

106. In principle, a nationwide class action can be brought in a state court, although special notice standards and a right to opt out must be recognized. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

107. See *infra* text accompanying notes 123-141.

can occur in other ways, but examining these techniques requires that we first focus on the special dynamics of mass tort litigation.

#### D. *The "New" Collusion*

1. *Inventory Settlements.* — At least potentially, courts can respond to signs of collusion (or, more precisely, "non-adversarial" settlements) by reducing the plaintiffs' attorneys' fee award (which in virtually every jurisdiction must be approved by the court in the case of a class action). But in the mass tort context, this may be a particularly ineffective weapon.

To understand its ineffectiveness, one must remember that the mass tort plaintiffs' attorney typically has an inventory of cases that the attorney represents on an individual basis. Often, the inventory may exceed several thousand cases. Normally, the individual cases in this inventory will move slowly through the litigation pipeline and settle only once a trial date has been set.<sup>108</sup> Thus, the plaintiffs' attorney's tactical goal is to expedite cases, pushing them through the pipeline to the eve of trial (and predictable settlement). Conversely, defendants in the mass tort setting are concerned less about existing cases than future claimants, who may dwarf the number of present claimants because of the long latency period associated with mass torts.

Given these different concerns, the possibilities for a deal between the two sides should become evident at this point: both sides have an incentive to trade a settlement of the plaintiffs' attorney's entire inventory (on terms favorable to the attorney) for a global settlement in a class action of all future claims (on terms favorable to the defendants). The advantages to the plaintiffs' attorney of such a trade are several: First, because plaintiffs' attorneys are almost invariably compensated on a contingency basis by their individual clients, the plaintiffs' attorney can expect to receive a substantial fraction (usually around thirty percent but sometimes more) out of the aggregate amount received by the clients from such an inventory settlement.<sup>109</sup> Second, the inventory settlement telescopes into one year payments that might be delayed for many years. Thus, it gains the attorney the time value of money over this period. Third, some cases that go to trial might lose, and other cases might be too weak on the merits to justify a settlement offer or to dare to take to trial (and thereby risk the attorney's credibility with the court). However, such cases can be included within the inventory settlement (which will typically encompass even unfiled cases so long as some medical evidence supporting the condition exists).

In return for the inventory settlement, the plaintiffs' attorney will be expected to serve as class counsel in a class action brought as a "settlement class" against the same defendants. By definition, a settlement class

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108. See McGovern, *supra* note 51, at 663.

109. See, e.g., Passell, *supra* note 79, at B6 (describing an inventory settlement of \$190 million in which one plaintiffs' attorney firm received \$65 million).



"action" cannot go to trial, and thus defendants need not fear litigation in the event that the two sides have a subsequent falling out. The critical step in this trade requires a special definition of the class: it must consist only of future claimants. Otherwise, if the proposed class covered present claimants, it would look suspicious that the attorneys representing the class had just settled similarly situated cases on a superior basis. This incongruity is avoided by defining the class as consisting of those persons having claims against the defendants with respect to the particular product, process, accident or incident at issue who have not filed suit prior to the date the class action is filed.<sup>110</sup> Under this approach, the inventory settlements can be effected shortly before the class action is filed.

To ensure that the plaintiffs' attorneys do not "welch" on their deal by settling their inventory cases and then refusing to file the "future claims" class action, the defendants may also require the plaintiffs' attorneys to sign an agreement that they will not in the future represent claimants against the defendants with regard to the same mass tort. Such an agreement (which raises serious ethical problems)<sup>111</sup> is, however, probably not essential. Because the plaintiffs' attorneys are disposing of all their existing clients in the inventory settlements, they have no other current clients to represent and thus have every incentive to serve as class counsel in the proposed "future claims" class action because it holds out the promise of an additional fee award (as class counsel). On self-interested economic grounds, plaintiffs' attorneys would decline such a trade of the class counsel position for an agreement not to sue the same defendants in the future only if they believed they could solicit new clients and earn contingency fees from such cases greater than the joint payoff from the class action and the inventory settlement. But in "mature" mass tort cases, the competition for clients may be stiff, thus making such a trade preferable.<sup>112</sup>

If one accepts the premise that an inventory settlement can be used as an inducement to the plaintiffs' attorney to enter into a non-adversarial settlement of a class action that disadvantages the class members, it follows logically that the person most susceptible to such an inducement will be the plaintiffs' attorney with the largest inventory of present claimants. Indeed, the more the plaintiffs' attorney maintains a high volume, low quality inventory of cases, the more the attorney may welcome a non-adversarial resolution of cases. In actual practice, defendants do seem to

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110. For an example of such a class definition that excludes all but future claimants, see *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 319 (E.D. Pa. 1994).

111. See Koniak, *supra* note 4 (manuscript at 192-95). It should also be emphasized that such an agreement implies that the plaintiffs' attorney cannot reach an objective, disinterested decision as to whether class resolution or individual case-by-case resolution is more in the interest of the class members (because they could not serve as individual counsel).

112. It should be remembered that there are many asbestos defendants, and the agreement not to sue applies only to the defendants in the particular action. Hence, plaintiffs' attorneys are not truly liquidating their human capital in the field.

have targeted plaintiffs' attorneys who fit this profile of high volume "wholesalers."<sup>113</sup>

2. *Double-Dipping*. — Even in the absence of a separate inventory settlement, a plaintiffs' attorney can favor a mass tort class action for self-interested reasons when the clients' interests would be better served by opting out. This is because one perverse and important characteristic of the mass tort class action is that it permits the attorney to receive two fees: one as class counsel and another as the legal representative of individuals filing claims under it. This feature is in sharp contrast to securities and antitrust class actions, where plaintiffs' counsel has very few (if any) individual clients. The initial fee will be the class action fee award, which will be set by the court. It will generally be equal to a percentage of the recovery that is reasonably predictable in advance.<sup>114</sup> To be sure, if the court doubts the value of the settlement, it may reduce the fee award. However, the second fee, which is paid by the individual client, is not generally controlled by the court and may be grossly disproportionate to the services actually rendered by the attorney at this stage.<sup>115</sup> Individual tort victims tend not to be legally sophisticated and may often sign standard contingency fee contracts that award the attorney as much as forty per-

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113. See *infra* text accompanying notes 187–191.

114. Different formulas exist for computing the fee award, but the outcomes under these formulas appear in the main to be similar regardless of the formula used. See William J. Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 *J. Legal Stud.* 185, 209 (1994). In securities class actions, the fee award will vary somewhat among the circuits, but will generally be between 20% and 30% of the recovery. See *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 273 (9th Cir. 1989) (25% benchmark fee should normally be followed); *In re Oracle Sys. Sec. Litig.*, 852 F. Supp. 1437, 1451 (N.D. Cal. 1994) (surveying recent studies and finding 30% appropriate); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (benchmark fee award near 30%); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 750 (S.D.N.Y. 1985) (25% fee award is norm); 1 *Alba Conte, Attorney Fee Awards* § 2.08, at 51–52 (1993).

115. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 *UCLA L. Rev.* 29, 31–32 (1989). In the *Silicone Gel* breast implants class action the settlement agreement provided that administrative costs and legal fees could not exceed 24% of the total settlement fund. See Tessie Bordon, *Settlement Funds Go to Pay Administrative Tab*, *Houston Post*, Nov. 1, 1994, at A11. This settlement was approved with some minor modifications by Judge Sam Pointer. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994). Although Judge Pointer did not expressly limit the contingency fees that individual attorneys could charge their clients, the existence of the 24% ceiling coupled with extensive administrative costs for notice and fund management plus the necessity of some separate fee award to class counsel made it mathematically inevitable that contingency fees would have to be reduced (at least if most claimants had secured their own counsel). The settlement also provided that the court could "make appropriate reductions" in contingency fee arrangements, and many plaintiffs' attorneys interpreted this statement to mean that a *de facto* ceiling would apply. See Mike McKee, *Sparring Over \$1 Billion Pot: Breast-Implant Fund Spawns Angling, Anxiety*, *Legal Times* (Washington), May 9, 1994, at 4. Although this approach was commendable in intent, it may have resulted in a counterproductive incentive for plaintiffs' attorneys to advise their clients to opt out from the class action. See *infra* note 300 and accompanying text.

cent of the recovery received by the victim. Once liability has been established by the class action settlement, the individual attorney often has little more to do than to file a claim establishing the client's eligibility. Typically, this filing can be done by a paralegal in a few hours. In this setting, commentators have argued that contingency fees are unjustified because the attorney is no longer exposed to any contingency or risk in the case.<sup>116</sup>

In some recent mass tort class actions in which there was no separate inventory settlement, the attorneys' fees that individual law firms expected to receive from their clients alone approached the size of the largest class action fee awards.<sup>117</sup> The size of such contingency fees seems unconscionable in light of the limited work to be performed once liability has been established. Generally, the mass tort class action will establish an independent "claims resolution facility" which requires only that individuals or their representatives present the necessary medical documentation and evidence of work history to receive compensation.<sup>118</sup>

The mass tort claims resolution facility itself presents still another area where the plaintiffs' attorney may have a sharp conflict of interest. Traditionally, defendants and their counsel have not been involved in the claim allocation process and have been largely indifferent as to how a settlement was distributed so long as they received a release from further liability.<sup>119</sup> For plaintiffs and their attorneys, however, the issues associated with the design of such claims facilities are often fundamental. Should the settlement fund be distributed on a first-come, first-served basis? Or should payments be prorated or otherwise paid in deferred installments to ensure that the fund remains adequate to compensate future claimants? From a self-interested perspective, plaintiffs' attorneys have little reason to hold back settlement funds for future claimants and considerable reason to prefer a first-come, first-served approach. The latter approach affords them early payment both for existing clients and new clients that they are well positioned to solicit because of their role as class counsel. As a result, this desire for an early payout heightens the possibility that the settlement fund will be exhausted before future claimants are compensated.

3. *Eligibility Restrictions and Illusory Benefits.* — Even if a self-interested plaintiffs' attorney is willing to enter into a "cheap" settlement, a problem

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116. See Brickman, *supra* note 115, at 78.

117. In March 1995, the author was told by an attorney who requested anonymity but who was participating in the *Silicone Gel* litigation, see *infra* text accompanying notes 241-264, that some firms in that case had large enough client inventories that they expected to receive upwards of \$50 million simply from their clients without regard to any court-awarded fee to class counsel.

118. See Francis E. McGovern, Forward, Claims Resolution Facilities and the Settlement of Mass Torts, 53 *Law & Contemp. Probs.*, Autumn 1990, at 1, 1. Typically, defendants negotiate a lump sum settlement and thus have no further liability even if the claims actually filed dwarf all projections and require a scaling back of the benefits.

119. See *id.* at 4.

remains: the court must approve the proposed settlement. In a mass tort case involving serious physical injuries or illness, this can be a significant hurdle. Few, if any, courts would approve a settlement that accorded desperately ill plaintiffs only nominal consideration. For example, if the sole producer of a carcinogenic product offered only \$5000 compensation to plaintiffs suffering from a form of cancer likely to have been caused by its product, there would likely be a public outcry (and an appeal) if the court accepted such a settlement that seemingly placed a \$5000 price tag on human life.

Accordingly, in order to structure a "cheap" settlement in a mass tort case, the parties must do more than simply agree on compensation levels below the amount that parties at arm's length would negotiate. Various tactics to this end are possible. One is to impose rigorous eligibility criteria that would disqualify many or most within the plaintiff class—but in a manner that is not self-evident to the court or to other third parties. For example, severely restrictive eligibility criteria can be imposed<sup>120</sup> (i.e., a ten-year occupational exposure, without an employment break, to asbestos). Or, in a mass tort property damage case, various losses that might have been caused by factors other than the defective product can be broadly and generically excluded from the settlement's coverage.<sup>121</sup> In classes likely to be dominated by future claimants, another approach is to provide for a very low inflation factor.<sup>122</sup> Thus, as illnesses and injuries inevitably arise over a thirty-year (or longer) period, the later claimants will find their claims being released for compensation that is clearly inadequate by then-prevailing standards. Finally, the parties can simply underestimate the number and character of the claims likely to be filed against the settlement fund. Given the multi-decade latency periods of many mass torts, this is easy to do even with the best of intentions, but in the common case where the defendants agree only to make a lump-sum settlement, the result of such underestimation is to reduce radically the benefits that future claimants will receive. Because projections of future claims are both expensive to prepare and susceptible to manipulation,

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120. For precisely this example, see *infra* note 286.

121. Again, for such an example, see *infra* note 286.

122. This was a major issue in *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 278 (E.D. Pa. 1994); see also *infra* notes 213–214 and accompanying text (discussing impact of inflation on *Georgine* settlement). The appropriate inflation factor to use in determining the payments to future claimants is an extremely sensitive determination. In the National Gypsum mass tort bankruptcy, "the court adopted a three to four percent annual inflation rate for future settlement values," rejecting the rate of six to eight percent sought by future claimants. Dunbar & Neumann, *supra* note 58, at 31. Although the higher rate may better reflect recent national experience, even it probably serves as a poor proxy for determining the increased medical costs that the future claimant will face on becoming ill after a long latency period. The rate of increase in medical costs has recently exceeded the overall inflation rate by a considerable margin. See Mike Causey, HMOs May Be Best Route, *Wash. Post*, Aug. 18, 1995, at B2 (noting "medical cost increases that typically are double or triple the inflation rate"). A low inflation rate leaves the claimant with an inadequate settlement to pay those costs.

plaintiffs' attorneys will be inclined to rely on data prepared by defendants and thus need not engage in anything resembling active collusion. As a result, acquiescence by plaintiffs' attorneys in an underfunded settlement may be the gravest danger that future claimants face.

There are no doubt justifications for some occupational exposure criteria and for some exclusions from coverage, and by definition projections will sometimes miss the mark. The critical point, however, is that these are issues that the parties uniquely understand, but which the court approving the settlement may only dimly perceive. Put more simply, complex damages, eligibility, and causation issues tend to arise more commonly and in more complex variations in mass tort cases than they do in ordinary commercial class action litigation. As a result, when the plaintiffs' attorney is subject to a conflict of interest, the parties may find it easier to blind even a well-motivated court to their proposed settlement's impact because a higher level of expertise is necessary to evaluate the settlement.

4. *Settlement Classes*. — Nothing better facilitates collusion than the ability on the part of the defendants to choose the counsel who will represent the plaintiff class. To be sure, even if so chosen, plaintiffs' counsel could behave responsibly. But the dynamics for collusion are set in motion when such a selection process is possible.

Surprisingly, this practice is today not only possible but rapidly becoming common.<sup>123</sup> The new procedure involves negotiations between defendants and plaintiffs' attorneys prior to certification of the class action<sup>124</sup>—and, in some particularly dramatic cases, prior even to the filing of the class action.<sup>125</sup> Obviously, this approach allows the defendants to test out settlement terms (potentially with several teams of plaintiffs' attorneys) before any action is filed. Then, when and if an agreement is reached, the action will be filed as a "settlement class." Originally, the term "settlement class" seems to have meant only that in certifying the class "for settlement purposes," the court would defer any decision as to whether the proposed class actually satisfied Rule 23's certification criteria until after negotiations produced (or failed to produce) a settle-

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123. Settlement class actions are not only common, but in some district courts appear to constitute the majority of certified class actions. Preliminary data collected by Federal Judicial Center researchers investigating class action activity in two selected district courts indicated that out of 63 motions for class certification in the Northern District of California during a two-year period, approximately 19 (or 30%) were certified for settlement purposes only; correspondingly, out of 97 motions for class certification in the Eastern District of Pennsylvania, approximately 13 (or 13%) resulted in certification for settlement purposes only. See Willging et al., *supra* note 14, at 23–24. Viewed in terms of the total classes that were certified, this data translates into a finding that roughly 54% of N.D. California certified class actions and 26% of E.D. Pennsylvania certified class actions were certified as settlement classes.

124. See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (upholding pre-certification settlement), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993).

125. See *Georgine*, 157 F.R.D. at 267–68 (describing negotiation of settlement prior to filing of the class action); *infra* text accompanying notes 187–191.

ment.<sup>126</sup> Under this approach, defendants waived no rights and could still object if the negotiations failed. Some recent decisions and the developing practice seem, however, to conflate the issue of class certification with that of settlement adequacy: if the settlement seems fair, then the court assumes that the class can be certified (on the apparent theory that the predominant common issue for purposes of Rule 23 is the fairness of the settlement).<sup>127</sup>

From the defendants' perspective, any attempt to reach an agreement by means of a settlement class is a "no lose" proposition: if defendants can obtain agreement from plaintiffs' attorneys and the court to a favorable settlement, the technique advances their interests; if they cannot, they are no worse off and can still object to any attempt by plaintiffs to obtain final class certification. More importantly, at least at the pre-filing stage, the plaintiffs' attorneys with whom the defendants are negotiating are always aware that if they do not reach agreement, the defense attorneys can move on and try their luck with a new team of plaintiffs' attorneys. Indeed, this is the critical difference between the evolving "settlement class action" procedure and negotiations between the parties in a conventional class action. In the latter context, if the defendants rebuff plaintiffs' counsel, the plaintiffs' team can litigate to a judgment. In the settlement class action, however, the plaintiffs' attorney has only a commission to settle and not to litigate. Such a plaintiffs' attorney has little more than a right of first refusal on the terms offered by the defendants. As this attorney must be painfully aware, a failure to exercise that option implies only that the option may pass to whomever is next in line. Thus, the bottom line is that the availability of the settlement class action tends to reduce the plaintiffs' attorney's negotiating leverage.

Courts have long been aware of the potential for lawyer-shopping that exists in informal settlement negotiations.<sup>128</sup> The original *Manual*

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126. See *Girsh v. Jepson*, 521 F.2d 153, 155 n.3 (3d Cir. 1975); *Greenfield v. Villager Indus.*, 483 F.2d 824, 826, 832-33 (3d Cir. 1973).

127. This interpretation, however, plainly misreads Federal Rule of Civil Procedure 23. Rule 23(a)(2) requires that for a class to be certified there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). If the class is to be certified under Rule 23(b)(3) (as most actions for money damages must be), then these common issues must also "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Also, Rule 23(b)(3) requires the court to determine that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* By focusing only on the settlement's fairness, a few courts have found the fact of a settlement largely resolves these latter issues of "predominance" and "superiority." See *Georgine*, 157 F.R.D. at 316; *Bowling*, 143 F.R.D. at 160. But see *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), discussed *infra* note 285 and accompanying text.

128. Consider, for example, the following judicial statement:

[A] person who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendants' wishes. This is so because such an individual, lacking official status, knows that a negotiating defendant may not like his "attitude" and may try to reach a settlement with

for *Complex Litigation* strongly discouraged the use of a settlement class action, pointing to the dangers that plaintiffs' counsel would not be able to live up to its fiduciary responsibility in such a conflict-laden context.<sup>129</sup> During the 1980s, however, courts gradually retreated from the *Manual's* original *per se* rule. In *Weinberger v. Kendrick*,<sup>130</sup> Judge Henry Friendly acknowledged the dangers latent in any settlement reached before the class was certified, but reasoned that the court could "scrutinize the fairness of the settlement with even more than usual care."<sup>131</sup>

Recognizing these dangers, some decisions accepted the settlement class only when all class members were treated identically and the prospects for conflicts among them seemed minimal.<sup>132</sup> This is clearly not the case in the mass tort context. Here, substantial variation in the type and severity of injury is the norm, not the exception. In part for this reason, some courts of appeals in the early to mid-1980s reversed certifications of mass tort settlement class actions.<sup>133</sup>

The major turning point in judicial attitudes toward the settlement class action came in 1989 in the Dalkon Shield mass tort litigation. Rather than viewing a settlement class as presumptively suspicious, the Fourth Circuit instead saw the existence of a tentative settlement as a positive factor: "If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification."<sup>134</sup>

In force until this year, the *Manual for Complex Litigation (Second)* still urged "great caution" in certifying a settlement class action.<sup>135</sup> It explained:

In such situations, the fairness of the settlement may be very difficult to assess. No one may know how many members are in the class, how large their potential claims are, what the strength and

another member of the class. . . . Consequently, when the settlement is not negotiated by a court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class.

*Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971).

129. See *Manual for Complex Litigation* § 1.46, at 60-61 (5th ed. 1982).

130. 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). For similar statements, see also *Mars Steel v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987) (finding settlement substantively and procedurally fair because the plaintiffs' class would receive the expected value of its claim and notice was adequate); *In re Beef Antitrust Litig.*, 607 F.2d 167, 174-77 (5th Cir. 1979) (holding partial settlement fair and reasonable because it was necessary, included all defendants, and reduced the burden on settling plaintiffs), cert. denied, 452 U.S. 905 (1981).

131. *Weinberger*, 698 F.2d at 73.

132. See *In re Baldwin-United Corp.*, 105 F.R.D. 475, 480-81 (S.D.N.Y. 1984).

133. See, e.g., *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984), rev'g 102 F.R.D. 239, 241 (S.D. Ohio 1984). As of 1986, Professor Linda Mullenix observed that "scant authority supports the proposition that a class can be certified for settlement purposes only." Mullenix, *supra* note 11, at 1039.

134. *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

135. *Manual for Complex Litigation (Second)* § 30.45, at 243 (1985).

weakness of the parties' positions are, or how much the class members will benefit under the settlement. Lacking this information, the court should be wary of presenting the settlement to the class.<sup>136</sup>

These words are particularly true in the case of mass torts, where the future claimants' problem dwarfs the problem of evaluating fairness in ordinary class actions. Nonetheless, the new *Manual for Complex Litigation (Third)* relaxes standards still further by first noting that cost and time savings have lead courts to "permit the use of settlement classes and the negotiation of settlement before class certification," and then expressing the mild caution that "settlements involving settlement classes . . . [require] closer judicial scrutiny than approval of settlements where class certification has been litigated."<sup>137</sup> In short, the progression from the first to the third *Manual* reveals a dilution in the tenor of its warnings about settlement classes, which is concomitant with the growing percentage of the federal civil docket that mass torts represent.

When courts first accepted settlement class actions, the normal pattern was that parties litigated actively for a period of months or longer, sparring over discovery and related motions—until reaching a tentative agreement on a settlement. In contrast, the newer pattern has involved a settlement reached after little or no active litigation (and sometimes before the complaint is filed).<sup>138</sup>

Judicial attitudes toward the settlement class action have divided in one important respect. Some courts have found it necessary only to determine that the settlement is fair and adequate, dispensing with, or relaxing the standard for, the specific findings required by Rule 23.<sup>139</sup> Conversely, the Third Circuit has insisted upon the same findings in a settlement class action as in one certified for trial.<sup>140</sup> This relaxed atti-

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136. *Id.*

137. *Manual for Complex Litigation (Third)* § 30.45, at 243 (1995).

138. See *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 711 (3d Cir. 1993); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 728 (2d Cir. 1992), modified sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993); see generally 2 Newberg & Conte, supra note 96, § 11.27 (discussing temporary settlement classes).

139. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*76-77 (N.D. Ala. Sept. 1, 1994); see also *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 316 (E.D. Pa 1994) (finding that the fairness and adequacy of the settlement is a "predominant issue for purposes of Rule 23(b)(3)"); *Bowling v. Pfizer*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (approving settlement, noting "egalitarian fairness" in treating class members alike), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993). In effect, this approach means that if the court believes the settlement is fair, it can also thereby find that the "predominance" and "superiority" requirements of a Rule 23(b)(3) class action are also satisfied; these requirements are the principal doctrinal hurdles for certification of a class action seeking money damages. See *infra* note 142.

140. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995). Rule 23(a) requires findings of numerosity, typicality, commonality, and adequacy of representation, and Rule 23(b)(3) requires additional findings of superiority and predominance as to class actions certified under Rule 23(b)(3). See Fed. R. Civ. P. 23(a), (b)(3).



tude of some courts toward settlement classes contrasts with their generally harsher attitude toward certification of mass tort class actions when the defendant objects.<sup>141</sup> For plaintiffs, this disparity increases the pressure to settle. For defendants, the current state of the law represents the best of both worlds: uncertainty as to whether a "hostile" class action can be certified, but receptivity toward settlement classes.

5. *Restricting Opt Outs: Mandatory Classes and the Limited Fund Theory.* — Probably the most aggressive tactic that has been attempted recently in connection with a "friendly" mass tort settlement is the certification of a "mandatory" class action from which class members may not opt out. Normally, a class action seeking money damages must be certified pursuant to Federal Rule of Civil Procedure 23(b)(3),<sup>142</sup> and in such a case, class members have an express right to opt out.<sup>143</sup>

Because "small claimants" have little incentive to opt out and because future claimants have little ability to do so, a "mandatory" class action principally impacts "high stakes" present claimants who would otherwise pursue individual actions. In reality, certification of a Rule 23(b)(1)(B) mandatory class is a protection for defendants against the "danger" that high stakes individual claimants, dissatisfied with the terms of the settlement class, will opt out. If this were to happen, defendants would lose the benefit of the settlement because they might have to pay twice: once to the claims resolution facility established by the settlement, and again to individual claimants who opt out.<sup>144</sup> Yet, the existence of

141. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

142. Rule 23(b)(3) provides that a class action may be certified if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available means for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In shorthand, these are known as the "predominance" and "superiority" requirements.

143. Rule 23(c)(2) provides that in any class action maintained under subdivision (b)(3), the court shall "advise each member that . . . the court will exclude the member from the class if the member so requests by a specified date." Fed. R. Civ. P. 23(c)(2). The right to opt out is also protected by the Due Process Clause, but only to an uncertain degree. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 114 S. Ct. 1359 (1994); *infra* notes 407-439 and accompanying text.

144. Of course, defendants can (and do) protect themselves against this danger by including a provision in the settlement agreement entitling them to back out if a specific percentage or number of class members chooses to opt out. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 325 (E.D. Pa. 1994) (noting that defendants had chosen not to exercise this right). The *Silicone Gel* settlement also contained such a provision, and the district court noted, even as of 1994, that the number of opt outs "raises the specter that one or more defendants may elect to withdraw from the settlement in view of the risks and costs of potential litigation with these claimants." *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*17, \*23, and \*65 (N.D. Ala. Sept. 1, 1994). Such a withdrawal or "walkaway" provision is analogous to the common provision in a merger agreement permitting the acquiring firm to elect to cancel the merger if more than a specified percentage of the stockholders of the acquired firm elect to exercise their statutory right of appraisal.

substantial opt outs may be the best evidence that the original settlement was inadequate (and possibly collusive).

Attempts to obtain certification of a mandatory class action under Rule 23(b)(1)(B) usually seek to rely on the justification that, absent pooling and proration among all claimants, the defendant's limited assets soon will be exhausted to the prejudice of future claimants, who will not receive compensation. There are at least two short answers to this justification: First, bankruptcy handles this pooling function much better, and with superior safeguards and procedures, than does the class action.<sup>145</sup> In particular, claimants in bankruptcy are protected by the "absolute priority" rule, which precludes the debtor's shareholders from participating in the reorganized company until all creditors have been paid in full.<sup>146</sup> Second, the prediction that one's assets are insufficient to handle future claims is easily made, particularly by self-interested defendants. When the court accepts this claim, the defendant may be able to escape with a settlement that scales back its tort liability, whereas in bankruptcy, it would be forced to transfer virtually all its equity to its creditors.<sup>147</sup> Until recently, possibly for these reasons in part, attempts to certify a "limited fund" class action have generally been reversed on appeal.<sup>148</sup>

Other techniques for restricting opt outs also have been used recently. If a large number of class members do opt out, defendants may claim that the objectors to the settlement misinformed them about the litigation and request the court to invalidate all existing requests to opt out from the class. If they are successful, a second notice and opt out period will be provided, but the impact may be to exhaust and demoralize the objecting attorneys who labored to canvass their individual clients. In addition, the court can require that a disclosure statement be circulated informing the class members that in the determination of the court they have been misinformed by materially misleading communications earlier provided to them. For example, in *Georgine v. Amchem Products*,

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145. See *infra* text accompanying notes 457-470.

146. In principle, the Bankruptcy Code prohibits confirmation of a plan of reorganization that permits a junior class to participate in the distribution unless the claims of all senior classes are paid or satisfied in full. See 11 U.S.C. § 1129(b)(2) (1994). In reality, shareholders do obtain a modest share in the reorganized company alongside the former creditors. See Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. Pa. L. Rev. 125, 181 (1990). Still, even if the equity receives 10 to 15% of the reorganized company because of its nuisance value, this pattern contrasts sharply with the *Ahearn v. Fibreboard* class action, see *infra* text accompanying notes 215-240, where stockholders made no more than a nominal contribution to the class action settlement.

147. See *infra* text accompanying notes 163-171.

148. See *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 857 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). But see *Ahearti v. Fibreboard Corp.*, No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062 (E.D. Tex. July 27, 1995) (discussed *infra* text accompanying notes 215-240).

*Inc.*,<sup>149</sup> Judge Reed both invalidated some 236,323 individual opt outs and refused to permit plaintiffs' attorneys to execute forms on behalf of their individual clients.

Although plaintiffs' attorneys specializing in individual trial work have self-interested reasons to advise their clients to opt out, the better remedy might be to permit the settling parties to try to lure these opt outs to opt back in.<sup>150</sup> Otherwise, the draconian remedy of en masse invalidation seems capable of confusing clients and exhausting individual plaintiffs' attorneys.

6. *Initial Summary.* — Part I has made a depressingly simple point: conflicts of interest permeate the mass tort field. These conflicts are not only between attorney and client, but between present claimants and future claimants. Because of the inevitable heterogeneity among class members in personal injury class actions and also because of the uniquely exposed position of future claimants, the conflict problem is probably more intense and aggravated in mass torts than in other areas of class action or high volume litigation. Yet these conflicts largely have been ignored in the recent commentary on mass torts, obscured behind a mist of rhetoric about public law approaches and the need to protect the federal docket from inundation.

Even if courts wanted to monitor these conflicts closely, it is doubtful that they currently have the tools to do so. Attempts to estimate the impact of inflation a half-century away or to project the number of future claims likely to arise are little more than a stab in the dark. Yet, as will be seen next, there is very little evidence that courts want to engage in such monitoring.

## II. CASE STUDIES IN MASS TORT CLASS ACTIONS

Context counts. Critics invariably overgeneralize by treating all mass tort cases alike. Not only does the behavior of the parties differ from context to context, but judicial behavior in particular seems to change, depending in large measure on the degree of pressure that a generic type of litigation places on the court. This section will focus on three distinct subcontexts: (1) asbestos litigation; (2) silicone gel breast implants; (3) mass disaster litigation; and (4) mass tort property damage litigation.

### A. *Asbestos Litigation*

1. *Background.* — Although, like a massive, unending river, asbestos litigation has flowed through the courts, it at least had a definable start-

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149. 160 F.R.D. 478, 500-02 (E.D. Pa. 1995).

150. That is, after the court approved a revised disclosure document, defendants could circulate it to the class members who had previously opted out and request them to cancel their earlier opt out decision. Silence by the class members would leave them in the position of having opted out. This approach divides the logistical burden of canvassing the class members between the two sides.

ing point: the Fifth Circuit's holding in 1973 that asbestos manufacturers could be held strictly liable for injuries resulting from asbestos exposure.<sup>151</sup> By 1992, less than twenty years later, an estimated 200,000 personal injury claims, each typically naming multiple defendants, had been filed or were pending nationwide.<sup>152</sup> Yet, even this number may represent only the tip of the proverbial iceberg. By some estimates, upwards of twenty-one million Americans have been exposed to asbestos in a manner that risks serious health problems,<sup>153</sup> and estimates as high as an additional 250,000 to 500,000 deaths from asbestos exposure have been responsibly made.<sup>154</sup> Nor has the pace of case filings begun to slacken. By 1990, the rate of case filings was increasing at an exponential pace.<sup>155</sup>

Because asbestos cases tended to be geographically concentrated (basically in eastern and Gulf coastal areas where shipyards, which once used asbestos abundantly, were located), federal courts there first began to experiment with aggregative processing techniques in asbestos litigation. The most innovative and successful experiment was that employed by Judge Robert Parker of the Eastern District of Texas. Faced with over 2000 aggregated claims, Judge Parker selected 160 representative cases and tried them in three phased stages before three juries.<sup>156</sup> In Phase I, the first jury ruled basically on the question of liability; in Phase II, two new juries were presented evidence on plaintiffs' exposure to defendants' products. Finally, in Phase III, the same two juries considered contributory negligence issues<sup>157</sup> and then, sitting separately, awarded damages for two different groups of claimants. The actual individual plaintiffs received the verdict that the jury awarded them, but the awards in these representative cases were then averaged and the other claimants, whose cases were not tried, received the average amount for their subgroup. The result conserved both judicial time and the notoriously expensive

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151. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

152. See *Hensler & Peterson*, *supra* note 37, at 1004.

153. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 736 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993).

154. See *id.* at 746; see also Steven L. Schultz, Note, *In re Joint Eastern & Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for Use of Federal Common Law in Mass Tort Class Actions*, 58 *Brook. L. Rev.* 553, 560 n.39 (1992) (citing estimate of 500,000 likely deaths).

155. Between 1989 and 1990, the number of asbestos-related personal injury case filings in federal court increased by 66%, from 8230 in 1989 to 13,687 in 1990. See Schultz, *supra* note 154, at 555 n.9.

156. See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990) (consolidating asbestos cases for trial on common issues).

157. See Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *Stan. L. Rev.* 815, 822 (1992); see also *Trangsrud*, *Mass Trials*, *supra* note 4, at 80–82 (criticizing use of multiple phases in mass tort actions).

transaction costs of asbestos litigation.<sup>158</sup> All this was accomplished through consolidation of cases and without the use of the class action format.

Subsequently, Judge Parker's consolidation and sampling approach was replicated on an even larger scale in a Baltimore trial that covered some 8500 cases.<sup>159</sup> Although commentators applauded this consolidation approach for its ability to distinguish among categories of injury (and thus avoid the gross distortions when inventories of cases are settled based on often arbitrary allocation formulas),<sup>160</sup> neither defendants nor mass tort practitioners have shown any enthusiasm for this approach.<sup>161</sup> Trial lawyers prefer to pursue punitive damages in individual actions, and the defendants (who appealed Judge Parker's decision to use sampling techniques) appear to prefer the delay and negotiating leverage that a congested docket affords them.<sup>162</sup>

2. *The Bankruptcy Alternative.* — Beginning in the early 1980s, a number of asbestos producers, including Johns-Manville Corporation, the industry's largest firm, sought the protection of bankruptcy to obtain relief from cascading asbestos claims.<sup>163</sup> According to the Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist, eleven out of the twenty-five major asbestos manufacturers had sought bankruptcy protection by 1991.<sup>164</sup> At the time, these bankruptcies were controversial within the bankruptcy bar because of their "novel premise that the corporation was entitled to bankruptcy protection not because it was insolvent, but because continuing trends in asbestos litigation made a bankruptcy reorganization the best way to manage the payment of present and future claims."<sup>165</sup> That asbestos producers sought bankruptcy reorganization should not have been surprising. Facing a future of seem-

158. See *supra* note 15.

159. See Hensler & Peterson, *supra* note 37, at 1004 n.235, 1054.

160. See Saks & Blanck, *supra* note 157, at 826-41.

161. See Hensler & Peterson, *supra* note 37, at 1054.

162. In addition, as discussed *infra* at notes 183-191 and accompanying text, defendants benefitted from the decision to consolidate and stay all pending federal asbestos cases in 1990.

163. At least fifteen major asbestos producers filed for bankruptcy reorganization during this period, beginning with Unarco Industries in July 1982 and Johns-Manville Corporation in August 1982. For a partial list, see Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing at 17, *Ahearn v. Fibreboard Corp.*, No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062 (E.D. Tex. July 27, 1995) [hereinafter *Ahearn Class Action Notice*] (on file with the Columbia Law Review). For representative decisions, see *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y.), mandamus denied, 749 F.2d 3 (2d Cir. 1984); *In re Amatex Corp.*, 30 B.R. 309 (Bankr. E.D. Pa. 1983), *rev'd*, 755 F.2d 1034 (3d Cir. 1985); *In re UNR Indus., Inc.*, 29 B.R. 741 (Bankr. N.D. Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

164. See Asbestos Ad Hoc Committee Report, *supra* note 69, at 14, reprinted in *Asbestos Litig. Rep.* at 22705.

165. Smith, *supra* note 61, at 373; see also Frank R. Kennedy, *Creative Bankruptcy? Use and Abuse of the Bankruptcy Law—Reflection on Some Recent Cases*, 71 *Iowa L. Rev.* 199, 202-10 (1985) (discussing Johns-Manville bankruptcy).

ingly endless, repetitive, and expensive individual cases, these defendants understandably wanted a quick fix that would resolve all asbestos liabilities in one proceeding. The hope was that a transfer of assets could be made to a mass tort bankruptcy trust, which could then use low-cost arbitration procedures to resolve eligibility and damage issues among the claimants. In addition, asbestos defendants undoubtedly hoped that under this arrangement their shareholders could retain a significant share of their equity, because that had become the standard outcome in other bankruptcy reorganizations.<sup>166</sup>

That bankruptcy reorganization would prove more advantageous to defendants than litigation quickly proved an unfounded hope. Johns-Manville Corporation transferred eighty percent of its ownership to its bankruptcy trust.<sup>167</sup> Yet, even this contribution proved inadequate. Funded with nearly \$5 billion in assets, the Manville Personal Injury Settlement Trust opened in 1988. Two years later, it was effectively insolvent.<sup>168</sup> Although it had been estimated that some 83,000 to 100,000 claims would be filed during the life of the Trust (extending well into the twenty-first century), 240,000 claims were in fact filed by the end of 1994, and several hundred thousand more claims were expected to be filed.<sup>169</sup>

From a public policy perspective, the principal lesson from the Manville reorganization is that, unless restricted, present claimants will deplete virtually any settlement fund in short order, leaving future claimants empty-handed. Yet, ironically, future claimants receive both more substantive protection (i.e., the absolute priority rule) and considerably more procedural protection in bankruptcy than they enjoy today in class action settlements.<sup>170</sup> Thus, although the bankruptcy experience under-

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166. Although the "absolute priority" rule in bankruptcy entitles creditors to be paid in full before shareholders retain any share in the bankrupt entity, the empirical reality is that shareholders possess a nuisance value which they can exploit to obtain participation in the 10 to 15% range in corporate reorganizations. See LoPucki & Whitford, *supra* note 146, at 179-90.

167. See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 485 (E. & S.D.N.Y. 1995).

168. See Smith, *supra* note 61, at 368-69.

169. See *Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. at 485-86.

170. For example, while subclasses in a class action are largely discretionary with the trial court, bankruptcy gives far more formal procedural protection to classes of creditors (including the right to a class vote). When a class of creditors votes against a plan of reorganization, the plan may only be approved under the so-called "cram down" provisions of Chapter 11, which basically require the court to find that the absolute priority rule has been complied with and that all members of the dissenting class have been paid in full. See 11 U.S.C. § 1129(b) (1994). In contrast, Rule 23 requires neither approval by the class members nor satisfaction of absolute priority. The relatively open-textured liberality of Rule 23 has recently caused it to be viewed as an alternative mechanism by which even corporate bondholders might be forced to accept a reorganization plan that would not satisfy the absolute priority rule. See Richard L. Epling, *Are Rule 23 Class Actions A Viable Alternative to the Bankruptcy Code?*, 23 Seton Hall L. Rev. 1555, 1568-69 (1993).

Two recent asbestos mass tort proceedings, one resolved in bankruptcy, the other in a class action, provide a useful contrast. In *In re Johns-Manville Corp.*, 36 B.R. 743, 759

lines the vulnerability of future claimants, it also suggests that a bankruptcy proceeding may be a superior alternative to a class action.

For defendants, the practical lesson from the Johns-Manville experience with mass tort bankruptcy is that it is neither cheap nor final. When the Manville Trust became insolvent, Judge Jack Weinstein engineered a class action to restructure and increase the payments to the Manville Trust from the newly organized Manville Corporation.<sup>171</sup> Absent finality, the attractions of mass tort bankruptcy thus looked minimal to the corporate planner, and so the search turned to other alternatives.

3. *The Return of the Asbestos Class Action.* — During the mid-1980s, the asbestos industry pinned its hopes primarily on alternative modes of dispute resolution. The Asbestos Claims Facility, an industry-wide consortium, and its descendant, the Center for Claims Resolution (CCR),<sup>172</sup> sought during this period to encourage expeditious resolutions of claims in order to avoid the expense of litigation. Its premise was that because over sixty percent of asbestos-related expenses went to attorneys' fees and costs, early settlement could economize on this component.<sup>173</sup> Yet, the more claims they settled, the more plaintiffs' attorneys invested in search activities to discover new claimants. From the defendants' perspective, informal resolution also brought about a deterioration in the quality of claims, as individuals without visible symptoms or incapacity, but with a telltale pleural thickening on their pulmonary walls, increasingly predominated within the claimant population.<sup>174</sup> Attempts by defendants to establish "pleural registries," which deferred payment to unimpaired asbestos claimants while preserving their tort claims if their

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(Bankr. S.D.N.Y.), mandamus denied, 749 F.2d 3 (2d Cir. 1984), the court appointed a special representative for future claimants. In contrast, in *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 317-19 (E.D. Pa. 1994), the court found it unnecessary to recognize special subclasses or even to appoint a guardian ad litem. Even if subclasses are recognized, however, there is no provision for a class vote, and the reaction of class members to the settlement is generally discounted by the court.

171. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993).

172. See *supra* note 83. The CCR was formed in 1988 when the asbestos-related bankruptcy of some major participants in the Asbestos Claims Facility forced the Facility's dissolution. In addition, philosophical differences arose among its members, some of whom wished to take a harder, more adversarial stance toward plaintiffs. See Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *Tex. L. Rev.* 1587, 1608-09 (1995).

173. For this 60%+ estimate, see *supra* note 15. In the Johns-Manville bankruptcy, the court estimated the amount of compensation received by victims to be even lower (namely, only 30 cents out of every dollar expended). See *Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 749.

174. Known as "pleural plaques," such pulmonary calcification or thickening is generally believed to be caused by exposure to asbestos, and may foretell more serious future illness (including cancer), but is not by itself incapacitating. See *id.* at 739-41.

injuries worsened, proved unsuccessful.<sup>175</sup> Not surprisingly, few asbestos victims preferred deferral to an immediate cash payment (with the right in most jurisdictions to bring a later suit if their condition deteriorated).

Meanwhile, pressure for change was building within the judiciary. In 1990, an informal network of ten federal district judges attempted to establish an "ad hoc nationwide coordinating committee" to resolve the asbestos case load crisis through case consolidation and management.<sup>176</sup> Although the Sixth Circuit refused to accept this unauthorized innovation,<sup>177</sup> the judges' joint action led to further developments. In March 1991, the Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1990, released its report, which concluded that "this litigation impasse cannot be broken except by aggregate or class proceedings."<sup>178</sup> It recommended that Congress create "a national system for resolving asbestos claims which at the very least permits consolidating all asbestos claims in a single forum."<sup>179</sup>

Based on this hint that nationwide consolidation was now appropriate, eight federal district judges with heavy asbestos caseloads petitioned the JPML in 1991 to consolidate all asbestos personal injury cases in the federal system in a single forum.<sup>180</sup> Despite having refused a similar request on five previous occasions,<sup>181</sup> the JPML decided now to go with the flow, curiously emphasizing the risk of further bankruptcies if it did not do so.<sup>182</sup>

By an order dated July 29, 1991, the JPML transferred all pending personal injury asbestos cases to Judge Charles R. Weiner of the Eastern District of Pennsylvania.<sup>183</sup> Two days later, on August 1, 1991, Judge

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175. See Hensler, *supra* note 172, at 1608; see also Fitzpatrick, *supra* note 83, at 13-15.

176. See Stephen Labaton, 10 Federal Judges Agree on Plan to Consolidate Asbestos Lawsuits, *N.Y. Times*, Aug. 11, 1990, at 1.

177. See *In re Allied-Signal, Inc.*, 915 F.2d 190, 191 (6th Cir. 1990).

178. Asbestos Ad Hoc Committee Report, *supra* note 69, at 19, reprinted in *Asbestos Litig. Rep.* at 22708.

179. *Id.* at 30, reprinted in *Asbestos Litig. Rep.* at 22713.

180. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp 415 (J.P.M.L. 1991).

181. See *id.* at 417.

182. See *id.* at 421-22. As discussed *infra*, bankruptcy may be a much better system for dealing with future claims. The JPML also, however, appropriately stressed the absurdity of multiple awards of punitive damages to present claimants, which can work to deny recovery to future claimants.

183. Revealingly, Philadelphia was also the federal district court with the most asbestos cases (5703) then pending on its civil docket. See Lisa Gibbs, *Strategy Changes in Asbestos Cases*, *Miami Rev.*, Sept. 12, 1991, at 1, available in LEXIS, News Library, ARCNWS File. Thus, the Eastern District of Pennsylvania appears to have been the district court under the greatest pressure to achieve a global settlement. The transfer to the Eastern District of Pennsylvania was pursuant to 28 U.S.C. § 1407(a) (1988), which permits transfer for pretrial purposes, such as discovery and pretrial motions. In reality, however, it is well understood that relatively few cases are remanded to the transferor court, but are usually settled or resolved by the transferee court. See Chesley & Kolodgy, *supra* note 44, at 509-10 (citing data).



Robert Parker, Chair of the Judicial Conference's subcommittee with responsibility for asbestos litigation and a former member of the Ad Hoc Committee appointed by Chief Justice Rehnquist,<sup>184</sup> wrote to Judge Weiner and, in the course of a generally hortatory letter, outlined the task before him:

We now have an opportunity to prove that the federal courts are not impotent. It is incumbent upon us to establish that we are viable as an institution and that we can provide modern solutions for modern problems. If we fail to rise to the task, I fear far reaching consequences.

I deeply believe we are not irrelevant—that we do have a role in our society that is greater than refereeing one-on-one litigation in an expensive and cumbersome manner . . . .

I view your role as one of the commanding generals. You are the Eisenhower of this D-Day operation. The rest of us are colonels prepared to take orders in this joint effort. . . . The magnitude of this assignment is unprecedented in federal court history.

I would encourage you to at all times maintain a focus on the problem as a whole and not let the lawyers mire you into individual or small group considerations. If you let them, they can dominate your time to the point of rendering the transferee judge ineffective as far as the overall solution is concerned. Case management as applied to individual cases or consolidated groups simply will not work on this problem.

I would encourage you to be reluctant to grant exemptions to transfer. The fact that some judge may have X number of cases scheduled to go to trial two months or six months from now and on that basis (contrary to the MDL Order) gains an exemption from this process, in my judgment, is counterproductive. I think we have to continually focus on the larger problem. This focus will produce dynamics that should work toward the larger solution.<sup>185</sup>

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184. See *supra* notes 69 and 164 and accompanying text.

185. Letter from The Honorable Robert M. Parker, Chief Judge, United States District Court, Eastern District of Texas, to The Honorable Charles R. Weiner, United States District Court, Eastern District of Pennsylvania 1-2 (Aug. 1, 1991) (on file with the Columbia Law Review). This letter was also circulated to a number of other federal judges prominent in mass torts litigation, including Judge Jack Weinstein, who filed it with the clerk of the district court for the Eastern District of New York. Both Judges Parker and Weiner had earlier been active in calling for concerted judicial action to resolve the asbestos litigation crisis. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 746-49 (E. & S.D.N.Y. 1991) (citing both judges as taking leading roles), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993). Hence, the JPML was referring all asbestos personal injury cases to a known participant in the prior debate. In quoting this letter, there is no intent to suggest any breach of judicial ethics or other impropriety; the point is rather the degree to which it shows that the bench has come to self-consciously see itself as an interest group, which needs to act (and bargain) collectively.

Clearly, this letter contemplated that Judge Weiner would stay all pending asbestos litigation, granting very few "special hardship" transfers back to the court from which individual cases were transferred. In blunt terms, Judge Parker advised that pressure must be kept on one side (the plaintiffs' attorneys) to induce a global settlement. So admonished, Judge Weiner did indeed slow the pace of asbestos litigation in the federal courts—to the point that fewer than one dozen asbestos cases in federal court appear to have been tried to a verdict or fully settled between the July 29, 1991 transfer date and July 1992.<sup>186</sup>

More importantly, the Parker/Weiner correspondence indicates that asbestos litigation had transcended the usual bilateral context of private litigation and had become a public policy concern in which the judiciary was determined to play a proactive role. The consolidation of asbestos litigation was then the culmination of a coordinated campaign by federal district judges to pressure plaintiffs (and their attorneys) to enter into global settlement discussions with defendants. In short order, nationwide defendants' and plaintiffs' asbestos steering committees were formed, and, throughout the remainder of 1991, exploratory talks continued between the two sides.

Contemporaneously with these developments, defendants' behavior toward pending asbestos cases changed sharply. Because without Judge Weiner's consent plaintiffs could no longer proceed to trial in federal court, defendants (and particularly the largest industry consortium—the CCR) began to stonewall, resisting any individual settlements. Despite repeated requests from plaintiffs' attorneys to allow a transfer of their cases back to their original jurisdictions, Judge Weiner remained adamant. Gradually, his message became clear: no individual settlements would occur outside a global resolution of all asbestos claims. Because many asbestos victims were desperately ill and dying, this tactic greatly increased the pressure on the plaintiffs' steering committee. Nonetheless, in November 1991, the plaintiffs' steering committee rejected the defendants' steering committee's offer of a global settlement. In truth, this rejection should not have been surprising. With respect to asbestos litigation, the plaintiffs' bar has always been split between "litigators" and "settlers"—those attorneys with a "high quality" clientele having serious injuries and those with a massive, but diverse, inventory of cases. Divisions on the plaintiffs' steering committee appear to have mirrored those within the plaintiffs' bar.

What happened next, however, was surprising. Recognizing that the plaintiffs' steering committee had been split over whether to accept their proposals, the CCR decided to approach the two co-Chairmen of the

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186. See Andrew Blum, *Asbestos Group Asks for Halt to MDL*, Nat'l L.J., July 13, 1992, at 7 (reporting that a majority of the 13-member plaintiffs' steering committee appointed by Judge Weiner had filed a motion with the JPML asking that the MDL proceeding be dissolved, citing in part the alleged fact that fewer than a dozen federal cases had been fully resolved in the interim).

plaintiffs' steering committee, Gene Locks and Ron Motley,<sup>187</sup> and attempt to negotiate a separate settlement with their firms covering all future personal injury claimants in the United States who had been exposed to asbestos. Although it is speculative to guess why the CCR targeted these two law firms, both controlled large inventories of asbestos cases and would benefit greatly from an inventory settlement of them.<sup>188</sup> In any event, the CCR, which had previously indicated its unwillingness to settle inventories with plaintiffs' firms in light of Judge Weiner's stay order, entered into negotiations with these two law firms to settle their entire inventory of asbestos cases. Ultimately, these inventory negotiations resulted in the CCR defendants agreeing to settle claims held by the 14,000 clients of these two firms for a total of just over \$215 million.<sup>189</sup> Because the court never permitted discovery of either attorney, the contingent fees that both firms stood to receive is not known, but on the standard assumption of a one-third contingency fee, the participating law firms would have received over \$71 million. Nor would this be their only benefit from the litigation. The CCR also agreed to pay any attorneys' fees that the court decided to award to class counsel.<sup>190</sup> In return, Messrs. Locks and Motley agreed that even if the class action settlement fell through, they would not file new claims against the CCR defendants that did not meet the highly restrictive medical criteria for compensation included in the proposed class action settlement.<sup>191</sup>

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187. In his deposition in *Georgine*, Mr. Lawrence Fitzpatrick, Chief Executive Officer of the CCR, testified that: "We decided to target two law firms for our initial settlement discussions. Those firms were the firms of Ness, Motley and Greitzer & Locks." Deposition of Lawrence Fitzpatrick, Chief Executive Officer of CCR, in Joint Appendix at 1191-94, *Georgine v. Amchem Prods., Inc.*, No. 94-1925 (3d Cir. Feb. 6, 1995) [hereinafter Joint Appendix] (on file with author).

188. Mr. Fitzpatrick testified at his deposition in response to a question as to why CCR had targeted these two firms that "Ness Motley had probably the most number of cases" *Id.* at 1192. Other attorneys active in mass tort litigation have commented to the author that the firm of Ness, Motley, Loadholt, Richardson & Poole is generally recognized as the largest firm (in terms of cases handled) in the asbestos field and is also active in much other mass tort litigation. Mr. Gene Locks of Greitzer & Locks has described his firm to the author as having the largest inventory of cases in the Philadelphia region.

189. The Ness, Motley firm (on behalf of itself and other firms that had referred asbestos cases to it) was to receive \$138,077,100 for its clients, and the Greitzer & Locks firm was to receive \$77,417,000 for its clients. See Exhibit SP303, Total Settlement Amounts Payable to Ness, Motley and Affiliated Counsel and to Greitzer and Locks, in Joint Appendix, *supra* note 187, at 1399.

190. See Stipulation of Settlement Between the Class of Claimants and the Defendants Represented By the Center for Claims Resolution, in Joint Appendix, *supra* note 187, at 324, 421.

191. See Deposition of Michael Rooney, President of CCR, in Joint Appendix, *supra* note 187, at 1197-98. For the district court's description of this "futures provision," see *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 299-301 (E.D. Pa. 1994). There is a substantial question, nonetheless, whether this agreement violated ABA Model Rules of Professional Conduct Rule 5.6(b) (1992) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of

4. *The Georgine Class Action*.<sup>192</sup> — The next step was even more extraordinary: On January 15, 1993, the two sides simultaneously filed the complaint, the answer, a joint motion for class certification, and the 106-page Stipulation of Settlement in *Georgine v. Amchem Products, Inc.* in federal district court in Philadelphia. Uniquely, the case was over before it had begun—a comprehensive settlement without discovery, motions, or preliminary litigation of any kind. As might be expected under such circumstances, the parties jointly moved the court “for conditional certification of a class action for the purposes of settlement.”<sup>193</sup>

The parties’ speed was matched by that of the court. On February 1, 1993, two weeks after the complaint’s filing, Judge Weiner conditionally certified the proposed class—without bothering to hold a hearing, hear evidence, or require notice to class members.<sup>194</sup> At the same time, Judge Weiner did, however, appoint another judge, District Judge Lowell A. Reed Jr., to conduct hearings on the fairness of the proposed settlement.<sup>195</sup>

After extensive hearings and much discovery (but not of the two lead counsel), Judge Reed issued an order in August 1994 that both certified the class action under Federal Rule of Civil Procedure 23(b)(3) and approved the proposed settlement as fair and adequate.<sup>196</sup> In addition, the court enjoined all class members from “initiating or maintaining any asbestos-related personal injury or death claim(s) or lawsuit(s) against any CCR defendant” in any court, state or federal, except as expressly permitted by the Stipulation of Settlement.<sup>197</sup>

The substantive terms of the *Georgine* settlement are as surprising as the process by which it was reached. The settlement was carefully framed to catch only future claimants, but to catch all of them. Specifically, the class was defined to include

[a]ll persons . . . who have been exposed in the United States or its territories . . . , either occupationally or through occupational exposure of a spouse or household member, to asbestos . . . for which one or more of the defendants may bear legal liability and who . . . have not, as of January 15, 1993, filed a lawsuit for

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the settlement of a controversy between private parties.”). See Koniak, *supra* note 4 (manuscript at 142 nn.174 & 175, 192–93) (analyzing this issue).

192. In discussing this action (in which the author appeared as a pro bono expert witness), the author is deliberately refraining from commenting on the specific conduct of the settling parties or the legal ethics of any attorney. The focus is instead on those issues that have recurring significance. Others have examined the ethical issues in considerable detail. See Koniak, *supra* note 4. For the fullest journalistic account of *Georgine*, see Roger Parloff, *The Tort that Ate the Constitution*, *Am. Law.*, July–August 1994, at 75.

193. Joint Motion of Plaintiffs and CCR Members for Conditional Class Certification, *in* Joint Appendix, *supra* note 187, at 302, 303.

194. See Order No. 11, Granting Joint Motion for Class Certification, *in* Joint Appendix, *supra* note 187, at 112.

195. See Order No. 12, *in* Joint Appendix, *supra* note 187, at 113.

196. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 337–38 (E.D. Pa. 1994).

197. Preliminary Injunction, *in* Joint Appendix, *supra* note 187, at 1049, 1050.

asbestos-related personal injury or damage . . . against the defendant(s)."<sup>198</sup>

This definition obligingly allowed the asbestos plaintiffs' bar to continue to litigate or to settle their existing cases and thereby predictably minimized opposition to the settlement among them. By and large, this strategy worked, as the plaintiffs' bar protested, but only a few plaintiffs' firms undertook the substantial costs of objecting to the settlement. Faced with the federal court's stay order and sensing the strong desire of the court to approve the settlement, most saw little alternative (even if the settlement were rejected) and so grudgingly settled their inventory of cases with the CCR defendants.

Nonetheless, grounds for objections to the settlement are glaringly obvious. First, the substantive terms of the class action settlement clash sharply with the contemporaneous inventory settlements reached by the same plaintiffs' attorneys. Under the inventory settlements, all claimants received compensation (even in the case of lesser injuries), but under the class action only the most seriously injured of asbestos victims will receive compensation—and only then under constraints that could delay actual receipt indefinitely. Essentially, the class action settlement created an insurance system covering all future claims, but provided compensation only for those claims that matured into incapacitating illnesses. Moreover, the settlement processed all future claims through a claim review process managed directly by the CCR defendants, in which the claimants would have to prove both a specific medical condition that was compensable under the settlement *and* occupational exposure to the asbestos products of a member of the CCR, based on criteria far stricter than that required by tort law. For example, in the case of lung cancer, occupational exposure to asbestos of between eight and fifteen years (depending on the victim's job classification) would be required and such exposure must have occurred "at least twelve . . . years prior to [m]anifestation of the lung cancer."<sup>199</sup> Clearly, either lesser periods of exposure or a more recent commencement of exposure would ordinarily suffice in the normal tort system if the claimant were suffering from any of the various cancers or pleural illnesses normally associated with asbestos. In fact, objectors to the settlement presented medical testimony that approximately half the claims that are filed in the tort system, and paid by the CCR in the tort system, would not qualify for payment under the exposure and medical criteria set forth in the Stipulation of Settlement.<sup>200</sup> Dr. Christine Oliver of the Harvard Medical School also testified that up to

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198. *Georgine*, 157 F.R.D. at 319.

199. Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 324, 355–56.

200. See Testimony of Dr. Victor Roggli, *in* Joint Appendix, *supra* note 187, at 1363 (stating that claims for pleural disease that would fail the settlement's criteria constitute at least a plurality, and probably a majority, of all asbestos-related diseases).

fifty percent of the victims that she diagnoses with asbestos-related lung cancer would not satisfy the settlement's medical criteria.<sup>201</sup>

As with other mass tort settlements, *Georgine* worked off a grid system, which specified a limited range of damages that the CCR would award for the various asbestos diseases recognized by the Stipulation of Settlement:<sup>202</sup>

<u>Compensable Medical Category</u>	<u>Minimum Value</u>	<u>Negotiated Average Value Range</u>	<u>Maximum Value</u>
Mesothelioma	\$20,000	\$37,000–60,000	\$200,000
Lung Cancer	10,000	19,000–30,000	86,000
Other Cancer	5,000	9,500–12,500	32,000
Non-Malignant	2,500	5,800–7,500	30,000

The key figure here is the floor on the average range; although actual awards could go higher or lower, CCR was not obligated to pay more than this lower figure on average to victims who satisfied the medical and exposure criteria (i.e., \$5800 to a person with confirmed asbestosis that reduced his lung capacity by, hypothetically, seventy percent).<sup>203</sup>

The limited compensation payable under *Georgine* comes into clearer focus when its settlement grid is contrasted with the Johns-Manville settlement approved by United States District Court Judge Jack Weinstein:<sup>204</sup>

201. See Testimony of Dr. Christine Oliver, *in* Joint Appendix, *supra* note 187, at 1379.

202. See Exhibit B to Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 438. This exhibit is reproduced in the court's opinion. See *Georgine*, 157 F.R.D. at 337. Victims who were found by the CCR to have "extraordinary" claims could be awarded more than the "maximum" value specified above, but only a limited number of claims (no more than 3% of compensable cancer claims and no more than 1% of compensable asbestos claims) could be found to be "extraordinary" in any one year. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 324, 392–93. Nor, of course, was there any obligation on CCR to consider any claim "extraordinary."

203. A claimant who is dissatisfied with the settlement offered by CCR can reject the offer and pursue an individual action in the tort system—but this right to exit the settlement is limited to 2% of the lung cancer victims, 1% of the "other cancer" victims, and .5% of the "non-malignant" victims in any particular year. If more seek to exit the settlement, the excess above these levels must wait in line, possibly for years. See Amendment to the Stipulation of Settlement of January 15, 1993 Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 511, 516–18.

204. See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 495–96 (E. & S.D.N.Y. 1995). This decision notes that the settling parties "expect that most claimants will settle their claims at scheduled values." *Id.* at 495. Johns-Manville was responsible for a larger market share than any individual CCR defendant (and possibly than the aggregate of all CCR defendants), but it was bankrupt, while all CCR defendants remained highly solvent.

	<u>Scheduled Disease Category</u>	<u>Scheduled Value</u>	<u>Maximum Value</u>
I.	Bilateral Pleural Disease	\$12,000	\$30,000
II.	Nondisabling Bilateral Interstitial Lung Disease	\$25,000	\$40,000
III.	Disabling Bilateral Interstitial Lung Disease	\$50,000	\$300,000
IV.	Other Cancers	\$40,000	\$200,000
V.	Lung Cancer (One Lung)	\$60,000	\$400,000
VI.	Lung Cancer (Two Lungs)	\$90,000	\$400,000
VII.	Malignant Mesothelioma	\$200,000	\$500,000

In sharp contrast to *Georgine* (which justifies the lack of compensation to victims without cancer or disabling asbestosis on the ground that they have sustained only minor injuries), the Johns-Manville settlement recognizes the reality of asbestosis disease and permits a maximum recovery for it of \$300,000, which amount exceeds the highest recovery possible for a malignant cancer (i.e., \$200,000) under *Georgine*. Comparing the two tables, one sees that, in the ordinary case, a disabled victim of asbestosis will receive \$50,000 under the Johns-Manville settlement but only between \$5800 and \$7500 under *Georgine*.

Of course, any contrast between the *Georgine* and *Johns-Manville* settlement values must acknowledge that Johns-Manville was a much larger defendant than any of the CCR members and probably represented a greater share of the asbestos industry than they did in the aggregate. Unlike the twenty CCR defendants, however, Johns-Manville was bankrupt and needed to repay financial and trade creditors as well as tort victims. In this light, the contrast between a mass tort class action (*Georgine*) and mass tort bankruptcy (*Johns-Manville*) provides a roadmap for the solvent corporation that suggests that the class action route will enable it to escape much of its tort liability without risking the loss of corporate control that is often incident to a bankruptcy reorganization.

The *Georgine* settlement also imposed strict limitations on the number of qualifying claims that may be paid in any year.<sup>205</sup> Known as "case flow maximums," these limitations were specified for individual disease categories. Thus, in year one, the CCR defendants were required to pay no more than 700 lung cancer cases, 700 mesothelioma cases, and 200 "other cancer" cases.<sup>206</sup> If more qualifying claims are filed, a queue results, and claimants may be required to wait for years (and possibly

205. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 324, 382; Exhibit A to Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 436-37.

206. These figures are the limitations on these specific categories. In addition, the CCR defendants were required to make additional, but smaller, payments to a residual category of "other" claimants. See Exhibit A to Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, *in* Joint Appendix, *supra* note 187, at 436-37. Cumulatively, the CCR defendants could not be required to pay more than 5755 mesothelioma cases, 4185 lung cancers, and 1445 "other

never be paid). For example, between 1989 and 1993, CCR appears to have in fact paid about 25,000 claims a year.<sup>207</sup> If this rate were to continue, a substantial backlog of cases would soon result. Faced with indefinite delays, some victims might soon be forced to accept private settlements well below even the judicially approved levels.

To sum up, the *Georgine* settlement first screens out most persons who would normally receive compensation in the tort system (and who did in fact receive compensation under the inventory settlements paid by the same defendants), and then, for those who do qualify for compensation, it imposes "case flow maximums" under which plaintiff victims could face a long and uncertain wait; finally, the compensation offered falls well below the typical recoveries in the tort system. The contrast between the recoveries afforded present claimants in the tort system and those offered future claimants under the *Georgine* settlement is dramatically illustrated by evidence that the objectors to the settlement presented at the fairness hearing.<sup>208</sup> Starting with the admitted fact that the Ness, Motley firm (one of the two firms serving as lead counsel in the class action) settled its client cases for \$138,077,100,<sup>209</sup> the objectors computed that if the clients in these inventory settlements had recovered the *maximum* average payment that a similarly situated class member would receive under the *Georgine* class action, they would have received only \$89,660,000. So viewed, the difference of \$48,417,100 represents a fifty-four percent premium that the individual clients in the inventory settlements received over the maximum average payment under the class action.<sup>210</sup>

This disparity between the inventory settlements and the class action settlements pales, however, in comparison to the disparity between claim-

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cancers" over the first few years of the settlement (which could only be extended beyond that point with defendants' consent). See *id.*

207. See Center for Claims Resolution: All Filings By Calender Year By Disease, *in* Joint Appendix, *supra* note 187, at 1400-01. The district court itself acknowledged that the CCR defendants had settled 128,000 claims from 1989-1993 and could expect to pay 225,000 claims over the next ten years. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 279 (E.D. Pa. 1994). These figures may understate the actual figures because much of the five-year prior period overlapped with the period of the federal court stay on asbestos litigation, during which the CCR defendants resisted settlements.

208. See Exhibit 0-170, Comparison of Greitzer & Locks Inventory Settlements with *Georgine* Negotiated Average Value Range and Comparison of Ness Motley Inventory Settlements with *Georgine* Negotiated Average Value Range, *Georgine v. Amchem Prods. Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) (on file with the Columbia Law Review). The author helped prepare this exhibit and testified at the settlement hearing with respect to it. For a fuller analysis of this point, see Koniak, *supra* note 4 (manuscript at 122-37). The *Georgine* court found, however, that Exhibit 0-170 did not provide "sufficient information." *Georgine*, 157 F.R.D. at 310.

209. See *supra* note 189.

210. Even this comparison understates the disparity because an unknown percentage of the class members would be disqualified under the strict medical and exposure criteria applicable to the settlement. For example, most persons with non-malignant conditions receive no cash compensation under the settlement, while a substantial percentage of the inventory settlements fall into this category and were compensated.



ants with malignant conditions and those without. Ultimately, class counsel in *Georgine* simply waived compensation for most class members with non-malignant conditions in return for cash payments to those class members with serious malignant conditions. The rationale for this extraordinary act of waiving the rights of some clients to benefit other clients was that "exposed" class members could not predict their future injuries and would prefer to waive compensation for "minor" injuries and reserve it for major life-threatening illnesses. But is this true? Would an individual with a normally compensable injury waive compensation in order to receive greater compensation in the possible (but unlikely) event that the condition would worsen into a very serious or fatal injury? Economically, the assumption that individuals would voluntarily make such a choice is the equivalent of predicting that individuals would insure only for catastrophic illness and would waive any compensatory recovery for lesser injuries in favor of an exclusive focus on death and disability. As an empirical matter, this seems a very shaky prediction.<sup>211</sup>

Normatively, it is even more suspect. Although a legislature or some politically accountable body might decide to provide compensation to only the worst off on paternalistic grounds, a private attorney, acting as class counsel, seemingly has no entitlement to abandon the interests of one group of clients to benefit another. Indeed, the very fact that such trade-offs could be reached highlights the need for subclasses and separate representation of different categories of claimants. Determined not to impede a global resolution, however, the district court rationalized each of these conflicts: subclasses were not needed, the non-malignant future claimants were dealt with fairly because they might receive cash compensation if their injuries worsened, and the differential between the amounts paid in inventory settlements and the class members was irrelevant.<sup>212</sup>

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211. To believe that individuals would willingly trade compensation for severe and often disabling illnesses for greater compensation to be received only in the case of usually fatal illnesses (i.e., mesothelioma and lung cancer) requires that we believe that they would display an extreme level of risk aversion and ignore the equivalent impact on their dependents of their long-term disability. Even if some individuals would behave in this fashion, it is unlikely that all or most would. The more logical premise is that, in making insurance decisions, class members who had been occupationally exposed to asbestos would consider the financial impact on their families if they were unable to work (and, even worse, the negative cash flow their long-term disability would represent).

212. The district court found that "the fact that non-impaired pleural claimants in the inventory settlements received immediate cash compensation where similarly situated claimants under *Georgine* would receive a different bundle of rights, with no immediate cash payment, was not evidence that [c]lass [c]ounsel were burdened by an impermissible conflict of interest." *Georgine*, 157 F.R.D at 298. To justify this disparity, the court asserted that the present claimants had gone to class counsel with a "realistic expectation that their cases were going to be resolved in the tort system," while future claimants had not. *Id.* (quoting testimony of Professor John P. Freeman). This statement leaves unanswered the critical question: why would future claimants ever want their claims to be settled at

Finally, in terms of its discrimination against future claimants, the most revealing deficiency in the *Georgine* settlement was its failure to contain any adjustment for inflation. Under the settlement, the amounts to be received by future claimants are fixed for the first ten years, regardless of increases in the cost of living. Thereafter, payment ranges *may* be increased in the eleventh year, up to twenty percent, but only if the parties negotiate new values (or if binding arbitration establishes new values in the event that the parties cannot agree). Historically, however, consumer prices have increased at a much faster rate.<sup>213</sup> Even the *Georgine* court conceded that the CCR defendants had failed to produce evidence that rebutted the objectors on this point.<sup>214</sup>

In overview, *Georgine's* failure to deal responsibly with the issue of inflation reminds us that the interests of future claimants are not homogenous. Some will become ill early; others only after a long latency period. If adjustments are not made for inflation, future claimants will be treated very differently under a settlement that purports to make equal payments to each. In addition, the late-maturing claimant also bears the considerable risk that the number of claims made will exceed that projected, with the result that the case flow maximums in the *Georgine* settlement will have been exceeded in the interim.

5. *Ahearn v. Fibreboard*. — *Georgine* might be dismissed as an aberration—if it were not swiftly followed by other class actions that replicated its techniques. *Ahearn v. Fibreboard Corp.*,<sup>215</sup> filed months after *Georgine* but negotiated contemporaneously with it, was also designed as a future claims class action with the class again being defined to exclude all persons with pending claims against Fibreboard.

*Ahearn* is both similar to and different from *Georgine* in important ways that require a closer analysis. Long a wholly-owned subsidiary of the

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lower values outside the tort system (at least when the defendants were highly solvent, as the CCR defendants were agreed to be)?

213. During the 1970s, the Consumer Price Index for urban consumers (CPI-U) increased 103.4%, and during the 1980s, this same rate of increase was 64.4%. See Request by White Lung Association, et al. To Take Judicial Notice of Consumer Price Index Statistics and Explanation of Relevance of Those Statistics at 5–6, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) (on file with the Columbia Law Review) (memorandum filed by Public Citizen Litigation Group in *Georgine*). To understand the impact of this minimal 20% adjustment, it means that in year 20 (i.e., 2014) the maximum negotiated average value that could be paid to lung cancer victims would be \$36,000. If, however, the inflation rate over the next 19 years were 100%, it would take \$60,000 to hold constant the real dollar award of \$30,000, which the same claimant would receive today. See *id.* at 8. Moreover, the 20% figure in the settlement is only a ceiling on what might be negotiated (or arbitrated) and not a guarantee. Finally, the cost of medical expenses has increased at an even faster rate than consumer prices, see Causey, *supra* note 122, at B2, and asbestos victims are uniquely exposed to increases in medical expenses. In short, *Georgine* presents a vivid illustration of the subtle ways in which mass tort settlements discriminate against future claimants.

214. See *Georgine*, 157 F.R.D. at 278. Nonetheless, the court added that the settlement did not have to be perfect to be approved.

215. No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062 (E.D. Tex. July 27, 1995).

Louisiana Pacific Corporation, Fibreboard was spun off by its parent as an independent publicly owned company in 1988 at a point when its potential insolvency as the result of asbestos liabilities was already a clear and present danger.<sup>216</sup> By that time, over 50,000 asbestos-related actions had been filed against Fibreboard and the number has since soared to approximately 200,000.<sup>217</sup> Following the transfer by the JPML of all asbestos-related personal injury litigation to Judge Weiner in 1991,<sup>218</sup> Fibreboard, like the CCR defendants, unsuccessfully sought to negotiate a global settlement of all its asbestos-related cases with the nationwide plaintiffs' steering committee.<sup>219</sup>

For Fibreboard, a global settlement was particularly urgent, because already it had unpaid obligations in excess of \$1 billion for asbestos cases that it had settled earlier, and it was experiencing difficulty in convincing its insurers to pay these claims. Faced with asbestos liabilities well in excess of its net worth, Fibreboard began a complex three-party negotiation with its insurers and several selected plaintiffs' attorneys. With the collapse in the spring of 1992 of efforts by all asbestos defendants to reach a global settlement with the plaintiffs' steering committee, Fibreboard began negotiations with the Ness, Motley firm to reach a settlement covering simply itself. By December 1992, Fibreboard and Ness, Motley reached an inventory settlement covering "approximately 20,000 existing asbestos personal injury claims."<sup>220</sup> Pursuant to this agreement, Ness, Motley agreed to recommend the settlement provisions to future claimants that it represented.<sup>221</sup> Eventually, by August 6, 1993, this settlement agreement was extended to cover some 45,000 pending asbestos-related personal injury claims against Fibreboard.<sup>222</sup>

On August 9, 1993, at the same time that this massive inventory settlement was reached, United States District Judge Robert Parker, the same judge who earlier had recommended to Judge Weiner that he force a global settlement on plaintiffs in *Georgine*,<sup>223</sup> appointed the Ness, Motley firm along with two other attorneys "to act as negotiating counsel

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216. See Report of the Guardian Ad Litem, Eric D. Green at 68, *Ahearn* (No. 6:93cv526) [hereinafter Report of the Guardian Ad Litem] (on file with the Columbia Law Review).

217. See *Ahearn* Class Action Notice, *supra* note 163, at 16. Some 17,200 new actions were filed against Fibreboard in 1988 alone, the year it was spun off. See *id.*

218. See *supra* text accompanying note 183.

219. See *Ahearn*, 1995 U.S. Dist. LEXIS 11062, at \*10.

220. *Ahearn* Class Action Notice, *supra* note 163, at 23.

221. See *id.*

222. This revised agreement was expressly made subject to approval by the federal court as fair and reasonable. See *id.* at 24.

223. See *supra* text accompanying note 185. Like Philadelphia (the forum for *Georgine*), the Eastern District of Texas was a district inundated with asbestos litigation. See *supra* note 71. Judge Parker had previously tried *Cimino v. Raymark, Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), an innovative approach to consolidating asbestos cases. See *supra* text accompanying notes 156-158.

on behalf of . . . a class of future claimants."<sup>224</sup> Less than three weeks later, on August 27, 1993, Fibreboard and these newly-appointed class counsel informed the court that they had reached an agreement in principle covering all future claims. The actual class action was filed on September 9, 1993, and on that same date, Judge Parker certified, for settlement purposes only, a future class of persons with asbestos-related personal injuries who had not asserted such claims against Fibreboard prior to August 27, 1993 (the date the agreement in principle was reached).<sup>225</sup>

In short, as in *Georgine*, the same plaintiffs' law firm simultaneously represented both present claimants in an inventory settlement and future claimants in a class action. The official class action notice estimated that the total number of present claimants represented by Ness, Motley in the inventory settlement "may exceed 50,000," in which case, it said, the aggregate amount of the present claims represented by Ness, Motley would approximate \$500 million.<sup>226</sup> This notice also estimated that plaintiffs' counsel would receive on average contingent fees equal to "approximately one-third of the payout to such present claimants," thus implying that plaintiffs' counsel stood to receive approximately \$167 million under these settlements.<sup>227</sup> More importantly, most of these inventory settlements were effectively made contingent upon the approval of the class action settlement.<sup>228</sup> As a result, class counsel had a strong interest in approval of the class action settlement, even if it was not in the best interests of the future claimants.

In fairness, the *Ahearn* settlement received close judicial supervision and did not involve the same glaring disparities as in *Georgine* between the terms received by the present claimants and those applicable to future claimants.<sup>229</sup> Nevertheless, the substantive terms of the *Ahearn* settle-

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224. *Ahearn* Class Action Notice, supra note 163, at 24.

225. See id. at 27.

226. Id. at 30.

227. Id. It should be emphasized that this entire amount would not go to one firm because Ness, Motley handled cases on referral from over 100 co-counsel in *Ahearn*. See id.

228. Alternatively, the inventory settlements became operative on a favorable outcome in an action that Fibreboard had filed against its insurance carriers. Still, the bottom line here is, as the *Ahearn* Class Action Notice states, "[a]pproval of the Global Settlement Agreement will operate to trigger payouts in excess of \$300 million to present claimant clients of Global Health Claimant Class Counsel." Id. at 30.

229. Judge Parker had had extensive experience in asbestos litigation and had been a member of the Ad Hoc Commission appointed by Chief Justice Rehnquist. See supra text accompanying notes 156-158 and 184-186. Parker also appointed Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator. See *Ahearn* Class Action Notice, supra note 163, at 23. Judge Higginbotham recommended a mandatory class action covering future claimants. See id. at 24. Unlike *Georgine*, the *Ahearn* Trust will base compensation at least in part on historical settlement values for the category of injury, see id. at 40, and will not exclude lesser injuries (including pleural plaques). See id. at 39. Claimants who reject the compensation offered by the trust are permitted to sue the trust (but only after an extended mediation process and non-binding arbitration). In the event a litigant rejects

ment were extraordinary for the limited cash contribution they required of Fibreboard. Under the settlement, Fibreboard's two principal insurers will deposit \$1.525 billion into a trust fund for future claimants, to which Fibreboard will add a mere \$10 million. This token contribution might be understandable if Fibreboard were otherwise insolvent, but, apart from its asbestos liabilities, Fibreboard appears to be a thriving company. The guardian ad litem appointed by the court to protect the future claimants concluded that Fibreboard's value (once its asbestos liabilities were stripped away) might be as high as \$250 to \$300 million, and other expert testimony placed it in the range of \$230 to \$240 million.<sup>230</sup> If we assume Fibreboard has a net worth of \$250 million, then its \$10 million contribution represents only four percent of this net worth.

Probably the most dramatic evidence of the impact of this settlement on Fibreboard was the reaction of its stock price to its announcement. During 1992, Fibreboard's common stock fluctuated from a low of 2 1/8 per share to a high of 9 3/8.<sup>231</sup> This depressed value no doubt reflected the overhang of asbestos liabilities. But as the possibility of a settlement increased, Fibreboard's stock price climbed, and, during the month the settlement was announced, it soared, running up from 11 7/8 to a high of 22 7/8.<sup>232</sup> By the end of the year, Fibreboard's stock price reached a high of 35 5/8—nearly three hundred percent above its highest closing price in the month before the settlement.<sup>233</sup>

Such a dramatic stock price movement suggests that there has been a wealth transfer: Fibreboard's shareholders have gained, and its tort creditors (and insurers) have lost. More importantly, this stock price reaction contrasts sharply with what would have happened in a mass tort bankruptcy, where tort claimants sometimes receive eighty to ninety percent of the stock of the reorganized entity.<sup>234</sup> Instead, Fibreboard and its

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the trust's offer and suits, damages are capped at \$500,000 per claimant and punitive damages are disallowed. See *id.* at 41-43.

230. See Report of the Guardian Ad Litem, *supra* note 216, at 68-69.

231. See *id.* at 68.

232. See Standard & Poor's, *Daily Stock Price Record: American Stock Exchange 53* (3d Qtr. 1993). On the date of the settlement's announcement, August 30, 1993, Fibreboard's stock gained \$4.75 to close at \$20.25 in heavy trading on the American Stock Exchange. Correspondingly, the stock of its principle insurers—Chubb and CNA—declined on the New York Stock Exchange. See *Fibreboard Settles Asbestos Claims with Insurers*, UPI, Aug. 30, 1993, available in LEXIS, News Library, UPI File; see also Peter Kerr, *2 Insurers Settle on Asbestos*, N.Y. Times, Aug. 31, 1993, at D1, D2 (reporting that Chubb and CNA agreed to pay Fibreboard \$3 billion to cover individual asbestos claims). This one-day trading gain of over 25% probably understates the total gain to Fibreboard's shareholders because the settlement was actually struck on August 27 and the deal had been in active negotiations for weeks.

233. Fibreboard's high and low stock prices for July of 1993 had been 13 and 11 1/2, respectively. The settlement was announced to the market on August 30, and Fibreboard's low price in that month had been 11 7/8. See Standard & Poor's, *supra* note 232, at 53.

234. See *supra* text accompanying notes 163-171 (discussing Johns-Manville).

shareholders escaped with only a \$10 million contribution to the class action settlement.

The even more controversial aspect of *Ahearn* was, however, Judge Parker's decision to certify the class as a mandatory class under Rule 23(b)(1)(B).<sup>235</sup> Finding that defendant's insurance proceeds (which were obtained in a much-contested parallel settlement with Fibreboard's insurers) constituted a "limited fund," which would be exhausted before all individual claimants could be satisfied, the court certified the action as a mandatory class, which has the practical effect of denying class members the right to opt out.<sup>236</sup> Although it remains an unresolved question whether the right to opt out from a class action that primarily seeks a money judgment can be effectively extinguished in this fashion,<sup>237</sup> the curious and unique feature of *Ahearn* is that the company itself remained highly solvent and yet contributed only a trivial proportion of its own assets to the settlement fund.<sup>238</sup>

Effectively, *Ahearn* reveals the settlement technique in *Georgine* pushed one critical step further so that a not-yet bankrupt corporation can limit its liabilities to its insurance policies (at least with the help of cooperative plaintiffs' attorneys). Although pooling a defendant's assets when they are inadequate to satisfy all its creditors makes sense, *Ahearn* permits the defendant to limit tort creditors to an asset pool to which it makes virtually no contribution. In turn, a consequence of deeming the corporation's insurance policies to create a "limited fund" is that it creates a perverse incentive to underinsure. That is, under *Ahearn's* rule, a defendant may choose to purchase less liability insurance than it otherwise would, because there is an advantage to inadequate insurance reserves: namely that they can constitute a "limited fund" and justify a mandatory, non-opt out class action. In allowing Fibreboard to escape

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235. Federal Rule of Civil Procedure 23(b)(1)(B) permits a mandatory class action to be certified where "the prosecution of separate actions . . . would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(c)(2)(A).

236. Federal Rule of Civil Procedure 23(c)(2)(A) provides that class members may choose to opt out of a Rule 23(b)(3) class action. No similar right to exit exists with regard to any other class action.

237. The answer depends ultimately on how the Supreme Court chooses to interpret its decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); see also *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (holding that allowing res judicata to bar plaintiff's claims for monetary damages would be a violation of due process because plaintiff had not had the opportunity to opt out of the settlement reached in an earlier class action), cert. dismissed, 114 S. Ct. 1359 (1994). For discussion of the right to opt out, see *infra* text accompanying notes 407-439.

238. Absent insurance coverage, Fibreboard's assets would have been clearly insufficient to pay all asbestos claims that it faced. But as discussed above, the Fibreboard settlement was virtually limited to its insurance policies with Fibreboard contributing an additional amount (\$10 million) that represented about 4% of its net worth. See *supra* text accompanying note 230.

with only a \$10 million contribution to the class action settlement, the *Ahearn* court effectively placed Fibreboard's shareholders ahead of its tort creditors—a result altogether different than the result in mass tort bankruptcies (such as Johns-Manville) where the tort creditors received the vast majority of the corporation's equity value.<sup>239</sup>

In fairness, the non-opt out provision in the *Ahearn* settlement probably was demanded by Fibreboard's insurers, who seemed to have been unwilling to settle absent some mechanism for achieving global peace. Understandably, their fear was that they could be held liable twice (i.e., once to class members and then again to opt outs). But the insurers' fears hardly justified granting Fibreboard equivalent immunity from future claimants, particularly when the *Ahearn* settlement fund may well be inadequate to cover all future claimants.<sup>240</sup> Paradoxically, while the *Ahearn* settlement grants certainty and repose to the shareholders of the corporate defendant, it imposes risk and uncertainty on its tort creditors, who are exposed to cutbacks and potentially lengthy queues depending upon the number of future claims. In this light, in marked contrast to mass tort bankruptcies, the mass tort class action can be used to reverse the historic legal relationship between debt and equity—perversely shifting risk from diversified and logically risk neutral shareholders to non-diversified and normally risk averse tort creditors.

### B. *Silicone Gel Breast Implants Litigation*

The *Silicone Gel* breast implants litigation<sup>241</sup> stands in sharp contrast to asbestos mass tort litigation in several respects. Unlike asbestos (the oldest and most "mature" of mass torts), breast implant litigation was a new form of tort litigation, in which outcomes and settlement values were not yet easily predicted. From a procedural perspective, the settlement process in the *Silicone Gel* litigation provides a commendable example of a mass tort litigation that was structured reasonably and supervised intensively by the federal court. Settled at approximately \$4.23 billion, the settlement hardly seems collusive; indeed, it is the "man bites dog" story that

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239. See *supra* text accompanying notes 146, 166–167.

240. See Report of the Guardian Ad Litem, *supra* note 216, at 40 (concluding that "the rights of some victims to full historic compensation are likely to be impaired, as the Trust attempts to respond to the claims of others"). The settlement itself contains "spendthrift" provisions that limit the proportion of trust assets that can be paid in any one year (to protect future claimants). See *Ahearn v. Fibreboard Corp.*, No. 6:93cv526, 1995 U.S. Dist. LEXIS 11532, at \*142–\*43 (E.D. Tex. July 27, 1995). As in *Georgine*, the impact of these provisions is to subordinate the less severely injured to those with more serious injuries in the event that funds are insufficient to pay all claimants. See *id.* at \*143. Again, this raises the issue of how a single plaintiff's attorney can prefer one client's interests to those of another client.

241. For the decision approving the settlement of this class action, see *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994). For earlier decisions, see 837 F. Supp. 1128 (N.D. Ala. 1993); 793 F. Supp. 1098 (J.P.M.L. 1992).

shows that mass tort class actions need not necessarily result in non-adversarial, low cost settlements.<sup>242</sup> Yet ultimately, the *Silicone Gel* experience teaches pessimism, not optimism, because it provides an object lesson in the fragility of mass tort settlements—at least when present claimants are able to opt out. Finally, from a judicial management perspective, the breast implant litigation is a prime example of an “immature” mass tort, one that lacks an extensive history of outcomes in individual cases. In part for this reason, the parties cannot reliably estimate even the number of present claimants, much less anticipate future claims. The result has been a disaster for all sides, which underscores the dangers of certifying an “immature” mass tort class action.<sup>243</sup>

Breast implant litigation is a recent phenomenon, which increased dramatically in volume following the Food and Drug Administration's (FDA) January 5, 1992 ruling that placed a temporary moratorium on the use of breast implants for cosmetic purposes.<sup>244</sup> As in other mass tort areas, a bitter conflict rapidly developed between the personal injury trial bar and the class action specialists who quickly appeared on the scene. Within weeks of the FDA's ruling, Stanley Chesley of Cincinnati, a well-known but controversial class action plaintiffs' attorney, filed a nationwide negligence class action in his home jurisdiction (the Southern District of Ohio), which was quickly certified as a class action by the district court without a hearing.<sup>245</sup> Rival plaintiffs' attorneys specializing in individual trial work publicly predicted an impending sellout.<sup>246</sup>

But one did not materialize. Although the rival factions of plaintiffs' attorneys each asked the JPML to consolidate all breast implant litigation in a forum favorable to their side (Ohio or California), the Panel declined. Instead, realizing the level of acrimony within the plaintiffs' bar, the Panel consolidated all breast implant actions in a neutral forum that

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242. Under the settlement, claimants stood to receive between \$105,000 and \$1.4 million each, despite relatively little consensus as to the causal linkages between breast implants and disease. See David R. Olmos & Henry Weinstein, *Breast Implant Settlement in Peril*, L.A. Times, May 5, 1995, at A1.

243. For the sensible distinction of “immature” from “mature” mass torts (and the suggestion that only the latter be resolved in class actions), see McGovern, *supra* note 51, at 659, 690–94. Interestingly, the Seventh Circuit's recent mandamus decision in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), which reversed the certification of a mass tort class action, occurred in the context of an obviously immature mass tort. There, a class action was asserted on behalf of hemophiliacs infected by the AIDS virus as a consequence of using defendant's products. Yet, only 13 individual actions raising similar claims had reached trial, and defendants had won 12 of these. See *id.* at 1296. The Seventh Circuit panel justified its decision in terms of the “extortionate” leverage such a class action unjustifiably gave plaintiffs, see *id.* at 1298–99, but this factor may be present in many (and even most) mass tort class actions. A narrower rationale might have been its immaturity.

244. See Daniel Wise, *Bar Besieged with Queries on Breast Implant Claims*, N.Y. L.J., Jan. 30, 1992, at 1.

245. See Frankel, *supra* note 82, at 82.

246. See *id.* at 82, 90.



no litigant had suggested (the Northern District of Alabama) before Judge Sam Pointer, who was widely recognized as a leading expert among trial judges on class action procedures.<sup>247</sup>

Judge Pointer wisely decided to appoint a seventeen-member plaintiffs' steering committee to direct all pre-trial activity. Carefully balancing the membership on this committee to reflect all the principal factions (who had already engaged in a heated public debate), Judge Pointer appointed three co-chairmen, diplomatically dividing power between Stanley Chesley and representatives of the personal injury trial bar.<sup>248</sup> In addition, procedural safeguards not present in other recent mass tort litigation were followed: special guardians for subclasses were appointed, special opt out and late entry provisions were accepted, and the plaintiffs' steering committee met regularly to monitor the negotiations.<sup>249</sup>

Compared with other mass tort settlements, the breast implant settlement was negotiated in a virtual fishbowl of public disclosure and debate. Once a tentative settlement had been negotiated, a "Statement of Principles," which outlined the proposed settlement, was widely distributed by the plaintiffs' negotiating committee among plaintiffs' lawyers, victims' groups, and potential class members. Victims' groups were also invited by the court to a preliminary hearing on the settlement.<sup>250</sup> When the dust finally settled, a complicated settlement, involving forty different benefit levels, had been negotiated, requiring the defendants to contribute a record total of approximately \$4.23 billion over a multi-year period.<sup>251</sup>

This contrast between the "cheap" settlements in *Georgine* and *Ahearn* and the record settlement in *Silicone Gel* seemingly suggests that the legal rules and procedures governing the settlement process may matter—and

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247. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1101 (J.P.M.L. 1992). Judge Pointer was also a member of the Ad Hoc Committee on Asbestos Litigation appointed in 1990 by Chief Justice Rehnquist. See *supra* note 69.

248. See Andrew Blum, *Committee Named*, Nat'l L.J., Aug. 3, 1992, at 2.

249. For descriptions of the settlement negotiations, see Frankel, *supra* note 82, at 90-91; Henry Weinstein, *When Law, Tragedy Intersect*, L.A. Times, Mar. 26, 1994, at A1; Benjamin Weiser, *Feud in Breast Implant Cases Stirs Debate on Tactics*, Wash. Post, May 11, 1994, at D1.

250. See Alan B. Morrison & Brian Wolfman, *Representing the Unrepresented in Class Actions Seeking Monetary Relief* 61-62 (March 1995) (unpublished manuscript, on file with the Columbia Law Review).

251. The court describes the \$4,225,070,000 settlement as "reputed to be the largest such settlement ever." *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*1 (N.D. Ala. Sept. 1, 1994). The defendants are obligated to contribute approximately \$4.23 billion over a 30-year period, of which amount \$1.2 billion must be paid into the Current Disease Compensation Program. See *id.* at \*21-\*22. Dow Corning was scheduled to contribute approximately \$2 billion. See *id.* at \*79; *Judge Asks Lawyers to Renegotiate Breast Implant Suit*, N.Y. Times, Aug. 2, 1995, at A14. From the outset, however, there were doubts about Dow Corning's financial ability to meet its commitment, as neither its insurance carriers nor its two parents had agreed to contribute or guarantee its contribution.

greatly. For example, had there been only a two- or three-member team of plaintiffs' attorneys appointed to control the case in *Silicone Gel* (as in *Georgine* and *Ahearn*), the possibility of collusion would have been considerably stronger, and certainly the process of reaching a non-adversarial settlement would have been simpler. Of course, other factors may also help explain the *Silicone Gel* settlement. For example, because the class was defined to include both present claimants and future claimants (unlike *Georgine* and *Ahearn*), highly motivated class members existed to monitor the appointed attorneys. Networks of injured victims also developed to oversee the settlement process and communicate with class members, which is likely to happen only when the class is defined to include "high stakes" plaintiffs with present claims.

Curiously, the plaintiffs' substantive case in *Silicone Gel* may have been substantially weaker than in the asbestos litigation, because of the absence of clear scientific evidence of the causal relationship between breast implants and specific injuries.<sup>252</sup> That a record settlement resulted against such a backdrop strongly suggests that process differences are a powerful explanatory variable.<sup>253</sup> But this interpretation, although plausible, may be too glib because there is an alternative, darker interpretation of the *Silicone Gel* settlement.

If the *Silicone Gel* settlement represents a fair and uncorrupted outcome, it has also proven a fragile and unstable one. In any lump sum settlement, the amount that individual claimants will receive necessarily depends on the number and type of the claims that are filed. When the global settlement was first announced in September 1993, class members were initially informed that they would receive between \$200,000 and \$2 million (depending on their generic type of injury and other individual

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252. Several epidemiological studies have failed to find a causal connection between breast implants and any specific illness, and an FDA Advisory Panel recommended in 1991 that implants should remain on the market. See Gina Kolata, *Legal System and Science Come to Differing Conclusions on Silicone*, N.Y. Times, May 16, 1995, at D6. The most recent of these studies, conducted by physicians at the Harvard Medical School, finds no association between implants and illness. See Gina Kolata, *New Study Finds No Link Between Implants and Illness*, N.Y. Times, June 22, 1995, at A18. It should be understood, however, that plaintiffs' legal theories were not limited to claims that breast implants caused illness, but also that they masked detection of other illnesses, such as breast cancer, by preventing detection through mammography. See Statement by David A. Kessler, Commissioner, Food and Drug Administration and D. Bruce Burlington, Director, Center for Devices and Radiological Health, Public Health Service, Department of Health and Human Services, Before the Subcomm. on Human Resources and Intergovernmental Relations, Comm. on Government Reform and Oversight, 104th Cong., 1st Sess., Federal Document Clearing House, Aug. 1, 1995, available in LEXIS, News Library, CURNWS File.

253. To be sure, the settlement's size may also provide support for Judge Posner's thesis that mass tort class actions generate extortionate leverage. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995). Another explanation is that the courts themselves were not under the same pressure to reach a global settlement (at any cost) in the *Silicone Gel* litigation as they were in asbestos cases, because individual suits were less likely to have a material impact on the federal docket. This forms the alternative hypothesis: that pressure on the judicial system yields poor settlements for victims.

factors).<sup>254</sup> Later, these estimates were scaled down to a floor of \$105,000 and a ceiling of \$1.4 million,<sup>255</sup> but even these estimates depended on the number of claims actually filed. Thus, to protect class members, an important provision in the settlement agreement specified that class members would receive an additional opportunity to opt out if a higher than anticipated rate of claim filings forced the benefits to be scaled back from these estimated levels.

Sensible as this delayed opt out right was in the case of an "immature" mass tort where predictions of claim filings were necessarily more speculative, it created a material risk for defendants that from the outset placed the settlement under stress. Having agreed to contribute approximately \$4.23 billion, defendants still faced additional liability in individual actions brought by opt outs. For defendants, this implied that any underestimation of the likely number of claims could set off a chain reaction under which benefits would be scaled down and class members would in consequence opt out in substantial numbers to bring individual actions.

Exactly this scenario appears to have happened. As of the spring of 1995, some 435,000 claimants had filed for eligibility to receive benefits under the settlement,<sup>256</sup> while only 7800 domestic class members and 6500 foreign claimants had opted out.<sup>257</sup> The filing of over 400,000 claims clearly exceeded defendants' expectations and implied that a scaling down of the promised individual benefits would be necessary unless defendants agreed to increase their contributions. In early May 1995, Judge Pointer announced that these claims appeared likely to "substantially exceed" the funds committed by the defendants and asked the parties to negotiate a revised or enriched settlement.<sup>258</sup> Later that summer, the full extent of the necessary scaling back became evident: at best, class members would receive only twelve to sixteen percent of their scheduled benefits, at worst, less than five percent.<sup>259</sup>

For defendants, this development posed a hard choice: if they did not contribute more funds, an unknown, but probably substantial, number of claimants would predictably opt out and commence individual

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254. See Thomas M. Burton, *Breast-Implant Claims Fund May Need \$3 Billion More, Preliminary Study Says*, Wall St. J., May 17, 1995, at A4.

255. See *Silicone Gel*, 1994 U.S. Dist. LEXIS 12521, at \*5, \*20; Olmos & Weinstein, *supra* note 242, at A1.

256. See Barnaby J. Feder, *Dow Corning's Bankruptcy: The Impact on Implant Suits*, N.Y. Times, May 21, 1995, at F9. Of these approximately 400,000 claimants, some 137,000 claimed to have already experienced compensable illness. See Olmos & Weinstein, *supra* note 242, at A13.

257. See *Silicone Gel*, 1994 U.S. Dist. LEXIS 12521, at \*17.

258. See David S. Hilzenrath, *Renegotiation Order May Undo \$4 Billion Implant Settlement*, Wash. Post, May 5, 1995, at F1.

259. Thus, those expecting to receive the maximum (\$1.4 million) or the minimum (\$105,000) would now expect \$70,000 or \$5250, respectively. See Michael Unger, *Breast Implant Claim Fund Falls Far Short*, N.Y. Newsday, June 17, 1995, at A6.

actions. Even if they did increase their contribution, some scaling back of benefits might still be necessary if new claims materialized, and any such reduction would predictably trigger opt outs. As a result, defendants had clearly failed to achieve a global peace. Worse yet, preliminary analyses estimated that as much as an additional \$24 billion contribution would be necessary merely to pay the present claimants.<sup>260</sup>

In response, the principal defendant—Dow Corning—filed for bankruptcy reorganization on May 15, 1995.<sup>261</sup> Although Dow Corning followed in the path of other manufacturers that have elected bankruptcy reorganization to resolve mass tort liabilities, its incentives for electing bankruptcy appear to have been substantially different and novel. Unlike corporations that have opted for bankruptcy when faced with a mass tort class action, Dow Corning seemed intent on preserving the mass tort class action settlement; indeed, its tactical aim seems in part to have been to lock claimants within it by eliminating any incentive to opt out. Because the filing of a bankruptcy petition automatically stays tort litigation against the debtor,<sup>262</sup> opting out gains a claimant little and costs the claimant the right to participate in the settlement (if it remains intact). Once claimants were frozen into the class action, benefits could then be reduced without triggering a major increase in opt outs and hence individual litigation against it.<sup>263</sup> Those who had already opted out would be compensated eventually through the bankruptcy action (possibly with Dow Corning stock), but at the point Dow Corning elected bankruptcy this number seemed insufficient to shift control of Dow Corning away from its parents.<sup>264</sup>

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260. See Court Analysis: \$4.25 Billion Inadequate for Implant Claims, Sacramento Bee, June 17, 1995, at A14 [hereinafter Court Analysis: \$4.25 Billion Inadequate]. A month earlier, the additional contribution had been estimated at \$3 billion. See Burton, *supra* note 254, at A4.

261. See Barnahy J. Feder, Dow Corning in Bankruptcy Over Lawsuits, N.Y. Times, May 16, 1995, at A1.

262. See 11 U.S.C. § 362 (1994).

263. Class members can, of course, opt out to file against co-defendants, but Dow Corning has long been the largest producer of silicone breast implants. See Feder, *supra* note 261, at A1.

264. Just prior to its bankruptcy filing, Dow Corning estimated that there were 1500 individual actions pending against it by women who had opted out of the settlements. See Thomas M. Burton, Dow Corning Considers Filing for Chapter 11, Wall St. J., May 5, 1995, at A3, A4. Large as this number may seem, it pales in comparison to the number of asbestos actions pending against the CCR defendants (who did not elect to file for bankruptcy protection). Moreover, many of these implant cases probably had weak litigation merits. Judge Pointer found in approving the settlement that some 14,300 persons had opted out, of whom 6500 were outside the United States. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*17 (N.D. Ala. Sept. 1, 1994). Such foreign claimants have little chance at a substantial recovery if foreign law is applicable to their claim. Hence, only the 7800 domestic opt outs could bring a viable action (if they became ill with a silicone-related illness). In short, the domestic opt outs were small in proportion to those who *might* opt out. The critical point is that if Dow Corning had delayed its bankruptcy petition until after benefits were scaled

Outside bankruptcy, Dow Corning faced the worst of both worlds: a large class settlement plus individual litigation brought by a substantial, but indeterminate, number of opt outs. Within bankruptcy, Dow Corning was protected from opt outs and could resist pressure to make additional contributions to the class action settlement. More importantly, by combining a class action with a bankruptcy filing, Dow Corning's management achieved objectives that would be impossible under either technique alone. Standing alone, bankruptcy could enable Dow Corning's management to achieve a complete global resolution of its liabilities, *but* at the possible cost of its management losing control of the company (as *Johns-Manville* had illustrated). Standing alone, a class action could enable Dow Corning to achieve a cheaper settlement (as *Georgine* illustrated), but at the cost of remaining vulnerable to opt outs, particularly if benefits were scaled back. Used together, the combination of bankruptcy and a class action effectively converted a standard Rule 23(b)(3) opt out class action into a de facto mandatory class action. Moreover, because few claimants under the class action would thereafter opt out (at least to sue Dow Corning), the bankruptcy reorganization need not shift control of the firm (as prior mass tort bankruptcies have done).

### C. Mass Disaster Litigation

The asbestos, Agent Orange, Dalkon Shield, and breast implant litigations were all national events, covered by the media, watched by other judges concerned about their own dockets, and closely followed by several hundred attorneys. Ordinary mass disaster cases occur and are litigated on a much smaller scale.<sup>265</sup> Nonetheless, the concentrated character of the mass tort bar has meant that new techniques learned in the national context have quickly been re-applied in more localized mass tort litigation.

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back or after it had become obvious that the class action settlement was about to "crater," then a much larger number of claimants would have opted out at that point and been swept into the bankruptcy reorganization process; this could have shifted control of Dow Corning away from its two parents if these tort claims were settled for stock (pursuant to the usual procedures in mass tort bankruptcies by which settlement trusts are created). See *supra* text accompanying notes 165-166.

265. Mass disaster class actions involving a single discrete explosion, crash or accident have in the past been more common than mass exposure class actions. Because a single accident usually involves greater homogeneity among the victims and is less likely to involve latency periods and future claimants, it is more susceptible to class treatment. For an example of a mass accident class action, see *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993) (settlement of \$170 million approved for personal injury and property claims). A key reason that defendants prefer a class action in this context is that they can seek a mandatory, non-opt out class for punitive damages. For a recent example, see Notice of Class Action and Proposed Settlement, *In Re GCC Richmond Works Cases*, Judicial Council Coordination Proceeding No. 2906 (Cal. Super. Ct., Contra Costa County, Aug. 15, 1993) (on file with the Columbia Law Review) (certifying "Mandatory Punitive Damage Class" with regard to release of sulphuric gas by chemical plant).

A good illustration is supplied by the 1995 settlement of a mass disaster class action, *Hayden v. Atochem North America, Inc.*<sup>266</sup> The undisputed facts showed egregious environmental violations: basically, an agrichemical plant in Bryan, Texas had exposed the local community to arsenic contamination since the early 1970s, polluting the air, soil, surface water and groundwater.<sup>267</sup> In 1992, a class action seeking only property damages was filed against the current and former owners of the plant as a Rule 23(b)(3) opt out class action.<sup>268</sup> Although the class was initially certified as an opt out settlement class, the settling parties reconsidered their position once *Georgine, Ahearn*, and other recent cases had shown them the feasibility of resolving personal injury claims through the vehicle of a mass tort class action. In April 1995, the parties reached a revised settlement that converted the case from an opt out class action under Rule 23(b)(3) into a non-opt out class action under Rule 23(b)(2) and extended the settlement to cover personal injuries, including both present and future claims, as well as property damages.<sup>269</sup> To accomplish this critical conversion to a Rule 23(b)(2) class action,<sup>270</sup> the parties used a technique that was novel to mass tort cases but well known in labor litigation: they inserted a provision for injunctive relief into the proposed settlement in order to fall outside Rule 23(b)(3).<sup>271</sup> Specifically, the de-

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266. The facts discussed in the text are taken from the Notice of Pendency of Class Action, Proposed Settlement of Class Action, and Fairness Hearing, *Hayden v. Atochem N. Am., Inc.* (In re Bryan, Tex., Chem. Exposure Litig.), No. H-92-1054 (S.D. Tex. April 10, 1995) [hereinafter *Hayden*, Notice of Pendency] (on file with the Columbia Law Review). This litigation has been the subject of some press attention, largely because of the decision of Trial Lawyers for Public Justice, a public interest law firm, to oppose the proposed settlement. See Wade Lambert, Public-Interest Law Group Fights Some Class Settlements as Unfair, *Wall St. J.*, Aug. 17, 1995, at B4.

267. The class periods for personal injuries, wrongful death and medical monitoring claims ran from January 1, 1973 to April 10, 1995. See *Hayden*, Notice of Pendency, *supra* note 266, at 1.

268. See *id.* at 2. Trial Lawyers for Public Justice, the principal objector to the proposed settlement, pointed out in its amicus curiae brief that the First, Second, Third and Fourth Amended Complaints in *Hayden* sought class certification under Rule 23(b)(3) and did not include personal injury claims. Only the Fifth Amended Complaint, filed in 1995, alleged personal injuries. See Brief of Amicus Curiae Trial Lawyers For Public Justice In Opposition to the Proposed Class Settlement at 4 & n.4, *Hayden* (No. H-92-1054) [hereinafter Amicus Curiae Brief] (on file with the Columbia Law Review).

269. See Amicus Curiae Brief, *supra* note 268, at 5-6. The class action was certified as a settlement class action under Rule 23(b)(2) on April 10, 1995. See *Hayden*, Notice of Pendency, *supra* note 266, at 3.

270. The basic significance of a Rule 23(b)(2) class action is that there is no right to opt out (which exists only in the case of a Rule 23(b)(3) class action). Rule 23(b)(2) requires the parties seeking class certification to show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

271. For an early decision finding in the context of a labor and antitrust dispute that courts should prefer certification under Rule 23(b)(1) when injunctive relief is sought, see *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 903 (S.D.N.Y. 1975) (when a

defendants agreed to be enjoined from using the Bryan plant to produce, use, or handle arsenic.<sup>272</sup>

Given that the continued release of arsenic into the surrounding atmosphere almost certainly would violate a variety of federal environmental statutes carrying criminal penalties, this concession amounted to little and ordinarily would not have worked to convert a class action that was predominantly for money damages into a Rule 23(b)(2) class action (from which opting out is not permitted). Most courts have long used a "predominance" test that looks to the primary relief sought in distinguishing Rule 23(b)(2) from Rule 23(b)(3) class actions.<sup>273</sup> Still, plaintiffs characterized their class action as one for medical monitoring (arguably a form of equitable relief) and in fact settled for relatively modest monetary relief: namely, a \$55 million settlement fund,<sup>274</sup> which amount will in theory both support a medical monitoring program and compensate class members for both property damage and present and future personal injury claims, as well as pay plaintiffs' unusually high attorneys fees.<sup>275</sup> Despite these suspicious signs, the settlement nonetheless received preliminary judicial approval.<sup>276</sup>

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choice exists, court should certify class of present and future NBA basketball players under Rule 23(b)(1), and not Rule 23(b)(3), in order to ensure that there is no right to opt out), aff'd 556 F.2d 682 (2d Cir. 1977).

272. See Stipulation of Settlement at 22-23, *Hayden* (No. H-92-1054) (on file with the Columbia Law Review). Defendants also claimed that the principal defendant was on the brink of insolvency. This argument was highly debatable because an economist testified that the defendant (Elf Atochem North America, Inc.) had a net shareholder investment of \$529 million, but it supplied the basis for a "limited fund" argument which, as in *Ahearn*, might independently support a mandatory class action. See *Amicus Curiae Brief*, supra note 268, at 7-8.

273. See Lawrence J. Restieri, Jr., Note, *The Class Action Dilemma: The Certification of Classes Seeking Equitable Relief and Monetary Damages After Ticor Title Insurance Co. v. Brown*, 63 *Fordham L. Rev.* 1745, 1747 (1995). For decisions employing this predominance test, see *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir.) (action should be certified under Rule 23(b)(2) where primary relief sought was injunctive even though money damages also sought), cert. denied, 476 U.S. 1170 (1986); *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 609 (D. Ariz. 1982) (certifying action under Rule 23(b)(3) where primary motive was recovery of damages); see also 1 *Newberg & Conte*, supra note 96, § 4.14, at 4-48 to 4-49 (discussing test).

274. See *Hayden*, Notice of Pendency, supra note 266, at 1 (cash payments in settlement total \$55,070,000 plus "possible additional funds derived from pending litigation against third parties"). The "possible additional funds" depend on the outcome of litigation brought against the defendants' insurance carriers. However, the settlement also provides that Atochem will keep 48 3/4% out of the first \$90 million received from insurance carriers, even though future claimants may not have received anything. See *id.* at 4. Thus, it is possible that Atochem will be reimbursed nearly in full from its insurance while some claimants with "extraordinary claims" will receive nothing.

275. Class counsel will seek attorneys' fees from the settlement fund in an amount not to exceed \$18,358,333 and actual expenses in an amount not to exceed \$3.25 million. See *id.* at 6. These two amounts, if received, would amount to slightly more than 39.7% of the \$55,070,000 settlement fund.

276. On April 10, 1995, United States District Court Judge Calvin Botley certified the class action under Fed. R. Civ. P. 23(b)(2) for settlement purposes. A fairness hearing was

What makes the *Hayden* litigation truly shocking, however, is less its attempt to bar opt outs than its willful indifference to future claimants. Although the settlement carefully divided the settlement fund between property claims and personal injury claims,<sup>277</sup> it left the allocation between future and present claimants entirely to the future discretion of a special master. By the settlement's terms, most of the settlement fund will be allocated to a "Personal Injury Fund" that will primarily compensate all class members for the increased risk of injury as a result of their exposure.<sup>278</sup> However, because the latency period for arsenic exposure is up to forty years,<sup>279</sup> and an estimated 26,000 class members are covered by the settlement,<sup>280</sup> it is inevitable that some future claimants will incur actual arsenic-related illnesses in the remote future. Such claims for actual personal injury are defined as "extraordinary claims" by the settlement, and the special master is given substantial discretion in processing and recognizing them. No funds are specifically allocated for future claimants, but the special master is instructed to "make an initial evaluation of all extraordinary claims submitted during the first nine months [of the settlement] and . . . create a reserve from the Personal Injury Fund for the payment of extraordinary claims based on extraordinary claim awards."<sup>281</sup> Predictably, the settlement provides that if the fund for personal injury claimants proves inadequate, claims will be scaled back and defendants will have no additional liability.<sup>282</sup>

In overview, such an undefined allocation procedure simply sweeps the difficult problem of future claims estimation under the rug, postponing it until after judicial approval has been secured. If the estimation of future claims is implausibly low, no one is in a position to object (and present claimants receive a higher payment); in contrast, if it is too high, present claimants have a strong incentive to protest. The consequence is

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held on June 8, 1995, but no final decision had been rendered as of September 1, 1995. See *id.* at 3.

277. Thirty percent of the settlement fund (after deduction of attorneys' fees and expenses) is allocated to a property damage fund. This amount cannot be reallocated to future personal injury if the personal injury settlement fund proves inadequate. See Exhibit A, Protocol for Distribution of the Settlement Fund at 5, in *Hayden*, Notice of Pendency, *supra* note 266.

278. Section XII of the Protocol for Distribution of the Settlement Fund sets forth an elaborate formula to quantify the risk to present claimants based on the duration of their exposure and their relative proximity to the plant. See *id.* at 8-9. Actual injuries or illnesses resulting from arsenic exposure are treated as "extraordinary claims" by Section XIII and their handling is largely entrusted to the discretion of the special master. See *id.* at 11.

279. See *Amicus Curiae Brief*, *supra* note 268, at 6 (citing affidavit of plaintiff's own expert Dr. Stuart Lloyd Shalat).

280. See *id.* at 5 (citing plaintiffs' counsel's estimate that the class "has approximately 26,000 residents and somewhere around 5,300 residential properties and perhaps three thousand to thirty-five hundred other types of properties").

281. Exhibit A, Protocol for Distribution of the Settlement Fund at 12, in *Hayden*, Notice of Pendency, *supra* note 266.

282. See *id.*



that substantial corporations escape with a modest lump sum settlement from which class members cannot opt out, while future claimants are left to gamble on the adequacy of a settlement fund that does not even reserve specific amounts for them. Ultimately, the *Hayden* outcome reflects not only the triumph of defendants over plaintiffs, but also that of present claimants over unrepresented and still unknown future claimants.

#### D. Mass Tort Product Liability Cases

An instructive contrast to the foregoing mass tort personal injury cases is supplied by the recent experience in mass tort product liability cases. As a generalization, such cases involve the same operative facts as in a personal injury class action, except that they are inherently "small claimant" cases. The class members in such cases have either suffered a decline in the value of a defective product that they purchased or have experienced other property damage because of the product's malfunction. In the typical case, an automobile model is alleged to have a safety defect that resulted in both personal injuries and property damage. Although class actions for personal injuries in such cases are still rare to non-existent,<sup>283</sup> a property damage class action makes comparatively good sense because the interests of the class members are relatively homogenous. Each has suffered relatively equivalent property damages, and use of the class action would obviously economize on costly duplicative litigation.

The irony, however, is that it is in this property loss context that courts have recently been the most vigilant. Within the last year alone, courts have rejected proposed nationwide class action settlements in cases involving the Ford Bronco II,<sup>284</sup> a General Motors pickup truck with "side-saddle" gas tanks that allegedly exploded in minor collisions,<sup>285</sup> and a defective polybutylene (PB) plumbing system that had been installed in several million American homes.<sup>286</sup>

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283. This is probably because such a class action would have great difficulty satisfying the "commonality" requirement of Rule 23(a)(2) or the "superiority" requirement of Rule 23(b)(3). See *infra* text accompanying notes 362-382.

284. See *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. CA MDL-991, 1995 U.S. Dist. LEXIS 3507 (E.D. La. Mar. 20, 1995).

285. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (overturning settlement approved by the district court). Earlier, a Texas appellate court rejected a parallel settlement involving only Texas residents who purchased GM pickup trucks. See *Boyed v. General Motors Corp.*, 881 S.W.2d 422 (Tex. Ct. App. 1994).

286. See Settlement Agreement, *Beeman v. Shell Oil Co.*, No. 93-47363 (Tex. Dist. Ct., Harris County 1994) [hereinafter *Beeman* Settlement Agreement] (undated draft, on file with the Columbia Law Review). Filed as a nationwide class action in a Texas state court in September 1993, this action was brought against Shell Oil, DuPont, and Hoechst, who were the principal makers of polybutylene plastic pipe, which had been installed in over six million American homes. See Adam Bryant, *Plastic Pipe Makers Plan to Settle Lawsuit*, N.Y. Times, Oct. 25, 1994, at D4. The action resulted in a settlement class and a

What explains the relatively close scrutiny given these settlements? Possibly their facts were more egregious,<sup>287</sup> but the same pattern of settlement classes and separate inventory settlements was present in both contexts. Thus, plaintiffs' attorneys in these settlements do not appear to

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proposed settlement under which the defendants would be obligated to pay eligible claims (if made) of up to \$750 million. If claims exceed this amount, defendants could elect to pay additional claims, or, if they refuse, plaintiffs could sue in state court under a tolled statute of limitations. See *Beeman* Settlement Agreement, *supra*, at 12-13, 16-17. The actual payment by defendants would, of course, depend on the extent of the claims made, but the parties described this settlement as the largest property damage class action settlement in U.S. history. See Bryant, *supra*, at D4. Nonetheless, both the settlement agreement and the negotiation process leading up to it revealed some of the same suspicious features that have characterized mass tort personal injury class actions: namely, inventory settlements and severe eligibility restrictions. For example, the objectors to the *Beeman* settlement alleged that since January 1994, the defendants had paid "approximately \$88 million to proposed plaintiff's counsel" with regard to the latter's individual cases, resulting in estimated contingency "fees of approximately \$40 million" (in addition to the proposed class action attorney fee award of \$24.25 million). Letter from Robert B. Gerard, Esq., Counsel to the Objectors in *Beeman*, to John C. Coffee, Jr. (Dec. 20, 1994) (on file with the Columbia Law Review). Allegedly, these inventory settlements were reached only with "proposed class counsel that support *Beeman*." *Id.* In addition, the settlement agreement, itself, contained a variety of technical exclusions that would disqualify an indeterminate number of potential class members from eligibility for full replumbing. For example, because polybutylene pipe is heat sensitive, it often fails near water heaters, but any failure within a specified distance of a water heater was expressly excluded by the settlement agreement from receiving full replumbing. See *Beeman* Settlement Agreement, *supra*, at 18. Objectors estimated that less than 17% of the individual clients that they represented would qualify under the "quirky" terms of the *Beeman* settlement agreement. See Letter from Robert B. Gerard, Esq., Counsel to the Objectors in *Beeman*, to John C. Coffee, Jr. (Dec. 22, 1994) (on file with the Columbia Law Review). Ultimately, after the usual war of recriminations between the opposing camps of plaintiffs' counsel, the court declined to approve the settlement in February 1995 (but did not write an opinion). See Maryann Haggerty, Settlement is Thrown Out in Suit Over Plastic Pipes, Wash. Post, Feb. 22, 1995, at F1.

287. The *Ford Bronco II* litigation may represent the extreme example of a settlement offering only illusory benefits to class members. At issue was the alleged tendency of the utility vehicle "to roll over completely at relatively moderate speeds." Milo Geyelin & Neal Templin, Ford Attorneys Played Unusually Large Role in Bronco II's Launch, Wall St. J., Jan. 5, 1993, at 1. Under the proposed settlement, the class members would receive a "Utility Vehicle Package," consisting of (1) a video describing the vehicle and how it should be driven; (2) a sun-visor sticker that warned the driver how to operate the vehicle; and (3) an owner's guide supplement—and no cash. See *Ford Bronco II*, 1995 U.S. Dist. LEXIS 3507, at \*2. In addition, each member of the settlement class was invited to receive a free inspection, but repairs were at the customer's expense. These "benefits" seem largely intended to give rise to an "assumption of risk" or contributory negligence defense in any subsequent personal injury litigation against Ford if the driver arguably failed to comply with the manufacturer's instructions.

Although the *Ford Bronco II* settlement was rejected, similar attempts persist to certify mass tort property damage class actions involving little or no discernible monetary benefit for class members. See Nichole M. Christian, Chrysler Pact Could Block Minivan Suits, Wall St. J., Sept. 28, 1995, at B3 (discussing proposed class action settlement that would require Chrysler to replace faulty door latch handles, as Chrysler had already agreed to do in voluntary settlement with a federal agency, but would not provide cash compensation, except for \$5 million in requested plaintiffs' attorneys' fees).

have been more subject to conflicts of interest than those attorneys representing the class in recent asbestos class actions. In this light, the distinctive feature of property damage class actions was that rejection of the settlement imposed little cost on the court. Little impact on the federal docket was likely if the settlements were disapproved. After all, few individual plaintiffs would bear the litigation costs of suing for the decline in the value of their car or pickup truck because of a safety defect. In contrast, asbestos, breast implant, and Agent Orange cases did have the potential to swamp the federal docket because individual plaintiffs possessed "high stakes" claims and could obtain representation on a contingency fee basis.

Other factors may also explain the difference in judicial reaction. Chief among these factors is the lack of urgency surrounding property damage settlements. In some of these cases, rejection of the settlement has simply led to its renegotiation and enhancement.<sup>288</sup> But even if not, no class member is left impoverished. In the personal injury context,

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288. In the *Beeman* polybutylene litigation, discussed supra at note 286, the Texas court's rejection of the settlement led to the filing of a nationwide federal class action, which the plaintiffs claimed could result in an estimated \$7 billion in damages. See Jenny Luesby, *Shell & Hoechst to be Sued in U.S. Over House Pipes*, *Fin. Times*, July 7, 1995, at 4. DuPont, which was scheduled to pay an estimated \$70 million under the rejected settlement, quickly agreed to contribute up to \$120 million to the revised settlement. See Peter Fairley, *DuPont Gets Conditional Okay for Polybutylene Settlement*, *Chemical Wk.*, June 7, 1995, at 13. Such a \$50 million increase within several months of the original settlement's rejection may suggest that the original settlement was cheap. Then, in August 1995, Hoechst Celanese and Shell Oil agreed to a class action settlement under which they agreed, apparently on terms similar to those of the earlier settlement, to pay eligible claims (if made) of up to \$850 million. This settlement, in conjunction with the DuPont recovery, would imply a \$970 million total settlement, or a seeming \$220 million improvement in less than a year. See David Rotman, *Hoechst Celanese, Shell Agree to \$850-Million Pipe Settlement*, *Chemical Wk.*, Aug. 9, 1995, at 13.

Assessments of the polybutylene litigation are complicated, however, by the fierce battle among the defendants. At the time that DuPont agreed to a revised \$120 million settlement in Alabama state court, it also received as a condition of its settlement immunity from cross-claims by the other defendants. On this basis, objectors to this revised settlement argued that DuPont had effectively "capped" its liability at 8% of the cost of plumbing repairs and was liable for that amount only if the other defendants contributed the remaining 92%. See Letter from Arthur H. Bryant, Executive Director, Trial Lawyers for Public Justice, to John C. Coffee, Jr. 4 (Sept. 20, 1995) (on file with author). On this basis, DuPont would not have increased its contribution, but only reduced its maximum exposure, and class members would have gained little from this revised settlement.

This Article does not attempt to resolve the charges and countercharges among the parties in *Beeman*, but their disputes once again point out both the difficulties that courts face in monitoring mass tort settlements (where the parties alone possess the critical information) and the possibility of reverse auctions by which defendants may reach non-adversarial settlements with a "friendly" or dissident plaintiffs' attorney. Here, it is at least arguable that DuPont has cut a favorable deal with a cooperative plaintiffs' attorney that makes both class members and other defendants worse off.

however, courts are impelled by the perception that compensation must be expedited to the seriously injured and dying.<sup>289</sup>

Nonetheless, all these factors point toward a common conclusion: In dealing with mass tort personal injury class actions, courts are both more conflicted and pressured. Remove these pressures, and they become more skeptical of class action settlements, which, both procedurally and substantively, seem to be not very different from those that they have approved.

### E. *A Preliminary Evaluation*

What are the early lessons of the recent experience with mass tort class actions? First, recent cases underscore the difficulties inherent in dealing with future claimants. The destabilizing force that caused the *Silicone Gel* global settlement to unravel was the failure of the parties to estimate accurately the number of claims that would be filed. Given that an estimated 650,000 to 1,000,000 women received silicone implants during the 1970s and 1980s,<sup>290</sup> it may have understandably surprised defendants that 440,000 claimants (or well over forty percent) filed within months of the settlement's approval.<sup>291</sup> Defendants had estimated that \$1.2 billion would be sufficient to cover the first round of payments to present claimants, but wound up raising this estimate to \$24 billion.<sup>292</sup> Moreover, this underestimation could only grow as additional women would predictably file claims in the future upon discovery of illness. Arguably, the inaccuracy of these predictions may have been the consequence of the "immature" status of breast implant litigation. Only seventy-eight identifiable breast implant cases were pending in the federal courts (plus an estimated two hundred "related" actions) at the time the JPML consolidated all breast implant litigation in 1992 before Judge Pointer.<sup>293</sup> Such a limited experience provided insufficient information to estimate the number and types of claims likely to be asserted.<sup>294</sup>

Still, there may be a more basic reason why the parties grossly underestimated the claims likely to be filed: it was in their mutual self-interest to do so. Some \$1 billion of the \$4.23 billion *Silicone Gel* class action was

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289. For a representative decision, expressing exactly this theme, see *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995).

290. See Feder, *supra* note 256, at F9.

291. Of the 440,000 women who registered under the settlement, some 70,000 of them appeared "to qualify for immediate compensation, far beyond the 6,000 originally anticipated." Linda Himelstein et al., *A Breast-Implant Deal Comes Down to the Wire*, *Bus. Wk.*, Sept. 4, 1995, at 88, 88. Thus, present claimants exceeded projections by more than tenfold and the number of eventual future claimants necessarily remains uncertain.

292. See Court Analysis: \$4.25 Billion Inadequate, *supra* note 260, at A14.

293. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1098 n.1 (J.P.M.L. 1992).

294. Interestingly, it was possibly easier to estimate the likely number of claims in *Silicone Gel* than in a mass exposure case (such as asbestos) because the approximate number of implants sold was known. See Morrison & Wolfman, *supra* note 250, at 28.

reserved for attorneys' fees and expenses, and this fund was to be "divided among a core group of 21 lawyers and thousands of referring attorneys."<sup>295</sup> Receipt of these fees required that the settlement hold together, and this incentive could have induced plaintiffs' attorneys to accept a low estimate of likely claims as to which a more disinterested person would have been more skeptical.<sup>296</sup> To be sure, *Silicone Gel* is the almost unique case in which there was no hint of impropriety surrounding the settlement process. But for precisely this reason, it suggests that the contingent nature of the plaintiffs' attorneys' fees may leave them without an adequate incentive to contest an underestimate by defendants of likely future claims. Both sides then have reasons to suppress their misgivings about the adequacy of the settlement fund.

For defendants, the practical lesson from the *Silicone Gel* experience may be a perverse one from a public policy perspective: i.e., never grant a delayed opt out right, because it can expose defendants to double liability under both the class action and individual actions. Indeed, the *Silicone Gel* experience may confirm defendants in their recent practice of seeking to define the class to include only future claimants (who predictably will not seek to opt out during a brief initial opt out period ending well before their symptoms manifest themselves). To curtail claimant eligibility, defendants may increasingly negotiate individual defendant-by-defendant settlements, rather than industry-wide settlements.<sup>297</sup> Defendants will, however, likely persist in seeking an early resolution of future claims before the typical settlement price spiral that accompanies the evolution of a mass tort.<sup>298</sup> As a result, a dangerous combination seems likely to recur: early certification of a nationwide class action before there has been sufficient experience in individual cases to establish market values coupled with increasing restrictions on the plaintiffs' right to opt out.

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295. Gina Kolata, *A Case of Justice, or a Total Travesty?: How the Battle Over Breast Implants Took Dow Corning to Chapter 11*, N.Y. Times, June 13, 1995, at D1.

296. Current estimates suggest that benefits under the settlement will be cut back so that class members will receive at most 12% to 16% and at worst less than 5% of the scheduled efforts. See Unger, *supra* note 259, at A6. Errors of this magnitude are difficult to attribute solely to negligence or poor judgment. Defendants may have been content to create an inadequate settlement fund, which terminated their liability, and plaintiffs' attorneys had only limited incentives to contest this inadequacy.

297. As of early September 1995, the *Silicone Gel* settlement appeared to be headed in this direction as some corporate defendants had begun separate negotiations with the plaintiffs' attorneys. See Barry Meier, *Risks in Separate Deals on Breast-Implant Suits*, N.Y. Times, Sept. 1, 1995, at D3. For claimants, this involves two distinct risks. First, many may be unable to identify the maker of the implant they received, and thus individual defendant settlements effectively translate into increased eligibility requirements. Second, there is increased risk that an individual settlement fund may prove inadequate. In effect, industry-wide pooling protects claimants against disparities in outcomes because of the differing claims experiences of individual defendants. See *infra* note 299.

298. See *supra* text accompanying notes 58-62.

The Dow Corning bankruptcy also underscores for defendants the potential attractions of bankruptcy and a class action, used in combination, to deter opting out. If employed early enough before a substantial volume of individual litigation has begun outside the class action, bankruptcy need not threaten corporate control.<sup>299</sup>

Another perverse effect of *Silicone Gel* may be to discourage judicial attempts to limit plaintiffs' attorneys' fees. The settlement approved by Judge Pointer placed an outer twenty-four percent ceiling on legal and administrative costs and suggested that individual contingency fees might be restricted to this same ceiling.<sup>300</sup> The sensible premise to this policy was that because liability had been established under the settlement, the individual attorney should not receive a greater contingency fee.<sup>301</sup> Unconscionable as it may seem that an attorney should receive one-third or more of this riskless recovery under a retainer agreement with the client, the impact of this apparent ceiling may have been to encourage opportunistic opting out by self-interested plaintiffs' attorneys. That is, a plaintiffs' attorney representing an individual client entitled to \$1,000,000 under the settlement could anticipate a fee of only \$240,000 under the *Silicone Gel* settlement's presumed ceiling (assuming a private retainer agreement between the attorney and client under which the attorney was authorized to charge more). If, however, the attorney induced the client to opt out and maintain an individual action, and if that action resulted

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299. The *Silicone Gel* experience may also teach defendants to arrange for "settlement class" actions to be filed against them alone and not against their entire industry. Both *Georgine* and *Silicone Gel* were industry-wide class actions, and in that context it is far less credible to claim that the entire industry's insurance resources constitute a "limited fund." In contrast, *Ahearn* may teach defendants to seek individual class settlements and then ask the court to certify the class as a mandatory class based on the individual corporation's "limited" assets. In addition, such individual settlements inherently tighten eligibility requirements as each claimant must prove that he or she purchased from that defendant. See *supra* note 297.

300. The *Silicone Gel* breast implant settlement provided that no more than 24% of the total fund, or \$1.01 billion, could be spent on administrative or legal costs. See Bordon, *supra* note 115, at A11. Uniquely, this provision required that all legal fees, including individual contingency fees, come from the separate fund, and not from individual clients. See McKee, *supra* note 115, at 4. In turn, this implied that, as the administrative costs of sending notice to class members or administering the settlement fund rose, fee awards to plaintiffs' attorneys would have to fall. See Bordon, *supra* note 115, at A11. Although the 24% ceiling applied to aggregate expenses only and Judge Pointer pledged himself to seek to honor private contingency contracts between attorney and client, the combination of high administrative costs plus the need to award a separate fee to class counsel (from this same fund) made some reduction in contingency fees likely. Indeed, the settlement agreement provided that the judge could "make appropriate reductions" in privately negotiated contingency fees in order to stay within the ceiling. See McKee, *supra* note 115, at 4. Plaintiffs' attorneys in the *Silicone Gel* case read the settlement as intending to limit most contingency fees to 24% (or less). As an inevitable result, an incentive arose for plaintiffs' attorneys to advise their clients to opt out from the class action in order to escape the settlement's 24% ceiling, even if the client would fare better under the class action.

301. See Brickman, *supra* note 115, at 113.

in a verdict or settlement for the same \$1,000,000, the attorney would now earn \$400,000 (or perhaps more, depending upon the private retainer agreement between the client and the attorney, which today often provides a forty percent contingent fee). Indeed, the attorney could still do better even if the client did worse (for example, forty percent of an \$800,000 outcome would be \$320,000). Unfortunately, sensible fee reform may encourage socially undesirable and inefficient opting out that advances the attorney's interests rather than the client's.

Conspicuously absent in all these cases has been any effort to deal seriously with the problems of future claimants. Across the board, the issue of inflation has been quietly and uniformly repressed, and the settling parties in recent class actions have not attempted to project the number of future claims (and types of claims) with anything approaching the seriousness of the effort made in recent mass tort bankruptcy cases.<sup>302</sup> Only *Ahearn* gave any recognition to the special position of future claimants by appointing a guardian ad litem. Still, it is clearly an inadequate response to appoint a special representative *after* the settlement agreement has been struck.

Beyond the absence of procedural protections for future claimants, the larger question involves what future claimants conceivably gain from these settlements. *Ahearn* here supplies the best illustration. As with other mass tort class actions, its settlement essentially established an insurance fund to cover future claimants whose injuries mature into a compensable form over a multi-decade period. In *Ahearn*, this insurance fund consisted of the company's insurance resources (made available after a clearly intense and negotiated settlement with Fibreboard's two principal insurers) plus a trivial \$10 million contribution by Fibreboard. In return, Fibreboard received future immunity from all asbestos claims. Had the class action settlement not been reached, the same insurance resources would have been potentially available (although Fibreboard might again have had to sue and settle with its insurance carriers to obtain payment) *and* the future claimants would have also had access to the full economic resources of Fibreboard. Thus, the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right. The only benefit to class members in this setting is the reduced possibility that the company's insurance resources would have been exhausted by the time their claims matured. That is, "early" future claimants might have depleted these resources to the detriment of "later" future claimants. Although this is not a trivial problem, it could potentially be solved by injunctive relief restricting the payout of insurance resources to early claimants (and thus does not justify a complete release to

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302. See *supra* notes 58-59 and accompanying text (discussing Johns-Manville and National Gypsum mass tort reorganization proceedings). In part, this difference may reflect the bankruptcy courts' lesser concern with the status of the federal civil docket. Even more likely, it reflects the fact that future claimants must contend with other creditor classes in bankruptcy proceedings for shares of the same economic pie.

Fibreboard itself in return for a token \$10 million contribution). Put differently, no reason seems apparent why *all* future claimants should absolve Fibreboard from liability simply because *early* future claimants might otherwise exhaust the insurance fund.

In rebuttal, some may argue that a rash of sudden claims in a particular period could have forced Fibreboard into bankruptcy. Bad as bankruptcy might seem for shareholders, Fibreboard's tort creditors would likely have emerged better off from it. Based on the experience in the asbestos bankruptcies, most of the debtors' value in bankruptcy would have been contributed to a mass tort settlement fund.<sup>303</sup> Nor should it be assumed that bankruptcy would have necessarily resulted, as management might have found additional financial resources with which to pay claims. Bankruptcy is easy to threaten, but management will be predictably slow to make good on this threat because bankruptcy also jeopardizes their own continued employment.<sup>304</sup>

### PART III. THE SEARCH FOR REMEDIES

Potentially, there are a variety of levers by which courts could seek to discourage collusive settlements and protect the underrepresented in mass tort class actions. These range from strict constitutional standards to more modest adjustments in federal rules and certification procedures. What is clear, however, is that the traditional levers used by courts to align the interests of plaintiffs' attorneys and class members work poorly in the mass tort context. For example, the court's primary regulatory tool in the class action context has been its ability to adjust its fee award to reflect the plaintiffs' attorney's success (or lack thereof).<sup>305</sup> But in the mass tort context, the popularity of inventory settlements undercuts this judicial lever and permits potentially corrupting side payments. Moreover, mass tort class actions now produce recoveries exceeding the billion-dollar level. In such a context, even a modest percentage of the recovery may result in a fee award of such a magnitude that it brings the declining marginal utility of money into play. That is, the defendants' willingness to agree to a fee award of, say, \$80 million (in return for a less than fully adversarial settlement) cannot be as easily overcome by the prospect of an even larger fee recovery if the case were more aggressively litigated.

This Part is organized sequentially. First, it assesses those standards and doctrines that might prevent or discourage a court from certifying a future claims class action. Second, it considers possible standards to govern class certification and the selection of lead counsel. Third, it exam-

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303. See *supra* text accompanying notes 163–171.

304. See *infra* note 468 and accompanying text.

305. Commentators have long viewed the fee award standard as the court's primary weapon by which to regulate the private attorney general. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 13, at 690–92; John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 *Yale L.J.* 473, 473–74 (1981).



ines techniques that would effectively enable class members to opt out of the class action. Fourth, it proposes standards for the "settlement class action." Finally, it discusses the relative merits of bankruptcy and the mass tort class action.

The common premise to this analysis is not that each plaintiff should receive his or her "day in court" in the form of an individual trial. Rather, recognizing that idealism and pragmatism must be balanced, this Part begins from the premise that judicial competence is limited. Because courts cannot anticipate developments over a multi-decade period, judicial attempts to create an insurance system through a class action settlement are likely to go awry, with the result that at least the more distant future claimants will be undercompensated. Some measure of litigant autonomy is thus desirable not only for its own sake, but because group litigation will predictably shortchange future claimants.

To a degree, this may state a justification for benign neglect, for allowing the ordinary litigation system to muddle through imperfectly, but with some cases ending up in a mass tort bankruptcy (where the claimants have greater substantive and procedural rights). However, that option is both politically infeasible and certain to encounter judicial hostility. Thus, this Part proposes a means by which the class action can be combined with arbitration to reduce the logistical burden on courts. Under such a "constrained autonomy" model, the majority of claims are resolved through group litigation, but the "high stakes" claimant and the future claimant are provided with an escape hatch by which to assert their individual claims (albeit in a restricted forum).

#### A. *The Justiciability of Future Claims*

The utility of the mass tort class action to the defendant today probably hinges on its ability to resolve future claims.<sup>306</sup> The attractions of the class action over a bankruptcy reorganization to the defendant are obvious: (1) defendants can reach a settlement before the action is filed, whereas in bankruptcy there will typically be uncertainty as of the filing date as to what percentage of the firm's value must be given to the settlement trust set up to benefit victims; (2) the debtor corporation can escape the absolute priority rule and special class voting rules of bankruptcy;<sup>307</sup> (3) bankruptcy courts may reopen the proceeding and demand additional allocations from the reorganized corporation when the trust fund approaches insolvency;<sup>308</sup> and (4) the legal status of future

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306. Part II of this Article has hopefully illustrated this point. Both *Georgine* and *Ahearn* were framed as exclusively "future claims" class actions. See *supra* text accompanying notes 192-204, 215-240.

307. See *supra* notes 145-147, 163-171 and accompanying text.

308. The most recent example is National Gypsum Co., which emerged from an asbestos-related bankruptcy in July 1993. By the fall of 1994, the settlement trust created to resolve asbestos claims was asserting that its assets fell \$160 million short of the level necessary to fund expected claims; its trustees are now seeking this amount from National

claims in bankruptcy remains unresolved, with some decisions implying that some future claims cannot be discharged by the bankruptcy court.<sup>309</sup>

Understandable as it is that defendants want litigation closure from the typically spiralling costs of future claims, constitutional limits may constrain the ability of a federal court to provide it. The primary doctrinal obstacle is Article III, Section 2 of the U.S. Constitution, which permits federal courts to exercise jurisdiction only over "cases" and "controversies." Traditionally, this constitutional barrier has been employed to deny subject matter jurisdiction in two quite distinct contexts, both of which have applicability to the mass tort class action. First, numerous cases have held that federal courts may not hear "friendly," "feigned," or collusive lawsuits, in which there is no legitimate dispute between the parties.<sup>310</sup> Such actions both misuse judicial authority (because the court's perception of the facts and legal arguments is distorted by the absence of true adversaries), and confuse judicial decisionmaking.<sup>311</sup> Settlement class actions may sometimes present precisely this form of feigned litigation that violates this norm, but discussion of this issue will be deferred until a later section.<sup>312</sup>

Second, the deeper policy rationale for the "case or controversy" requirement is to preserve the separation of powers by limiting the matters that the judicial branch may address.<sup>313</sup> The traditional rhetoric of the case law says that federal courts may not decide "abstract or hypothetical

Gypsum. See Martha Brannigan, *National Gypsum Makes An Unlikely Takeover Target*, *Wall St. J.*, Mar. 6, 1995, at B4; see also *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 485-87 (E. & S.D.N.Y. 1995) (discussing insolvency of Johns-Manville Settlement Trust).

309. There appears to be a conflict among the circuits on this point. See *infra* notes 337-341 and accompanying text. At least in some circuits, only claims that have accrued under state or federal law are cognizable claims that may be discharged in a bankruptcy reorganization. See *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 941-42 (3d Cir. 1985) (holding that since plaintiffs' injuries were not manifest until after the bankruptcy, their claims had not "accrued" under federal law and therefore could not be discharged); *In re M. Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984) (only claims that have accrued under state law may be discharged in bankruptcy), cert. denied, 469 U.S. 1160 (1985).

310. See, e.g., *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971); *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *United States v. Johnson*, 319 U.S. 302, 305 (1943); *Muskrat v. United States*, 219 U.S. 346, 361 (1911); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 290 (E.D. Pa. 1972); *Teamsters Local 513 v. Wojcik*, 325 F. Supp. 989, 991-92 (E.D. Pa. 1971).

311. "[C]oncrete adverseness," the Court has said in this regard, "sharpens the presentation of issues." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

312. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 790 n.10 (3d Cir. 1995) ("some courts have even expressed concern that . . . [settlement class action] cases do not present a case or controversy for Article III purposes."); *infra* note 441 and accompanying text.

313. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Flast*, 392 U.S. at 95 (ease or controversy requirement assures that "federal courts will not intrude into areas committed to the other branches of government").

questions."<sup>314</sup> At bottom, this limitation prevents activist judges from making essentially legislative policy judgments as to which they typically have neither expertise nor legitimacy. Accordingly, a plaintiff must have more than an ideological interest in a dispute to have standing,<sup>315</sup> but rather must have a "personal stake in the outcome of the controversy."<sup>316</sup> The Supreme Court has framed a tripartite test for determining when this requisite personal stake exists, which requires that (1) the plaintiff have suffered a concrete injury in fact; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision.<sup>317</sup>

Do future claimants have the requisite "injury-in-fact" to give them standing? In *Lujan v. Defenders of Wildlife*,<sup>318</sup> the Court said that an injury in fact had to be "(a) concrete and particularized . . . and (b) 'actual or imminent, not "conjectural" or "hypothetical.'" "<sup>319</sup> Obviously, one can assert that highly contingent and delayed future claims in mass tort cases are not sufficiently "actual or imminent" to meet this standard. Here, however, it is necessary to refine and break down the somewhat overbroad concept of future claims.<sup>320</sup> In overview, future claimants can be subdivided into three distinct subcategories: (1) persons who have suffered a legally cognizable injury but (for whatever reason) have not yet filed suit; (2) persons who have been exposed to the toxic or defective substance, drug, or product but have not yet manifested injury;<sup>321</sup> and (3) persons who have not yet been exposed or injured but who will be in the future as a result of conduct by the defendants that has already occurred.<sup>322</sup> This last category arises typically when the product or sub-

314. *New Jersey, Dep't of Env'tl Protection & Energy v. Helder Indus., Inc.*, 989 F.2d 702, 707 nn.6-7 (3d Cir. 1993).

315. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986).

316. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker*, 369 U.S. at 204).

317. See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

318. 504 U.S. 555 (1992); see also *United States v. Hays*, 115 S. Ct. 2431, 2435 (1995) (discussing *Lujan* standing doctrine).

319. *Lujan*, 504 U.S. at 560.

320. There is no standard definition of this term. Two recent commentators defined a future claim as "a claim against a debtor for an injury or disease that has not yet become manifest at the time the debtor has filed for bankruptcy, but is based upon the occurrence, prior to the bankruptcy, of one or more material events, acts, or failures to act." Ralph R. Mabey & Jamie A. Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. Rev. 745, 750 (1993). As discussed, some courts would not accept this definition.

321. This category could be further subdivided into those who have suffered an injury, which is detectable (such as pleural plaques in the case of asbestos victims), but have no awareness of it, and those whose injuries are not yet detectable at all (but who simply have a statistically higher risk of future injury because of their exposure).

322. This fact pattern arises inevitably in cases involving environmental contamination or latent property damage. If a community has been exposed to a contaminant involving a long-term risk (i.e., a pesticide or air pollution containing a toxic chemical), defendants may seek to structure a settlement that will apply to future homeowners as well who thereafter acquire property or move into homes within the

stance remains in use (contrary to the fact patterns in the asbestos or silicone gel breast implants cases where the product had been withdrawn from the market); this category will predictably loom larger in future cases involving alleged tobacco addiction and injuries from secondary exposure to tobacco smoke. As discussed below, this third category is the one that can be most clearly excluded under a constitutional analysis.

As a practical matter, however, the critical category is the second one: the "exposure only" victims who lack symptoms at the time of the settlement. Defendants have zealously sought to cover such "exposure only" plaintiffs in recent settlement class actions, and indeed probably would not have settled had this category been excluded. For example, in *Georgine*, the complaint expressly asserted that the "exposure only" plaintiffs had sustained no physical harm as a result of their exposure to asbestos, but sought relief instead for (1) their increased risk of developing asbestos-related disease; (2) their fear and mental anguish at the prospect of developing asbestos-related disease; and (3) their need for medical monitoring and surveillance to detect asbestos-related illness at an early stage.<sup>323</sup> If intangible and contingent injuries such as these, which essentially spring from an increased base expectancy rate of future illness, amount to a concrete injury-in-fact sufficient to confer standing, then it would seem that few meaningful barriers remain. Indeed, on this basis, a settlement class action today might also resolve, consistent with Article III, the future claims of all citizens in the United States who have been exposed to secondary tobacco smoke.

But what practical lines can be drawn that would find such claims to be non-justiciable? Probably the simplest "bright line" standard would be to look to state law and assert that if a claim, as pleaded, was not cognizable under state law, then it also should not be a sufficient "injury-in-fact" for purposes of Article III. Today, in most state jurisdictions, exposure alone to toxic substances does not give rise to a legally cognizable injury for fear or emotional distress.<sup>324</sup> These decisions have generally held that increased risk of future injury, or fear of such injury, does not constitute an independent ground for the recovery of damages, absent some "direct

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affected location. In this author's view, such a future claim clearly flunks any acceptable Article III test.

323. See Class Action Complaint, *in* Joint Appendix, *supra* note 187, at 267, 285.

324. Generally, these cases require that there must be some physical injury to justify an award of damages for emotional distress. See *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 38-39 (4th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1205-06 (6th Cir. 1988); *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986); *Werlein v. United States*, 746 F. Supp. 887, 906 (D. Minn. 1990), vacated, 793 F. Supp. 898 (D. Minn. 1992); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1534 (D. Kan. 1990); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569 (D. Haw. 1990). On the other hand, some decisions dealing with insurance issues recognize that "the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as surrounding tissue reacts to the fibers thereafter." *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1042 (D.C. Cir. 1981).

physical injury or impact."<sup>325</sup> Some cases have said that even a "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action."<sup>326</sup>

Ironically, the same district court that decided *Georgine* had earlier found that "exposure only" plaintiffs lacked Article III standing in the absence of an actual asbestos-related injury.<sup>327</sup> Yet, when faced with the *Georgine* settlement class, the court reversed its prior position. Noting that in *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>328</sup> the Supreme Court had liberalized its test for Article III standing, abandoning its former "legal interest" test, which required an examination of the legal merits of plaintiffs' claim in favor of an "injury-in-fact" test, the *Georgine* district court concluded that the newer "injury-in-fact" test could be satisfied simply by the fact of exposure.<sup>329</sup>

Although the *Data Processing* decision may well have liberalized the "injury-in-fact" test, it does not follow that mere exposure alone is always sufficient. In particular, the authority relied upon in *Georgine* can be easily distinguished. Those cases that have found mere exposure sufficient to confer Article III standing have largely arisen in two very different contexts: injunctive actions and bankruptcy proceedings. The leading example of the former context is *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>330</sup> in which the Court did find that exposure to a toxin could confer standing to sue to enjoin enforcement of a federal statute.<sup>331</sup> It

325. 38 Am. Jur. 2d Frigh, Shock and Mental Disturbance § 55 (1968).

326. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985); see also *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73, 76 (3d Cir. 1988) (recognizing that *Schweitzer* held that a "manifest injury is a prerequisite for a FELA action for an asbestos-related injury"); *Deleski v. Raymark Indus.*, 819 F.2d 377, 380-81 (3d Cir. 1987) (noting that under New Jersey and Pennsylvania law neither the enhanced risk of disease nor the fear and emotional distress resulting therefrom are compensable unless accompanied by present physical symptoms of illness or injury).

327. See *Robinson v. Vaughn*, No. 91-7646, 1992 U.S. Dist. LEXIS 19518, at \*4-\*5 (E.D. Pa. Dec. 2, 1992); *Alim v. Vaughn*, No. 91-4348, 1992 U.S. Dist. LEXIS 12503, at \*4 (E.D. Pa. Aug. 18, 1992); *Hannibal v. Lyons*, No. 89-5845, 1990 U.S. Dist. LEXIS 8261, at \*2 (E.D. Pa. July 2, 1990).

328. 397 U.S. 150 (1970); see also *Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting that in order to confer standing, the injury must be "distinct and palpable" and not abstract, conjectural, or hypothetical). *Data Processing* is, of course, a decision primarily concerned with judicial review of federal administrative action, a context far removed from civil litigation for money damages.

329. See *Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437, 1447-48, 1454 (E.D. Pa. 1993).

330. 438 U.S. 59, 74 (1978). Another example of such an injunctive action is *Helling v. McKinney*, 113 S. Ct. 2475, 2480-81 (1993), where a prisoner successfully alleged that exposure to second-hand tobacco smoke amounted to an "injury-in-fact" for purposes of a cruel and unusual punishment claim.

331. The statute (the Price-Anderson Act) limited the liability of a plant owner in the event of a nuclear accident, and, after addressing standing, the Court upheld the Act against all asserted constitutional infirmities. Addressing the standing issue, the Court said that "[c]ertainly the environmental and aesthetic consequences of the thermal pollution of

noted that "the emission of non-natural radiation into appellees' environment would also seem a direct and present injury."<sup>332</sup> But injunctive actions stand apart from actions for money judgments because most injunctive actions will unavoidably affect unrepresented future claimants. Thus, for example, an injunction redrawing school boundaries in a desegregation case necessarily and inevitably affects future claimants, many of whom have not yet even been exposed to the unlawful condition or danger. Given that such future claimants will inevitably be affected, it may be appropriate to recognize their standing and unnecessary to provide them a right to opt out. Precisely for this reason, Rule 23 permits non-opt out class actions when the plaintiff seeks relief that will necessarily affect absent parties.<sup>333</sup>

The bankruptcy context is even more distinguishable, for several reasons. First, the Bankruptcy Clause of the U.S. Constitution vests Congress with broad power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."<sup>334</sup> Congress thus has broader power here than elsewhere,<sup>335</sup> although the Fifth Amendment imposes some due process limitations even in this context.<sup>336</sup> Despite the differences in congressional authority (and the critical fact that Congress has acted by passing the Bankruptcy Code), the irony is that future claimants currently receive more protection in bankruptcy than in a class action. Today, in bankruptcy, the majority of recent cases have found that a legally cognizable claim in bankruptcy does not arise simply because negligent or reckless conduct by the defendant occurred prior to the time of the filing of the bankruptcy petition. Rather, these decisions have held that there must be some pre-petition relationship between the future claimants and the bankrupt entity in order for the future claimants to

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the two lakes in the vicinity of the disputed power plants is the type of harmful effect which . . . [satisfies] the 'injury in fact' standard." *Duke Power Co.*, 438 U.S. at 73-74.

332. *Id.* at 74.

333. See Fed. R. Civ. P. 23(b)(1)(B), (b)(2), (c)(3). Nonetheless, some argue that future claimants should not even be included in Rule 23(b)(2) class actions. See Elizabeth R. Kaczynski, Note, The Inclusion of Future Members in Rule 23(b)(2) Class Actions, 85 Colum. L. Rev. 397, 403 (1985).

334. U.S. Const. art. I, § 8, cl. 4.

335. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902).

336. See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935). There has been a lively debate on the nature and stringency of these Fifth Amendment limitations. Compare Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand. L. Rev. 1369, 1377-80, 1392-93 (1985) (characterizing constitutional difficulties facing use of representatives for future claimants in the bankruptcy context as "significant but not insurmountable") and Mabey & Gavrin, *supra* note 320, at 771-84 (concluding that Fifth Amendment's substantive and procedural due process standards do not prohibit discharge of future claims) with Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings*, 61 Am. Bankr. L.J. 145, 168-75 (1987) (noting that "practical difficulties of identifying and giving constitutionally adequate notice to thousands of contingent future claimants are almost certainly insurmountable").

have standing.<sup>337</sup> Some of these decisions also require that the claim was within the "fair contemplation of the parties" at the time of the bankruptcy filing.<sup>338</sup> When the claim was not within the parties' "fair contemplation," they have said, the bankruptcy reorganization will not act as a bar and the future claimant can still sue the reorganized entity years later when the claimant's injury first manifests itself.<sup>339</sup>

To be sure, not all courts have agreed, and some decisions have been more liberal<sup>340</sup> and still others more conservative<sup>341</sup> in defining when a claim arises under the Bankruptcy Code. Nonetheless, this intermediate standard, which requires both the existence of a pre-petition relationship and that the claim be within the parties' "fair contemplation," makes good sense and could easily be applied to govern justiciability in the class action context as well. From a policy perspective, the mass tort class ac-

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337. See, e.g., *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277 (5th Cir. 1994); *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991); *In re Piper Aircraft Corp.*, 168 B.R. 434, 439-40 (S.D. Fla. 1994). But see *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993) (rejecting *Chateaugay Corp.*'s "relationship" approach in favor of a "fair contemplation" test).

338. See *Jensen*, 995 F.2d at 930-31; *Chateaugay Corp.*, 944 F.2d at 1005.

339. In *Chateaugay Corp.*, the Second Circuit reasoned that if the future claimant there (the EPA) could succeed in keeping its "claim outside of bankruptcy," it could thereafter present the same claim "against the reorganized company that it anticipates will emerge from bankruptcy." *Chateaugay Corp.*, 944 F.2d at 1005. For the argument that "forseeability" is the appropriate standard for bankruptcy, see Kevin J. Saville, Note, Discharging CERCLA Liability in Bankruptcy: When Does A Claim Arise?, 76 Minn. L. Rev. 327 (1991).

340. A few decisions have adopted a "conduct" test that looks to the date of the misconduct. Under this standard, it would be enough that the defective or toxic product was produced prior to the time of the bankruptcy filing. See, e.g., *Grady v. A.H. Robins Co.*, 839 F.2d 198, 199 (4th Cir.) (Dalkon Shield claims found cognizable because produced prior to filing), cert. dismissed, 487 U.S. 1260 (1988); *In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (negligent dental treatment claims found cognizable because they arose at the "earliest point" in the relationship between the parties); *In re Johns-Manville Corp.*, 36 B.R. 743, 750 (Bankr. S.D.N.Y.) (asbestos claims found cognizable on the basis of exposure alone), mandamus denied, 749 F.2d 3 (2d Cir. 1984). These decisions precede those employing the relationship test and have not been followed recently.

341. A few (much criticized) decisions have used the point at which a claim would accrue under state law and thus typically require that some damage or injury have occurred to the victim. See, e.g., *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 941-42 (3d Cir. 1985) (holding that because plaintiffs' injuries were not manifest until after the bankruptcy, their claims had not "accrued" under federal law and therefore could not be discharged); *In re M. Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984) (only claims that have accrued under state law may be discharged in bankruptcy). This standard does interfere with the power of a bankruptcy court to deal with contingent claims, but would make relatively greater sense when applied to the class action context. As noted earlier, Article III's standards can be interpreted more liberally in bankruptcy because it is specifically addressed by the Constitution. See *supra* text accompanying notes 334-335.

tion and the mass tort bankruptcy contexts are functional substitutes, and the same limitations should apply in both contexts.<sup>342</sup>

At first glance, the relationship test announced in these bankruptcy cases may seem to impose only modest restrictions. Indeed, cases applying this relationship standard have suggested in dicta that exposure will suffice to establish the requisite relationship.<sup>343</sup> But this does not mean that any form of exposure need suffice. Once one recognizes that a relationship must exist between plaintiff and defendant at the time of the action to satisfy Article III, it follows that not all forms of exposure will suffice to establish this element.

Some distinctions seem obvious. Consider, for example, how the *Silicone Gel* litigation might have been analyzed under such a standard. A recipient of breast implants has obviously been "exposed" in an intrusive and intimate way through a surgical procedure. This fact should satisfy both the pre-petition relationship standard and the "fair contemplation" standard (particularly in the latter case given the substantial publicity surrounding the health hazards associated with breast implants before the time at which litigation was settled).<sup>344</sup> Similarly, recent mass tort episodes involving the Dalkon Shield or defective heart valves would also meet this standard.<sup>345</sup>

In contrast, in a hypothetical case involving secondary exposure to tobacco smoke or to a toxic pesticide through its release into the air, the same relationship should not be found to exist because those exposed would include not only employees and purchasers of the product, but the potentially limitless class of anyone coincidentally located in the vicinity of the release.<sup>346</sup> The status of asbestos cases under this standard is more

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342. Given that the bankruptcy decisions do ultimately rest on constitutional concerns about the dischargeability of future claims, they should not be dismissed as mere statutory decisions. Most commentators have recognized the constitutional foundation of these decisions. See, e.g., Mabe & Gavrin, *supra* note 320, at 760-89.

343. See *In re Piper Aircraft Corp.*, 168 B.R. 434, 439-40 (S.D. Fla. 1994); see also *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1275-76 (5th Cir. 1994) (dictum).

344. A timing issue surrounds the point at which the relationship must be found to exist. If the law looked to the moment of the settlement's approval, this would permit consideration of publicity and other efforts at notice mandated by the court.

345. In *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989), future claimants injured by the Dalkon Shield were found to be barred by the bankruptcy automatic stay. Although the case does not emphasize the nature of the relationship, it seems likely that the degree of exposure involved in this case would satisfy both the prior relationship and "fair contemplation" standards emphasized in *Piper Aircraft*, *Lemelle*, and *Jensen*. See *supra* notes 337-338. Similarly, in *Bowling v. Pfizer*, 143 F.R.D. 141, 147 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993), the injured class members in that mass tort class action had received defective heart valves. A more substantial personal intrusion is difficult to imagine. Thus, the facts of many mass tort cases in which standing has been recognized in future claimants are consistent with this proposed standard.

346. Besides employees who are occupationally exposed, immediate neighbors of a factory releasing a toxic emission or leaking toxic chemicals might also satisfy the requisite relationship test. The critical element would be that the possibility of injury from the



questionable. On the one hand, because the occupational exposure of many workers was long and sustained, the requisite relationship could be found to exist in their case. On the other hand, virtually every U.S. citizen has been exposed to asbestos.<sup>347</sup> A relationship that every U.S. citizen shares with the defendant is hardly a meaningful relationship, and, if exposure alone gave rise to the requisite Article III "injury-in-fact," there would be universal standing. Such a result—universal standing in all U.S. citizens—seems starkly at odds with the traditional prudential limitation on standing under which federal courts "limit access to the federal courts to those litigants best suited to assert a particular claim."<sup>348</sup>

This Article's contention that Article III should require a significant pre-settlement relationship between the future claimants who will be bound by the settlement and the defendant faces one significant doctrinal obstacle. In *In re "Agent Orange" Product Liability Litigation*,<sup>349</sup> the Second Circuit rebuffed the attempts of Vietnam veterans who sought to attack collaterally an earlier massive class action settlement of claims relating to "Agent Orange," a toxic defoliant used in the Vietnam War. The veterans claimed that they could not be bound by the earlier settlement, both because they had not received constitutionally adequate notice of the settlement and because they lacked a justiciable claim at the time of the settlement insofar as they had not then manifested any symptoms from their exposure (and thus arguably lacked the requisite "injury-in-fact" necessary to have their claims adjudicated).<sup>350</sup> The Second Circuit rejected these claims, relying in part on *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>351</sup> for its conclusion that the veterans had sustained the necessary "injury-in-fact." Other decisions, however, have been more skeptical as to whether future claimants should be included within a proposed class.<sup>352</sup>

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release or emission be within their "fair contemplation." Secondary exposure to tobacco smoke presents a similar but even more extreme example in which exposure alone should not satisfy a "relationship" test.

347. The objectors in *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), cited studies concluding that "probably everyone in the world" has been exposed to asbestos. Reply Brief of Appellants at 17, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-CV-0215).

348. *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985)).

349. 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994).

350. See *id.* at 1434-35.

351. 438 U.S. 59 (1978); see also *supra* notes 330-332 and accompanying text (discussing *Duke Power Co.*).

352. Some of these decisions declining to include future claimants raise due process concerns, while others rely more on prudential grounds for denying inclusion in the class to future claimants. See, e.g., *Scott v. University of Delaware*, 601 F.2d 76, 89 (3d Cir.) ("[W]e do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class . . ."), cert. denied, 444 U.S. 931 (1979); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981) (noting that due process considerations preclude inclusion of future claimants in the

So where are we left? On the policy level, the preferable rule may be the more conservative one stated in those bankruptcy decisions that find only claims that have accrued under state law to be cognizable under Article III.<sup>353</sup> In most state jurisdictions, this standard would require some present and recognized injury, thereby excluding the bulk of future claimants. Although this rule has been criticized in the bankruptcy context because it may deny the court the power to reorganize a company that is subject to contingent future claims, this critique has less applicability to the mass tort context, because, as this Article later argues,<sup>354</sup> this is precisely the function that a class action is least capable of successfully performing. Still, on the practical level, the case law on justiciability in class actions may have already gone beyond this point, so that only the Supreme Court would impose such an "accrued state claim" gloss on Article III. Nonetheless, at least outside the Second Circuit, federal courts could and should still look to the broader line of bankruptcy decisions that require both a significant, pre-filing relationship between the parties and that the future injury be then within the plaintiffs' "fair contemplation." Even within the Second Circuit, the degree of exposure remains relevant, and a secondary tobacco smoke or pesticide exposure case is not necessarily controlled by the *Agent Orange* precedent, which on its facts probably involved a more sustained exposure with clearer recognition by the class members of the possibility of injury. Finally, even *Agent Orange* does not confer Article III standing on class members who have not yet been exposed at the time of the action's filing.

Still, *Georgine* and *Agent Orange* suggest that federal courts will resist any effort at curtailing the justiciability of future claims in mass tort class actions when to do so threatens their ability to control their dockets. Symptomatically, the more restrictive bankruptcy cases arose in a context where courts had greater constitutional authority to define the standard, but less caseload pressure inducing them to be all inclusive.<sup>355</sup> At least

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class); *Moore v. Western Pa. Water Co.*, 73 F.R.D. 450, 453 (W.D. Pa. 1977) (describing future claimants as "an amorphous, phantom group, 'incapable of identification' and declining to include them within class) (citation omitted); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1974) (refusing to include future claimants on fairness grounds); see also Kaczynski, *supra* note 333, at 398 n.7 (future claimants not includable in a Rule 23(b)(3) class action).

353. See cases cited *supra* at note 341. As noted in the discussion at *supra* text accompanying notes 335-336, Congress has power to define standing more broadly in the bankruptcy context. Hence, the more restrictive "accrued state claim" standard could apply only outside bankruptcy, with bankruptcy courts left free to use a more liberal standard under which to reorganize companies.

354. See *infra* text accompanying notes 457-470.

355. The rhetorical differences between the bankruptcy decisions and the class action cases are also revealing. Consider the following language from *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 944 (3d Cir. 1985):

[I]f contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim . . . . Thus, in our case, every

on policy grounds, there are persuasive reasons why those circuit courts that have not yet faced the issue should apply the bankruptcy standards to the class action context in order to restrict future claims class actions:

First, future claims classes lack the " 'concrete adverseness which sharpens the presentation of issues.' " <sup>356</sup> That is, because such a class is inchoate and without existing members having a strong personal stake in the outcome, there will seldom be class members able or willing to monitor their attorneys. Future claims class actions present, then, the extreme example of lawyers operating without clients.

Second, doctrinally, Article III justiciability requires that plaintiffs show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." <sup>357</sup> Here, a fundamental problem with "exposure only" classes is that appropriate compensation for the injury of exposure is an elusive concept. Any current cash award will inevitably overcompensate those who do not develop more severe subsequent illness and undercompensate those who do. <sup>358</sup> All that reasonably can be done is to establish an insurance fund, but this requires courts to engage in precisely the kind of predictive decisionmaking that strains and usually exceeds their competence. Judge Posner made precisely this point in declining to permit future claimants to participate in a mass tort bankruptcy proceeding, stating that it arguably "would be a quixotic undertaking far beyond the realistic boundaries of judicial competence to make sufficiently generous provision for upwards of a hundred thousand unidentified claimants to justify extinguishing their claims involuntarily." <sup>359</sup> Put simply, to give adequate redress in a future claims class action, the court must both estimate the number and character of the claims that will be received and the likely inflation rate applicable to the future period. Recent experience suggests that courts have limited ability to perform this task. <sup>360</sup> Bad as the performance of

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employee who had worked near asbestos and whose address was known would be a known creditor . . . . We believe that our interpretation, which avoids such thorny constitutional issues, is the proper view of Congressional intent.

356. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

357. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citation omitted).

358. Nonetheless, some mass tort class actions have sought primarily to compensate class members for the risk to which they were exposed. See *supra* notes 266-282 and accompanying text. This may again show the bias of plaintiffs' attorneys in favor of present claimants over future claimants.

359. *In re UNR Indus., Inc.*, 725 F.2d 1111, 1120 (7th Cir. 1984). Judge Posner further noted that the rights of future claimants would be better protected if they were able to bring individual actions represented by "the very active plaintiffs' asbestosis bar." *Id.* at 1117.

360. For example, when the Manville Personal Injury Settlement Trust was confirmed in 1986, it was estimated that the Trust would receive approximately 83,000 to 100,000 claims during the course of its lifetime (which was expected to extend well into the next century). See *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 479 (E. & S.D.N.Y. 1995). However, by early 1994, some 240,000 claims had already been filed, and several

courts in asbestos cases has been, these cases are the paradigm of a "mature" mass tort case in which courts have some idea about the likely future filing rate and the value of claims in the legal marketplace. The unravelling of the *Silicone Gel* settlement shows that in the case of an "immature" mass tort, neither the parties nor the court can predict even the rate of case filings during the first year of the settlement.<sup>361</sup> Were the court instead facing a class action dealing with a new carcinogen or a drug with toxic side effects, it would lack any basis upon which to estimate the number of future claimants.

### B. *Class Certification and the Future Claimant*

Constitutional contentions may be more persuasive when repackaged more narrowly as arguments about the certifiability of a class action under Rule 23. Clearly, mass tort class actions have strained the boundaries of Rule 23, and there are a variety of ways that courts could draw those boundaries more conservatively, in part to avoid constitutional confrontations. Several different theories need to be considered under this heading: (1) that a future claimants class action should not be certified under the language of Rule 23; (2) that a future claimants class action should be certified only when the court finds a probability of success on the merits; and (3) that only a "limited" class action should be certified on the issue of liability, but typically not on the issues of causation or damages. Ultimately, this Article endorses a variant on the third of these options as the approach most likely to protect the future claimant without inundating the federal courts.

1. *The Authority of the Class Representative.* — Black letter law holds that the named plaintiff in a class action "cannot represent a class of whom they are not a part."<sup>362</sup> This means that the class representative can represent the class "only to the extent of the interests they possess in

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hundred thousand more were expected. See *id.* Yet, more care was taken in this case to estimate future claimants than in any other asbestos case. For further evidence of the limited capacity of epidemiological studies to predict accurately, see *supra* notes 58–60 and accompanying text.

361. Moreover, in *Silicone Gel* the estimation problems were simpler than in most mass tort cases because the number of women with breast implants was known and fixed.

362. *Bailey v. Patterson*, 369 U.S. 31, 32–33 (1962) (citations omitted).

common with members of the class."<sup>363</sup> In short, only a "typical" representative<sup>364</sup> can serve as an adequate representative.<sup>365</sup>

In this light, who constitutes a "typical" and "adequate" representative for a class of future claimants? In *Georgine*, the complaint listed several "exposure only" plaintiffs and asserted that, although they had suffered no physical harm at that point from their exposure to asbestos, they were entitled to relief for their fear and mental anguish at the prospect of future illness and for their special needs for medical monitoring and surveillance.<sup>366</sup> These allegations would probably be sufficient if the class as a whole were seeking relief only for these psychic injuries. In reality, however, relief is invariably also sought for more serious injuries (lung cancer, asbestosis) that only a portion of the class will later develop.

Thus, the underlying issue surfaces: can the class representative represent a class of future claimants and settle their claims for serious (but future) injuries from which the class representative does not suffer (and probably will not suffer)? The problem here is not simply one of "typicality," but of the necessary limits on the authority of the class representative. Read closely, Judge Friendly's decision in *National Super Spuds v. New York Mercantile Exchange*<sup>367</sup> suggests that the agent's authority is necessarily bounded by the pleadings. Accordingly, if the pleadings allege that the class representative was injured in one transaction involving a specific set of facts, the class representative lacks authority to settle or compromise claims involving another set of facts.<sup>368</sup> In mass tort cases, as noted above, the pleadings typically allege that the representative of the future claimants is subject to fear, anguish, and an increased risk of illness, but they do not (and cannot) allege that the representative will suffer from more serious illness and disease in the future. Arguably then, the class

363. *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17 (2d Cir. 1981).

364. This "typicality" requirement is set forth explicitly in Federal Rule of Civil Procedure 23(a)(3), which requires the court to find that "the claims . . . of the representative parties are typical of the claims . . . of the class." Some commentators, of course, view the class representative as a mere figurehead. See, e.g., Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 *Hastings L.J.* 165 (1990). Conversely, others view the class representative as having a close relationship to the adequacy of representation issue. See, e.g., Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 *Ohio St. L.J.* 607 (1993).

365. The "adequacy" criterion is set forth in Rule 23(a)(4). In *National Super Spuds*, Judge Henry Friendly found that the two requirements overlapped. See *National Super Spuds*, 660 F.2d at 17 n.6.

366. See *supra* note 323 and accompanying text.

367. 660 F.2d at 16-18.

368. The class representative can, however, settle claims based on legal theories not pled in the complaint (and over which the court would even lack subject matter jurisdiction) if they arise out of the same predicate facts. See *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).

representative cannot settle claims based on predicate facts that are not alleged (i.e., the claimants' future illness).

Judge Friendly's view in *National Super Spuds* that an atypical plaintiff cannot meet the "adequacy of representation" standard in Rule 23(a)<sup>369</sup> rests on a sound perception of the conflicts of interest that arise under any contrary rule. In the mass tort context, real conflicts are easy to visualize between a named plaintiff (who may or may not become seriously ill in the future) and those future claimants who do incur serious disease. For example, a class representative who has been exposed to a toxic product but who has only a five percent base expectancy rate of lung cancer as a result may logically prefer a settlement that emphasizes current cash compensation or medical monitoring for all claimants over a substantial cash award to only those who do become seriously ill. Precisely to this degree, such a plaintiff is not an adequate representative for those who do become seriously ill. Inherently, there is a considerable difference between the status of a person exposed to a risk and that of one who has had the risk actually materialize. To ignore this difference is to equate the holder of a lottery ticket with the winner of a lottery.

Of course, much depends here on whether one takes an *ex ante* or an *ex post* perspective. From the former perspective, the class members are similarly situated in that they are equally exposed to the risk, and the named plaintiff arguably might be described as an adequate representative. From the *ex post* perspective, however, the named plaintiff is hardly "typical" of the persons who later become seriously ill. In this context, the problem with the *ex ante* perspective is that it proves too much. Logically, from an *ex ante* perspective, the plaintiff need not even have yet been exposed to the toxic substance or defective product. After all, all citizens stand in risk of future exposure to many toxic products (such as asbestos or tobacco smoke), and the fact of exposure may only marginally increase the base expectancy rate of illness for those so exposed (say, from one percent to five percent). The case for an *ex post* perspective rests on the need for named plaintiffs who have an identity of interests with each major outcome group.<sup>370</sup> At least in a class action that is primarily for monetary relief, a close nexus should be required between the injuries sustained by at least one subclass of named plaintiffs and those to be sustained by the worst-off members of the future claimant class before the named plaintiff is deemed to be an adequate representative under Rule 23(a)(4).

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369. See *National Super Spuds*, 660 F.2d at 17 n.6.

370. Although the case law has been fairly tolerant on the issue of typicality, even the most tolerant cases have required that "the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg & Conte, *supra* note 96, § 11.28 at 11-58.

The issue of typicality tends to overlap heavily with the issue of adequacy of representation. For the view that an "atypical" named plaintiff cannot be an adequate representative, see *National Super Spuds*, 660 F.2d at 17 n.6.

Admittedly, this argument that a person subject only to a risk of injury cannot be an adequate or typical representative for the future claimants who in fact suffer severe injuries conflicts with some decisions that have been more permissive on this issue.<sup>371</sup> But these decisions tend to be institutional reform cases seeking primary injunctive relief. Ultimately, mass tort actions for monetary relief are both very different and more problematic in their value for plaintiffs. A person who is an adequate representative for an injunctive action may not be so for a money damages suit.<sup>372</sup> Why? Simply put, injunctive actions do not create the same difficult allocation problems in terms of how the settlement fund is to be distributed.

Although a purist might argue that no named plaintiff can be an adequate representative for at least remote future claimants, a reasonable solution would be to insist on classes having distinct subclasses for present and future claimants. This accomplishes several objectives: (1) current claimants, who typically have high stakes claims, are not likely to be as passive as future claimants and may monitor the negotiations actively;<sup>373</sup> (2) multiple counsel with responsibilities for distinct subclasses may impede collusion; and (3) the future claimants, if properly represented, will have an interest in a serious attempt to estimate the number and character of future claims and the impact of inflation.

2. "*Superiority*". — Under the language of Rule 23, the most obvious argument by which to restrict the scope of a future claims class action involves the "superiority" test of Rule 23(b)(3), which requires that the court find before certifying the class that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."<sup>374</sup> In evaluating this standard, Rule 23 further instructs the court to consider "the interests of members of the class in individually controlling the prosecution or defense of separate actions" and "the difficulties likely to be encountered in the management of a class action."<sup>375</sup> As discussed above, these difficulties are likely to be overpowering when mass tort injuries have long latency periods. A rational future claimant would prefer an individual action if it will likely pay him or her more than the class relief. Thus, where the class relief appears to be below the going

371. See, e.g., *Baby Neal v. Casey*, 43 F.3d 48, 61 (3d Cir. 1994) (finding that "differing degree and nature" of plaintiffs' injuries does not undermine class certification); *Hassine v. Jeffes*, 846 F.2d 169, 176-77 (3d Cir. 1988) (finding that named plaintiff may share common harm with class by virtue of personally facing "threat of injury").

372. Indeed, exactly this point was made by the Third Circuit panel in the *Baby Neal* case, which noted that "the individual differences in the children's circumstances might indeed militate against certification if the action sought certification under 23(b)(3) because a court would need to evaluate those differences in the event that the plaintiffs prevailed and were entitled to monetary damages." *Baby Neal*, 43 F.3d at 63.

373. The *Silicone Gel* present claimants provide such an example. See *supra* text accompanying notes 249-251.

374. Fed. R. Civ. P. 23(b)(3).

375. *Id.* 23(b)(3)(A), (D).

rate in individual actions (as in *Georgine*), it is difficult to understand why a class member would prefer less to more. In addition, the settlement fund is an inviting target for a host of present claimants and their attorneys, who on a piecemeal basis have repeatedly "raided" such funds in the asbestos context and driven them into insolvency.<sup>376</sup>

When should a class action resolution be seen as "superior to other available methods" for the resolution of a mass tort episode? One requirement should be that the settlement establish an actuarially reliable insurance fund, which is adequately funded. Here, the first problem is that experts themselves do not agree on the likely number of future claims in most mass torts cases. Even in the case of the "mature" field of asbestos litigation, recent "estimates for mesothelioma deaths range from 15,500 to 300,000, while the estimates of deaths from asbestos-related lung cancer range from 30,758 to 1,440,000."<sup>377</sup> In such an environment, a lump sum settlement under which the defendant deposits a fixed and limited amount based on an estimate of the likely future claims should not be approved. Rather, the settlement should be either open-ended or should at the least provide a continuing opportunity for class members to opt out and sue in individual actions in the event that benefits need to be scaled back.<sup>378</sup>

Next, to determine that an action is "superior to other available methods," the court should be able to find that the individual class members will do at least as well on a net basis as if they pursued individual actions. Here, the fact that the settlement will pay less than individual claimants have historically received should normally preclude a finding of "superiority."<sup>379</sup> Finding that a settlement is "fair and adequate" cannot be a substitute for finding that it is "superior" to other alternatives.

When, then, is the class action likely to satisfy the "superiority" requirement? First, by focusing on the net recovery to class members, the court is entitled to deduct the typically greater contingency fees that attorneys will require in individual actions from the typically greater recovery. Under these circumstances, even a smaller gross recovery in the class

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376. See *supra* notes 208–210 and accompanying text.

377. Dunbar & Neumann, *supra* note 58, at 1.

378. Precisely this protection in the form of a continuing right to opt out if benefits were reduced was provided in the *Silicone Gel* settlement, where the court was clearly aware that the fund might be inadequate. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*22–\*23 (N.D. Ala. Sept. 1, 1994).

379. On this issue, the *Georgine* court sidestepped the problem by finding that even though claimants in individual actions would receive cash compensation when class members would not, this was not a barrier because future claimants had "different expectations" about their rights. See *Georgine v. Amchem Prods., Inc.* 157 F.R.D. 246, 298 (E.D. Pa. 1994). Finally, the *Georgine* court deemed the "superiority" requirement to be satisfied by its finding that the settlement provided class members with fair compensation. See *id.* at 316.



action can be superior.<sup>380</sup> Second, where there are small claimants, the court arguably can give some weight to their more exposed status insofar as they may be unable to find representation outside the class action.<sup>381</sup> Third, evidence that insurance resources may be exhausted by individual claims, thereby leaving later claimants unpaid, can be relevant, because a class action allows the court to pool limited insurance resources and apply them equitably over the projected period during which future claims will arise.<sup>382</sup> Corporate solvency is much less likely to be an argument favoring the use of the class action, however, because the corporation (and its creditors) always retain the option of using the bankruptcy process to pool limited assets.

3. *Probability of Success.* — Judge Posner's decision for the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*<sup>383</sup> can be read to imply that a mass tort class action should not be certified in the absence of a finding that the action has a probability of success on the merits. Indeed, a close reading suggests that Judge Posner might expect the trial court to balance the class action's merit against the impact of its pendency on the defendants. Judge Posner's concern was that even though the defendants in *Rhone-Poulenc Rorer* had won 92.3% of the previous trials (thirteen out of fourteen), a class action could force them to settle because the jury would "hold the fate of an industry in the palm of its hand."<sup>384</sup>

Existing case law, however, poses a serious doctrinal obstacle to this approach. Under *Eisen v. Carlisle & Jacquelin*,<sup>385</sup> any consideration of the merits may be prohibited in deciding whether to certify a class.<sup>386</sup> Arguably, *Eisen* can be distinguished because the Court's real concern in that case was that the trial court had used its merits finding as a substitute for Rule 23's express criteria. To do so, the Court said, "contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class

380. The time delay pending recovery is a more problematic factor. Although it was heavily emphasized in *Georgine*, see *id.* at 310-311, 316, 322, it seems a bootstrap argument in that case when the delay in getting to trial within the tort system was largely due to the federal stay order that enjoined all asbestos-related personal injury litigation in federal court. See *supra* note 185 and accompanying text.

381. Ironically, in *Georgine*, the reverse was true: small claimants with pleural plaques received no cash compensation under the class action settlement, but would normally receive a cash payment in individual actions. See *Georgine*, 157 F.R.D. at 272-73, 291-92. Thus, the interests of small claimants can point in either direction.

382. Again, insurance was not an issue in *Georgine* where the CCR defendants were all highly solvent. The court specifically found that the CCR defendants could meet their obligations under the settlement. See *id.* at 291.

383. 51 F.3d 1293 (7th Cir. 1995).

384. *Id.* at 1300. Of course, by the same token, the jury could also hold the fate of the plaintiffs in its hand.

385. 417 U.S. 156, 177-78 (1974).

386. See, e.g., *In re Copley Pharmaceutical, Inc., "Albuterol" Prods. Liab. Litig.*, 161 F.R.D. 456, 460 (D. Wyo. 1995) (finding that consideration of merits of plaintiffs' claims is "expressly prohibited" when deciding whether to decertify class).

action without first satisfying the requirements for it."<sup>387</sup> Clearly, this was not what Judge Posner intended; his approach would seemingly use a merits review as an *additional* condition, not a sufficient one.

Even if Rule 23 does not today permit such an inquiry, the policy justifications for Judge Posner's approach as an additional condition seem strong. Interestingly, such a test effectively distinguishes between "mature" mass torts and "immature" ones, because early in their evolutionary cycle, new mass torts usually have only limited settlement value and a substantial prospect of defeat at trial.<sup>388</sup> However, in the case of a "mature" mass tort (such as asbestos), the prospect of success has increased to the point of near certainty, and at that point class certification would logically follow. From a policy perspective, this approach makes sense because the consequences of an adverse decision on the liability issue in the case of an "immature" mass tort would be highly unfortunate. Imagine that a trial on the central issue of liability is held in a nationwide class action of a new "immature" mass tort, and defendants win on their claim that there is no causal relationship between their product and the plaintiffs' injuries. A year later, new scientific evidence is discovered which establishes a causal connection. Unfortunately, the adverse decision may preclude the plaintiffs (who include future claimants) from bringing litigation for decades to come. Delaying the certification of the class action until the scientific evidence clearly supports plaintiffs (if indeed that is the outcome) thus may benefit future claimants over the long run.

4. *Limited Class Actions.* — Any serious effort at a balanced solution to the mass tort crisis must recognize that federal courts can no longer afford every litigant in mass torts cases an individual trial. Yet, mass tort class actions seem systematically to disfavor the plaintiffs, particularly future claimants. Given this statement of the dilemma, the search for reform must seek ways to divert cases out of the federal courts, but in ways that do not penalize tort victims.

One means to this end involves combining the class action with arbitration (and/or other alternative dispute resolution techniques) on the limited issues of damages and individual causation. A series of recent mass tort cases have certified a limited class action for purposes of determining liability, but not for purposes of determining causation or damages.<sup>389</sup> Conversely, in his *Rhone-Poulenc Rorer* decision, Judge Posner re-

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387. *Eisen*, 417 U.S. at 177.

388. See *supra* text accompanying notes 52, 58–62.

389. Indeed, this is the most common type of mass tort class action that has been actually certified. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir.) (certifying limited class action that contemplated "individual damages suits"), cert. denied, 479 U.S. 852 (1986); *Castano v. American Tobacco Co.*, No. 94-1044, 1995 U.S. Dist. LEXIS 2005, at \*41 (E.D. La. Feb. 17, 1995) (partial class certified with court specifically excluding individualized issues of injury-in-fact, proximate cause, reliance, affirmative defenses, and compensatory damages as unsuitable for class treatment); *Copley Pharmaceutical, "Albuterol" Products Liab. Litig.*, 161 F.R.D. at 458 (partial class action with

jected this approach, in part because such a bifurcated trial approach, he said, infringed the defendant's Seventh Amendment right to a jury trial.<sup>390</sup> This Seventh Amendment objection seems a weak argument, as a series of circuit court decisions have approved the use of successive juries to determine different questions,<sup>391</sup> and Rule 23(c)(4)(A) explicitly contemplates use of such a procedure. If a limited class were certified for purposes only of liability determination *after* a probability of success finding, it seems doubtful that even the Seventh Circuit would find a Seventh Amendment violation.

As contemplated, the class action would resolve only the issues of liability and generic causation. Each plaintiff would still be required to prove in a separate trial the facts demonstrating individual causation in that plaintiff's case (for example, that the plaintiff was occupationally exposed to asbestos for a sufficient period to cause the claimed injury or illness). Neither damages nor damage ranges would be established by the original verdict or by any settlement. In effect, although there could be a "settlement class" action, it could only establish liability, not the range within which recoveries would be allowed. Effectively, this protects future claimants from settlements that expose them to the ravages of inflation and from disproportionate allocation of the settlement fund to

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court excluding issues of causation, injury, and damages as not suitable for class treatment); *Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269, 279-80 (E.D. Tex. 1985) (certifying a limited class action on liability and related issues, but excluding all individualized issues in the case, such as exposure, causation, injury and compensatory damages, which would instead be tried later), *aff'd*, 782 F.2d 468, 470-72 (5th Cir. 1986); *Delgazzo v. Kenny*, 628 A.2d 1080, 1091 (N.J. Super. Ct. App. Div. 1991) (certifying limited class, but excluding issues of failure to cure, reliance, and damages). In contrast, very few decisions have certified a nationwide class of personal injury claims for *all* purposes. The leading example (and arguably the only non-bankruptcy example in which appellate courts have not reversed certification) is *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). A unique fact about the *Agent Orange* class action was the existence of a common defense to all individual or class claims (the military contractor defeuse). See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) (quoting *Diamond Shamrock*, 725 F.2d at 860 and citing the existence of this defense as the "cardinal fact" about the case), *cert. denied*, 484 U.S. 1004 (1988).

390. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995).

391. See *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686 (9th Cir.), *cert. denied*, 434 U.S. 298 (1977). In some limited circumstances, the Seventh Amendment has been held to require trial of all issues before a single jury. See *Gasoline Prods. v. Champlin Refining Co.*, 283 U.S. 494 (1931). The right to a unitary jury trial is not, however, an absolute one and truly applies only when the issues proposed to be bifurcated are "so interwoven . . . that the [one] cannot be submitted to the jury independently of the [other] without confusion and uncertainty which would amount to a denial of a fair trial." *Arthur Young*, 549 F.2d at 693 (citing *United Air Lines v. Wiener*, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961)). Later cases have upheld the power of a trial judge to certify the class only with respect to certain issues, reserving the other issues for a separate determination. See *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979).

other subclasses. Thus, if the settlement were reached in 1995, and a future claimant first became ill in 2010, such claimant would not be limited to a recovery in 1995 dollars, but could establish damages under the social and economic conditions prevailing in 2010. In addition, individual causation should be determined under the scientific standards applicable at the time of the damage determination.<sup>392</sup>

Advantageous as this proposal may be to courts and to plaintiffs, it may seem doubtful that a defendant would ever willingly accept such an open-ended settlement, which would deny it the right to know at the outset its total liability. Defendants, however, would receive two significant advantages: First, punitive damages could be eliminated as part of the settlement (or they could be fixed at an amount specified in the settlement). Second, and more importantly, the settlement could provide that the damages determination be allocated to an arbitration panel. The arbitration panel would neither be chosen by the defendants nor would it be limited in the amount it could award as compensatory damages; rather, it would apply the contemporary standards at the time of its determination. For the defendant, this approach would result in significant economies in transaction costs, because today transaction costs and legal fees appear to account for more of defendants' total expenditures than do payments to victims.<sup>393</sup> Because arbitration is significantly less costly than civil litigation, defendants would have a substantial incentive to accept such an open-ended procedure (subject, of course, to a right to seek a re-organization in bankruptcy if it proved too costly). Interestingly, sophisticated defendants have recently negotiated substantially this form of settlement to resolve a major nationwide class action with potentially thousands of class members.<sup>394</sup>

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392. This could either benefit or hurt the individual plaintiff. It would mean that artificial occupational exposure standards (such as a 10-year exposure rule) could not bar the plaintiff from proving individual causation, but it would also allow defendants to demonstrate that subsequent scientific discoveries disproved that, for example, silicone gel breast implants were related to specific illnesses. In effect, the policy here is not to blind the court with out-of-date scientific assumptions.

393. By one estimate, plaintiffs actually receive only 39% of every dollar expended on asbestos litigation, with the remainder being consumed by the transaction costs of both sides. See *supra* note 15.

394. In August 1995, New York Life Insurance Company reached a class action settlement with its policyholders that was uniquely structured to provide both class relief and individualized damages for those class members who wished to opt to pursue a special ADR alternative before an arbitration forum established pursuant to the settlement. See Notice of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear at 4-8, *Willson v. New York Life Ins. Co.*, No. 94/127804 (N.Y. Sup. Ct., N.Y. County Aug. 1995) (on file with the Columbia Law Review); Michael Quint, *New York Life in Accord on Class Action Settlement*, N.Y. Times, Aug. 15, 1995, at D2. All class members will be entitled to certain class relief (basically low-interest rate loans), but those class members who were dissatisfied with this relief could either opt out of the class action during an initial opt out period and sue individually or pursue an arbitration remedy that was elaborately designed by the settlement agreement and that provides for the award of monetary damages within specified ranges according to defined criteria. The New York

This proposal does not contemplate that either legislation or the court would require the class representative to accept arbitration. Instead, the Seventh Amendment right of the class members to a jury trial would be voluntarily surrendered by the class representative as part of the settlement, and class counsel accepting such a settlement would have to pass the same basic standards as to the adequacy of its representation as apply today.<sup>395</sup>

Above all, such a compromise makes political sense. Today, mass tort class actions ally the court and the defendants against the plaintiffs (with the plaintiffs' attorney often being an only equivocal champion of the interests of the class) in order to minimize duplicative mass tort trials. This proposal reverses the coalition by showing the court a manageable way to resolve the mass tort dilemma without sacrificing the interests of the future claimant or accepting the inevitability of endlessly repetitive individual trials. Litigant autonomy is retained in its most critical aspect, because the "high stakes" plaintiff is not submerged within the class. To implement this approach, a trial court would need only to signal that it would not certify any large class action under Rule 23(b)(3) unless it could be assured that a fair remedy would be available to individual claimants and that remedy would not prove unmanageable at the damage determination stage. Relatively quickly, both sides would learn (and the court could hint) that settlements incorporating second stage arbitration over the issue of damages would have a much greater likelihood of obtaining certification. Both sides would still have the same self-interested reasons for preferring a class action resolution, but the damages determination would be delayed in each individual case until the time that individual claimants discovered their injuries.

### C. *Class Certification and the Adequacy of Representation Standard*

Class actions have long been plagued by conflict of interests problems,<sup>396</sup> but the mass tort context exacerbates these conflicts to a unique degree. In particular, two types of conflicts stand out:

First, there are conflicts between the attorney's inventory of individual clients and the class members that the attorney wishes to represent in the class action. The inventory settlements in the asbestos cases present the most obvious illustration of this first type of conflict, because defend-

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Life settlement does not involve a future claimant class and does place clear boundaries on the damages that can be awarded (unlike the structure here proposed), but it is an innovative, thoughtful model.

395. This Article, however, does argue that the current adequacy of representation standard should bar an attorney from serving as class counsel where he or she has reached roughly contemporaneous inventory settlements with the defendants or certain other settlements that are linked to his or her prospective service as class counsel. See *infra* notes 401-403 and accompanying text.

396. See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 *Stan. L. Rev.* 1183, 1183 (1982).

ants tied the inventory settlements to agreements to accept the proposed settlement of the class action (on terms far less favorable to most class members).<sup>397</sup>

Second, there are multiple conflicts within the class itself: between present claimants and future claimants, between those with serious injuries and those with only "subclinical" injuries, between those with manifested illnesses and those without. The interests of class members also conflict depending upon the state law applicable to their claims: some class members may be entitled to recovery (and punitive damages) under the law of their jurisdiction; others similarly situated, except for a difference in state jurisdictions, may not. Almost inevitably, the settlement transfers wealth between these subclasses.

On an ethical level, probably the most disquieting phenomenon about recent mass tort settlements has been the acceptance of a single attorney acting as the representative of multiple subclasses of plaintiffs. Not only have the interests of these subclasses clearly conflicted, but the class counsel has explicitly traded off the interests of subclasses against each other, obtaining substantial compensation for one subclass in return for a waiver of cash compensation by another. In such multiparty negotiations between the defendants and different subclasses of plaintiffs, even the well-meaning plaintiffs' attorney shifts inevitably from the role of an advocate and adviser for clients to the role of a philosopher king, dispensing largess among his client subjects. In the asbestos cases, the pattern has been the starkest, with the "less" severely injured claimants typically having cash compensation waived on their behalf in order that those more severely injured (usually cancer victims) receive substantial cash compensation. These intra-class trade-offs are, however, an endemic problem that transcends the asbestos context. Any settlement that awards compensation by disease or injury classification creates potential allocation issues: should the compensation for one subclass be raised and correspondingly that for another lowered?

Nonetheless, courts approving mass tort settlements have resisted subclassing, arguing that the use of subclasses is left to the discretion of the trial court and should not be encouraged.<sup>398</sup> Of course, if courts are primarily motivated by the desire to facilitate expeditious settlements (particularly in the mass torts field), this resistance to subclassing should not be surprising, as any competent counsel for a subclass would probably

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397. See *supra* text accompanying notes 108-113, 172-214.

398. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 318-19 (E.D. Pa. 1994). *Georgine* relies on a labor law decision in which a labor union was permitted to represent the whole class, and subclassing was rejected. See *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), cert. denied, 480 U.S. 934 (1987). Suffice it to say that this is a very different context.

The Supreme Court has held "the burden of constructing subclasses . . . is upon the [party seeking class certification] and it is he who is required to submit proposals to the court." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980).

object to any wealth transfer that stripped his or her class of compensation in order to benefit another. But a principled defense of current procedures simply has not been made.

Proponents of mass tort class actions can reply that settlements would become impossible if all trade-offs within the plaintiff class became suspect. Still, outside the mass tort context, two general principles have been recognized: (1) The overall adequacy of the settlement cannot "ordinarily redeem a settlement that was bargained by a party who *was* in a conflict position";<sup>399</sup> and (2) trade-offs, and even gratuitous transfers from one subclass to another, will not be overturned if each subclass has received adequate representation by an attorney who acts with undivided interests.<sup>400</sup> In short, substantive review has been mild and permissive, provided that each subclass has its own impartial representative.

What practical rules, then, should govern mass tort class actions? Two distinct types of rules seem most important. Today, in certifying a class under Rule 23, the court must find that "the representative parties will fairly and adequately protect the interests of the class."<sup>401</sup> Adequate representation seems doubtful when the plaintiffs' attorney has entered into an inventory settlement that is in any way contingent upon the attorney's participation in the class action or that otherwise restricts the attorney's discretion to represent other clients in other actions against the same defendants. Even in the absence of an explicit linkage, inventory settlements between the defendants and the plaintiffs' attorney create a danger of collusion because the payout under the inventory settlement may be delayed or subject in some continuing respect to the defendants' control.

This conclusion does not mean that an attorney who has recently settled cases with the defendants should be barred from representing the class.<sup>402</sup> But how broadly should the disqualification be framed? One possibility would be to disqualify an attorney from acting as class counsel only when the inventory settlements appear to be more favorable than the class action's proposed terms; such a disparity would give rise to a presumption that the class has been "sold out."<sup>403</sup>

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399. In *re* Corrugated Container Antitrust Litig., 643 F.2d 195, 211 n.25 (5th Cir. 1981).

400. See In *re* Chicken Antitrust Litig., 669 F.2d 228, 236-38 (5th Cir. Unit B 1982) (upholding interclass sharing with a subclass of plaintiffs who lacked standing where each subclass had adequate representation).

401. Fed. R. Civ. P. 23(a)(4).

402. Obviously, such an overbroad rule would disqualify any attorney experienced in the field. In the context of a settlement class action, however, it is critical to bar the defendants from selecting such an attorney as the plaintiffs' representative with whom to negotiate the settlement.

403. In *Georgine v. Amchem Prods., Inc.* 157 F.R.D. 246, 298 (E.D. Pa. 1994), the settling parties took the position that future claimants were not similarly situated to present claimants and thus that they need not receive similar compensation. Their ethics expert, Professor John P. Freeman, argued (and the court explicitly agreed) that the fact that

Still, the problem with this narrower approach involves timing. If one waits until the class action settlement has been negotiated and presented to the court for approval to ascertain whether the class can be certified and whether the plaintiffs' attorneys who negotiated the settlement can represent the class, momentum will have already begun to gather behind the settlement. Eager for a docket-clearing settlement, trial courts face a temptation to close their eyes to conflicts and improprieties that they would not tolerate in other contexts. Rather than force the court to choose between sacrificing a possibly adequate settlement and tolerating a conflict of interest, it thus seems preferable to adopt a mildly prophylactic rule that disqualifies any attorney from serving as a lead counsel (for the class or any subclass) if the attorney has negotiated an inventory settlement with the same defendants. The mass tort bar is large and expanding, and it would be a gross overstatement to suggest that such a rule would disqualify all experienced plaintiffs' attorneys.

A second necessary procedural innovation is to require subclasses with separate representation for present and future claimants. Those opposed to subclassing have raised dubious arguments against it. The *Georgine* court argued that because illness is often progressive (with victims moving from asbestosis to lung cancer), subclassing was unnecessary.<sup>404</sup> In effect, because *ex ante* future claimants do not know what the severity of their illnesses will be, it argued that they all have a common interest and can be grouped in a single class. Unfortunately, this is no answer to the serious conflicts of interest that can arise between present and future claimants, because the former have every incentive to deplete the trust fund (which is often administered by their own attorneys).

A second unsatisfactory argument against subclasses was suggested by the Second Circuit in the *Johns-Manville* litigation: subclassing is less important in opt out class actions under Rule 23(b)(3), the court reasoned, presumably because dissatisfied class members are free to exclude themselves from the class.<sup>405</sup> Yet, as the same Second Circuit has emphasized in other decisions, the right to opt out means little in the case of future

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many claimants had received cash compensation under the inventory settlements whereas persons with similar injuries would not receive cash compensation under the class action, did not create a conflict of interest for the plaintiffs' attorneys representing both because the two classes of clients had "different expectations." Specifically, the present claimants had "a realistic expectation" that their cases would be resolved within the tort system and future claimants did not. *Id.* at 298. In truth, it seems hopelessly metaphysical to talk of the expectations of future claimants when most do not know that they have been injured. However, to the extent that future claimants have lesser expectations, this defines the problem, rather than solves it, because they are accurately expecting inferior treatment under the class action. In contrast, future claimants in individual actions will predictably do better than present claimants because the one clear pattern is that recoveries in mass tort cases rise steadily over time.

404. See *id.* at 318.

405. See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 745 (2d Cir. 1992), modified sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993).



claimants.<sup>406</sup> A procedural protection has little value to those who do not yet know that they will become ill or that they are even within the class of future claimants.

Moreover, the conflicts between subclasses go well beyond their respective entitlements to cash compensation and extend to most other issues as well: the case flow limitations, processing rules, and other payment terms that might enable present claimants to seize a disproportionate share of the settlement fund before future claims fully mature. Recent experience shows that present claimants and their counsel have both the incentive and the ability to understate the number and severity of future claims that will arise in order to justify a higher payment to present claimants. Nor is a guardian ad litem for future claimants an adequate substitute, because a guardian is not in a position to negotiate the settlement's terms. Arm's length negotiation between counsel for present and future claimants is essential to achieve a fair and realistic allocation of the settlement.

These two proposals—inventory settlements as a disqualifying factor for lead counsel and subclasses with separate counsel for present and future claimants—may lengthen settlement negotiations (as well they should have been lengthened in some recent cases), but they will not bar or seriously discourage settlements. Rather, they will simply give future claimants their vicarious day in court.

#### D. *Redefining the Right to Opt Out*

Beyond question, a future claims class action trivializes the right to opt out. But, in turn, an absolute right to opt out invalidates the idea of a mandatory class action.<sup>407</sup> Most commentators doubt that the Supreme Court meant to go this far when it recognized the presumptive right of a class member to opt out as an aspect of due process in *Phillips Petroleum Co. v. Shutts*.<sup>408</sup> Thus, on the doctrinal level, some compromise seems necessary.

On the policy level, analysis needs to begin with the recognition that persons who have been exposed to a toxic substance, but who have not yet manifested injury, will have little incentive to opt out from a class action that is allegedly brought on their behalf. Ironically, the Second Circuit conceded this point in the *Agent Orange* case, arguing that the right to opt out meant little in such a context and so could be sacrificed:

In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are con-

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406. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993) (noting that providing an opt out right to a person "unaware of an injury would probably do no good"), cert. denied, 114 S. Ct. 1125 (1994).

407. See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 39 (1986).

408. 472 U.S. 797 (1985).

tural at best . . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be made available to these claimants," and by ensuring that they receive vigorous and faithful vicarious representation.<sup>409</sup>

The problem with this statement is that it defines the issue too narrowly. Correct as it is that the right to opt out will mean little in a future claims class action,<sup>410</sup> this observation really suggests that the right needs to be redefined, not abandoned. If we assume that the right to opt out is of constitutional magnitude,<sup>411</sup> but also not an absolute right,<sup>412</sup> this implies that the right can be balanced against other considerations. In mass tort cases involving substantial personal injuries to the plaintiffs, litigant autonomy seems a value normally deserving considerable constitutional weight.<sup>413</sup>

Efforts to strike a balance, however, are not easy. Some have suggested that before a plaintiff can opt out of a federal class action, there should be a good cause hearing at which the court would balance the interest of the litigant in seeking to exit the class against those of the class members who would thereby be injured.<sup>414</sup> Unfortunately, the asbestos experience suggests that such a right would be both administratively burdensome and subject to low visibility abuse. Courts would regularly be warned by defendants that if plaintiffs opted out, it would jeopardize the finality of a long-negotiated settlement. The *Silicone Gel* experience suggests that such threats are not without some basis in fact.<sup>415</sup> The likely result might be that plaintiffs seeking to opt out would experience the same low success rates as plaintiffs seeking to escape the transferee court following a consolidation order by the JPML.<sup>416</sup> At the other extreme, individual plaintiffs' attorneys may wish to argue that, at least in the case of personal injury litigation, the opt out system should be replaced by a

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409. *Agent Orange*, 996 F.2d at 1435 (quoting 1 Newberg & Conte, *supra* note 96, § 1.23, at 1-56).

410. The decision describes the benefits from the right to opt out as "conjectural at best." *Id.*

411. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 114 S. Ct. 1359 (1994). For an overview, see Miller & Crump, *supra* note 407, at 38-57.

412. See, e.g., Thomas D. Rowe, Jr., *Jurisdiction and Transfer Proposals for Complex Litigation*, 10 *Rev. Litig.* 325, 360 n.141 (1991) (asserting that *Shutts* mandates a right to opt out only for "known plaintiffs" who lack minimum contacts with the forum).

413. See *Trangsrud*, *Mass Trials*, *supra* note 4, at 74-76.

414. See American Bar Ass'n Section of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 *F.R.D.* 195, 202 (1986); *Baughman*, *supra* note 2, at 239-41; *Friedman*, *supra* note 6, at 745.

415. See *supra* text accompanying notes 254-264.

416. Relatively few such litigants succeed in being able to transfer back to the original jurisdiction in which they filed the action. See *supra* note 183.

system for opting in.<sup>417</sup> Here, the argument would be that in high stakes actions for personal injuries, the class action is presumptively inappropriate and should only be used when individual class members consent. In fact, between 1938 and 1966, the Federal Rules of Civil Procedure effectively implemented such a system, because plaintiffs could only become class members in suits now falling within the Rule 23(b)(3) category (i.e., most actions for money judgments) by affirmatively electing to join the suit.<sup>418</sup> But the experience with this approach does not counsel its adoption. Commentators argue that many eligible class members simply would not, for whatever reason, take the affirmative step necessary to opt in.<sup>419</sup>

If so, a more promising option might be to permit opting out, but also to restrict the choice of forum that the exiting plaintiff could elect. At the same time, such a reform could also recognize a delayed right to opt out, which would accrue only once the individual became aware (or, at most, should have become aware) of a serious compensable injury. Under this compromise, even if the class action settlement were approved in 1995, "exposure only" class members who manifested injury in 2010 or 2015 could opt out at that point and pursue individual remedies.

Before such a delayed right is rejected as unacceptable to defendants, it is interesting to note that a delayed right to opt out has actually been structured into some recent mass tort settlements. In *Bowling v. Pfizer, Inc.*,<sup>420</sup> the court approved a class action settlement in a products liability case involving the defective Bjork-Shiley convex/concave heart valve, which had a tendency to fracture while in the recipient because of design and manufacturing defects. Between 50,000 and 100,000 patients had received this heart valve, and some 300 deaths had resulted because of fractures.<sup>421</sup> Given the unique risk of future fracture coupled with the emotional stress from exposure to such a risk, the *Bowling* settlement provided for a two-stage recovery: First, it gave a modest cash award to all class members for their claims for emotional stress, and, second, it established an "optional guaranteed compensation program."<sup>422</sup> Basically, in the event of a valve fracture, the victim would receive somewhere between \$500,000 and \$2,000,000, according to a formula that reflected age, income, and family status.<sup>423</sup> However, class members retained the right to

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417. Professor Trangsrud has made the case for consolidation in preference to a class action, and this position closely resembles an opt in system. See Trangsrud, *Joinder Alternatives*, supra note 4, at 831-49.

418. See Friedman, supra note 6, at 751.

419. See *id.*; see also John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 *Ariz. L. Rev.* 3, 72 (1983) (citing studies showing failure of significant numbers of plaintiffs to opt out of Rule 23(b)(3) actions).

420. 143 F.R.D. 141 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993).

421. See *id.* at 147.

422. *Id.* at 150.

423. See *id.*

reject this formula payment and sue for damages in court or to opt for binding arbitration to determine fair compensatory damages (in which even the defendant would waive all defenses to liability). In short, to the extent that the settlement covered future claimants, it effectively provided for delayed opt outs (either to sue in court or to accept binding arbitration).<sup>424</sup>

The attraction of this approach is that it effectively converts a "future claims" class into an option. Transposed to the asbestos context, it might imply that plaintiffs, on incurring lung cancer a decade into the settlement agreement's life, would have a choice between a specific payment (or a range of payments) and a right to sue in a civil proceeding (or to elect arbitration). Similarly, in a breast implants settlement, a subsequent leakage victim would have a similar choice. In fact, in the *A.H. Robins* case, the court effectively provided a delayed opt out for the victims of the Dalkon Shield. Every Class A member who was dissatisfied with the settlement offer made to her by the Settlement Trust was given "the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial"—minus any right to punitive damages.<sup>425</sup>

Of course, many practices are common and desirable that are not constitutionally required. Yet, as the Supreme Court loves to say, " 'due process' is a flexible concept."<sup>426</sup> In any specific context, the process that is due depends on a variety of factors; typically, courts balance the marginal gains from a procedural safeguard against its societal cost.<sup>427</sup> In the mass tort context, the value of the right to opt out and obtain one's day in court may seem both illusory, in a world where individual trial attorneys deal not in cases, but in inventories,<sup>428</sup> and expensive, in terms of its impact on the federal docket. However, the impact on the federal docket is a highly variable consideration. In a litigation context, where the docket burden is substantial (for example, asbestos), the court might limit the right to opt out to: (1) federal districts not experiencing a backlog; (2) state courts; or (3) arbitration panels under procedures by which the opting out litigant has an equal voice in the selection of the panel members.<sup>429</sup>

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424. In addition, certain class members who qualified for valve replacement surgery but declined it were also permitted to sue on a delayed basis for emotional injury. See *id.*

425. In re *A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

426. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985); see also *Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976) (noting that due process is flexible and calling for those procedural protections demanded by the particular situation).

427. See *Walters*, 473 U.S. at 320-21.

428. See *supra* text accompanying notes 108-113.

429. There is, of course, a Seventh Amendment objection to limiting the opting out plaintiff to an arbitration remedy and thus precluding any right to a jury trial. Here the doctrinal answer might be that because there is no recognized constitutional right to a delayed opt out right, there is also no constitutional right to a jury trial at this stage. In

These procedures, however, still do not answer the defendants' fundamental objection: the value of the settlement to them is undercut if it does not ensure global peace. Clearly, settlements on the current basis will be chilled if plaintiffs with cases having above average value can opt out to pursue individual remedies in any forum. But it is more debatable whether this consequence represents a vice or a virtue. The modern value of the right to opt out may lie more in its utility as a checking mechanism than in its ability to protect litigant autonomy. When sufficient numbers of plaintiffs opt out, the defendants will be exposed to a two-front war (as in the *Silicone Gel* litigation) and will seek to cancel the settlement.

Given the predictable passivity of most class members, minority vetoes may make sense.<sup>430</sup> In light of them, defendants will predictably learn to write into the settlement agreement a provision allowing them to terminate the settlement if a specified percentage or number of plaintiffs opt out. This in turn gives the plaintiff class a desirable chance to vote with their feet by opting out. The practical net effect might be to torpedo the dubious settlement or force its renegotiation. Although a delayed right to opt out, maturing as of the time of injury recognition, will not produce the same immediate referendum, it poses an even greater economic threat because the defendant cannot back out years after the settlement has become final. In response, defendants will need to structure settlement grids to differentiate more effectively in terms of the legal quality of the claims settled in order to induce those class members with higher value claims not to opt out.<sup>431</sup>

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effect, the class member is simply being accorded a privilege to seek a better award in arbitration, and the court is relying upon that privilege to find that the proposed class action satisfies the "superiority" standard applicable to a Rule 23(b)(3) class action.

430. An obvious analogy exists to another area of group decisionmaking: namely, the supermajority requirement for fundamental changes (such as mergers, liquidations and related events) in the corporation codes of many states. Although today only a minority of the states (including New York, see N. Y. Bus. Corp. Law § 903(a)(2) (Consol. 1983)) still require a supermajority approval, it used to be a universal requirement. See Ronald J. Gilson & Bernard S. Black, *The Law and Finance of Corporate Acquisitions* 642-43 (2d ed. 1995). For a history of the shift from the unanimous shareholder consent rule of the 19th century to the rule in force in most jurisdictions today (and the efficiency implications of different voting rules), see William Carney, *Fundamental Corporate Changes, Minority Shareholders and Business Purposes*, 1980 Am. B. Found. Res. J. 69.

431. In terms of its incentive effects, a delayed right to opt out should encourage defendants to (1) insert more cells into a settlement grid, thereby increasing the differentiation among class members; and (2) tilt the monetary relief toward the more seriously injured claimants. These conclusions follow because small claimants (i.e. those with lesser injuries) have less incentive to opt out because they (and their attorneys) face high transaction costs and considerable docket delay in pursuing individual cases. For example, assume in an asbestos class action that the ratio of asbestosis victims (i.e., a lesser injury) to lung cancer victims is 10:1. In the absence of a delayed right to opt out, the settlement grid might provide that the former cases would receive \$10,000 each and the latter \$100,000. Under a delayed opt out system, it would instead be in the interest of the defendants to move to a settlement grid that awarded the former claimants only \$5000 and

Still, is such a desirable right constitutionally necessary? *Phillips Petroleum Co. v. Shutts*<sup>432</sup> found that due process entitled class members to a right to opt out from the class, but there a nationwide class action had been filed in state court. *Shutts*'s applicability to actions filed in federal courts is less clear, and by its terms the decision's scope may be "limited to those class actions which seek to bind *known* plaintiffs concerning claims wholly or predominantly for money judgments."<sup>433</sup> Thus, the still unresolved issue is whether *Shutts* applies to a class action covering *unknown* future victims (such as those occupationally exposed to asbestos). The Second Circuit has recently answered this question with a highly equivocal "not necessarily." In *In re "Agent Orange" Product Liability Litigation*,<sup>434</sup> the Second Circuit "decline[d] to extend the *Shutts* holding into situations" where notice could not reasonably have been given, but it defined this context carefully and narrowly.<sup>435</sup> On the facts of the *Agent Orange* case, the Second Circuit said due process was not offended for two relatively unique reasons: (1) "the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement;" and (2) their "dim prospects of success."<sup>436</sup> Neither factor is present in the recent asbestos decisions, where present and future claimants were treated very disparately and where liability was never seriously contested.<sup>437</sup>

Even from the defendants' perspective, a delayed right to opt out could be a substitute for fully adequate notice in those cases where notice may be expensive or infeasible. Arguably, *Agent Orange* only waives the right to opt out in a case involving *unknown* future victims. In many mass tort class actions, the future claimants come from a large pool of individuals who could (at some expense) be identified and to whom notice could feasibly be given (for example, recipients of breast implants or defective heart valves). Within this context where notice is possible, the right to opt out is in fact often exercised, and due process under *Shutts* probably requires both notice and a right to opt out. To sum up, of recent mass tort cases, only the asbestos and *Agent Orange* cases have truly involved

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the latter \$150,000; under both formulas, defendants make the same aggregate payouts, but there is a reduced risk that "high stakes" claims will opt out under the second formula. Also, defendants might seek to differentiate asbestosis claimants into multiple categories, awarding some only \$4000 or \$3000 and others \$6000 or \$7000—again to deter opting out by those with stronger claims. Normatively, this implication that the worst injured will receive higher awards (at the expense of the less injured) seems desirable. Of course, the more that claims are differentiated in this fashion, the greater the need becomes for subclasses and separate representation.

432. 472 U.S. 797 (1985).

433. *Id.* at 811 n.3 (emphasis added).

434. 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994).

435. *Id.* at 1435.

436. *Id.* at 1437.

437. For the argument that notice and a right to opt out should be constitutionally required when present and future claimants are disparately treated or when prospects for success are stronger, see Koniak, *supra* note 4 (manuscript at 146-69, 176-83).

large classes of unknown and unknowable future victims. Although the Second Circuit has rationalized why a right to opt out need not have been accorded in *Agent Orange*, this rationale cannot be easily stretched to apply to most other mass torts, including asbestos.

From a policy perspective, the practical problem with a delayed right to opt out involves the issue of whether we wish to encourage greater discrimination among class members based on the strength of their litigation claims. Predictably, defendants will reduce their settlement offers under a system in which future claimants can opt out. They will anticipate that seriously injured plaintiffs, who expected recoveries in individual actions above the average recovery for their disease category under the settlement, would normally opt out. Because claimants with "low quality" cases would disproportionately remain in the class, rational defendants would respond either by lowering the per claimant ceilings on their proposed settlements or by insisting upon more detailed settlement grids with more precise differentiation in order to prevent individuals with lesser injuries from receiving an average value that was computed with more seriously injured victims in mind.

In this light, for a delayed opt out right to be feasible, there must be some disincentive to discourage excessive, "opportunistic" opting out. Often, the plaintiffs' attorney has an incentive to opt out in order to obtain a higher contingent fee than the same attorney would receive under the settlement. For example, in a controversial, but justified step, Judge Pointer approved a settlement agreement that, in effect, limited contingent fees in the *Silicone Gel* case to twenty-four percent of the recovery.<sup>438</sup> Unfortunately, this creates a perverse incentive to opt out because attorneys for class members who opt out may receive one-third or higher contingencies—and thus do better financially themselves while their clients may do worse. A first step toward chilling opting out motivated only by the attorney's self-interest would be to limit contingent fees payable by opt outs to the same or lesser percentage received by the class attorneys. Whether federal courts possess authority to regulate the relationship between class members who opt out and their attorneys remains, however, uncertain.

As a legislative matter, the most logical disincentive to discourage opportunistic opting out by plaintiffs' attorneys would be to base the fee award on the amount by which the exiting plaintiff exceeded the class action recovery. Thus, if the class action provided for an award of \$50,000 for each class member, and the plaintiff who opted out won \$100,000 at trial, the attorney's fee would be some one third portion of \$50,000 (or \$16,667). A more punitive alternative would be to tax some portion of the defendants' costs to a plaintiffs' attorney who failed to ex-

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438. See *supra* notes 115 and 300 and accompanying text.

ceed the class action recovery.<sup>439</sup> The real gain here is that such a fee disincentive saves the court's time and thus minimizes social costs by reducing any excessive private incentive to opt out. The plaintiffs' attorney would gain from opting out only if the attorney substantially outperformed the settlement.

### E. Settlement Class Actions

The settlement class action is susceptible to at least three distinct problems: (1) defendants may effectively be able to choose the plaintiffs' attorney (or at the least, to avoid negotiating with those plaintiffs' attorneys whom they consider to be intransigent and unreasonable—in short, the persons that plaintiffs, themselves, would be most likely to choose to represent their interests); (2) however chosen, the plaintiffs' attorneys have a limited franchise, cannot threaten credibly to go to trial if a deal is not struck, and thus are effectively negotiating with one arm tied behind their back;<sup>440</sup> and (3) when a settlement is reached prior to the filing of the action, the entire process seems to present a paradigm of the “friendly” or feigned suit that the “case or controversy” requirement has traditionally denied federal courts the power to hear.<sup>441</sup> If the “settlement class” procedure could be applied to labor negotiations, one suspects that the 1994–1995 baseball strike would have been concluded in a few days. But the results of such a settlement might have been as one-sided as they seem in the asbestos cases.

These objections to settlement class actions have long been understood and seem so powerful and obvious that one wonders why a court would accept a settlement negotiated in such a suspect fashion. Of course, a partial answer is that courts have frequently not accepted proposed settlements so reached. During the last year alone, for example, the *Ford Bronco II* settlement,<sup>442</sup> two separate settlements involving

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439. Such a proposal has been made by the Manhattan Institute. See Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. Times, Feb. 11, 1994, at A1, B18. For a critique, see John C. Coffee, Jr., *Regulating Plaintiffs' Attorneys*, N.Y. L.J., Sept. 22, 1994, at 5, 6.

440. The danger that unofficial preliminary negotiations could degenerate into lawyer-shopping has long been understood by appellate courts, even if they have done little to prevent it. See *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971) (quoted supra at note 128).

441. For this observation, see *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 790 n.10 (3d Cir. 1995); see also *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971) (dismissing action for lack of Art. III case or controversy where both parties sought to uphold constitutionality of anti-busing law); *United States v. Johnson*, 319 U.S. 302, 305 (1943) (dismissing action where plaintiff instituted a “friendly suit” at defendant's request); *Teamsters Local 513 v. Wojcik*, 325 F. Supp. 989, 991–92 (E.D. Pa. 1971) (denying declaratory relief for lack of actual controversy where both parties sought the same determination and where no specific conclusive relief existed).

442. See *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. CA MDL-991, 1995 U.S. Dist. LEXIS 3507, at \*31 (E.D. La. Mar. 20, 1995).



General Motors pickup trucks (with explosive side-saddle gas tanks),<sup>443</sup> and the polybutylene settlement<sup>444</sup> were rejected by state and federal courts. Only in the asbestos and breast implants areas—where the threat of seemingly unending personal injury litigation overhung the courtroom and was unmistakably on the court's mind—have such settlements been approved (and frankly encouraged).

Although strong arguments against any provisional certification "for purposes of settlement only" can certainly be made, it seems prudent to ask first if there are reforms that could minimize the potential for collusion. Three seem plausible. First, if settlement classes are to be tolerated, a minimal reform would require the court to oversee the selection of the plaintiffs' counsel, after adequate notice was first given to the specialized bar handling the specific mass tort that certification of a settlement class was contemplated.<sup>445</sup> In short, before the parties could link arms and jointly approach the court with a seductive settlement, the court must formally select the counsel with whom defendants are permitted to conduct preliminary negotiations. As discussed earlier, plaintiffs' attorneys who had entered into inventory settlements or similar understandings with defendants would be disqualified. The key to this proposal would be that the settling parties could not approach the court with a proposed settlement and ask to have the plaintiff's attorney named class counsel. Rather, as a means of alternative dispute resolution, defendants could ask the court for a limited period to engage in settlement negotiations with a plaintiffs' attorney to be designated by the court (during which period all related actions might be stayed).

Realistically, however, such a reform, standing alone, could be abused. The trial court bent on settlement (as was the court in *Georgine*) would know with whom the defendants wanted to negotiate. Attorneys with a reputation for a tough bargaining style would be less likely to be selected. Indeed, under this proposed rule, it is entirely possible that the *Georgine* court would have deliberately chosen the same lead counsel, precisely in order to ensure a quick settlement.

Thus, a second and supplementary reform involves the use of broad and representative steering committees, deliberately chosen to mirror the composition of the plaintiffs' bar. This approach was more or less followed in the *Silicone Gel* litigation.<sup>446</sup> Under such an approach, plaintiffs' counsel would be denied authority to present any settlement to the court

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443. See *General Motors*, 55 F.3d at 818-19; *Boyed v. General Motors Corp.*, 881 S.W.2d 422, 433 (Tex. Ct. App. 1994).

444. See *supra* note 286 and accompanying text.

445. The court could, for example, advertise the position by requesting applications to be filed with it. Judge Vaughan Walker has used this procedure in conducting auctions for the position of lead counsel. See *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990). Although auctions pose additional issues, there seems no inherent reason why an attorney must have already filed an action to be chosen lead counsel in a class action.

446. See *supra* text accompanying notes 248-249.

for its approval until it had first received a ratification vote from the broad-based steering committee. Such an approach might prevent some settlements (as in *Georgine*, where a nationwide plaintiffs' steering committee had earlier refused to approve the settlement offer proposed by the CCR defendants).<sup>447</sup> But that is the point of the reform.

How should the court staff such a steering committee? Most areas of mass tort practice have specialized American Bar Association or American Trial Lawyers Association (ATLA) committees or other ad hoc informal organizations.<sup>448</sup> The problem lies not in identifying a representative committee, but in accepting the risk of paralysis if the steering committee deadlocks. Trial specialists who believe (in good faith and possibly with some justification) that the class action was not designed to handle personal injury tort litigation will predictably oppose class certification. Yet, deadlock is not inevitable, as the *Silicone Gel* settlement demonstrated. Moreover, if individual actions have been stayed pending a resolution of the class action (as they were in *Georgine*), the pressure to settle will in time become irresistible. The danger is not that the courts have too little power to induce settlement, but rather that they will use their very considerable powers in a one-sided fashion to pressure only plaintiffs.

A third proposal might be to preclude certification of a class defined exclusively in terms of future claimants. By definition, future claimants are silent and passive, and thus they cannot monitor their attorneys. Sometimes, however, present claimants can, and in the personal injury context they have a strong incentive to do so. Again, the *Silicone Gel* litigation provides the better model, because it included both present and future claimants. Of course, present claimants can normally opt out of the action, but this should be a telltale sign. Whereas Judge Reed invalidated several hundred thousand opt outs in *Georgine*,<sup>449</sup> Judge Pointer encountered no similar problem (at least on any similar scale) in the *Silicone Gel* litigation, suggesting strongly that the proposed settlement in the latter was perceived to be fairer than in the former.<sup>450</sup>

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447. See *supra* text accompanying notes 192-214.

448. For example, ATLA had a Breast Implants Litigation Group (BILG) that began to meet shortly after the FDA's 1992 decision to impose a moratorium on the cosmetic use of implants. In October 1993, over 300 attorneys belonging to BILG met to discuss developments in the class action and whether to recommend that clients opt out from it. See Andrew Blum, *Some Grumble Over Implant Pact, But Approval is Expected*, Nat'l L.J., Oct. 18, 1993, at 3, 52. Meetings on such a scale suggest at least that active monitoring is feasible.

449. See *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 518 (E.D. Pa. 1995).

450. In the *Silicone Gel* litigation, Judge Pointer circulated a comment form to class members in 1994. He reported that "less than 1/3 of 1% of those to whom notices were sent and only slightly more than 1% of those who have already registered under the settlement" voiced negative comments. In re *Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at \*14 (N.D. Ala. Sept. 1, 1994). In absolute terms, some 7800 persons in the United States and 6500 persons outside the United States opted out as of the initial opt out period, but this came to less than 5% of putative class members. See *id.* at \*16. In general, the rate of opting out tends to be low.

Ultimately, these proposed reforms still dodge the central issue: is the concept of a class certified only for settlement purposes valid? Or does such a limited certification inherently produce weak and one-sided settlements because the plaintiffs forego their right to trial? At the heart of this problem is the anomaly that a class certified by consent for settlement purposes might not be certifiable for litigation purposes.<sup>451</sup> If this is the case, the plaintiffs' attorneys will know (or at least suspect) that they lack negotiating leverage and may accept recoveries far below what the plaintiffs could receive in individual actions. From this diagnosis follows a clear prescription: eliminate the anomaly by not allowing a settlement class to be certified when a "litigation" class action could not be certified. In short, the same certification standards should apply to both settlement class actions and "litigation" class actions.

This reform would not require legislation or rulemaking, but it would restrict a rapidly developing practice. Today, there is a tendency for courts facing a proposed settlement in a settlement class action to ignore the specific criteria specified in Rule 23(a)—i.e., numerosity, typicality, commonality, and adequacy of representation—and to focus instead only on the fairness of the settlement.<sup>452</sup> Some decisions approving pre-certification settlements in settlement class actions have simply identified the "questions of law or fact common to the class" as the adequacy of the settlement.<sup>453</sup> Put simply, this is bootstrapping, because it trivializes the requirements of Rule 23(a) by reading the commonality and typicality requirements out of the Rule.

The better approach would be to apply the requirements of Rule 23(a) consistently in both settlement and litigation class actions. Exactly this approach has been taken this year by the Third Circuit in the *General Motors Pick-up Truck Fuel Tank* litigation.<sup>454</sup> Although such a requirement may invalidate some settlements, an insistence that the trial court find that the individual elements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—are each satisfied, and a refusal to deem the attractiveness of the settlement as dispositive of these issues will preserve the negotiating leverage of plaintiffs because they will

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See Willging et al., *supra* note 14, at 50–51 (finding in their survey of two federal districts that not more than one to two percent of class members appeared to opt out in any case in their survey).

451. This is particularly true in those circuits (most notably the Seventh Circuit) where recent precedents suggest that a mass tort class action for personal injuries may not be certified. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296–1304 (7th Cir. 1995); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

452. See 2 *Newberg & Conte*, *supra* note 96, § 11.27, at 11-53 ("There is no doubt that the use of a temporary settlement class tends to short-circuit the class certification process if the class settlement is approved.")

453. See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (noting "egalitarian" nature of distributing costs among those who share same risk of injury), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993).

454. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 792–800 (3d Cir. 1995).

be able to reach sustainable settlements only in cases when they had the right to proceed to trial. Under these circumstances where plaintiffs have both options (settlement and trial) open, the parties at least may be truly bargaining in the shadow of the law by discounting the likely results at trial.

Realistically, the Third Circuit's requirements in *General Motors* will not significantly change current practices. Writing for the Third Circuit in another decision in 1995, Judge Becker (the author of the *General Motors* decision) found that the commonality requirement in Rule 23(a) would be "satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."<sup>455</sup> This is not an onerous requirement. In this light, *General Motors* may be more important for its recognition that collusion is a danger than for its substantive holding. A practical response to the settlement class action therefore requires not simply that the doctrinal requirements be the same for both "settlement" and "litigation" classes, but that courts insist that a representatively selected steering committee choose the lead counsel that negotiates with the defendants and ratifies the proposed settlement. The tell-tale clue that something would go wrong in *Georgine* came early on when defendants were able to approach the minority faction of the plaintiffs steering committee, after the majority had rejected its proposals.<sup>456</sup>

Ideally, the settlement class action should become a temporary form of alternative dispute resolution with clear time limits. If the parties cannot reach an agreement within, say, a year after judicial selection of lead counsel and a steering committee for plaintiffs, the same action should go forward as a "litigation" class action. Defendants could, of course, then move to dismiss on the grounds that the proposed class flunks the standards of Rule 23(a) or (b), but an objector to the settlement should have the same ability to raise these same issues when the parties seek to certify the settlement class. Only when the rules of the game are the same for both types of class actions can we expect the settlement process to fairly approximate and discount the likely outcome at trial.

#### F. *Bankruptcy Versus the Mass Tort Class Action*

The reforms discussed in this Part—in particular, delayed opt outs and restrictions on the certification of future claimant classes—carry potential costs: First, the inability of corporations to resolve their contingent tort liabilities could cripple some firms and lead to their operational collapse.<sup>457</sup> Second, if early resolution of all tort claims is prevented,

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455. *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

456. The analogy in the corporate setting would be if an acquiring firm could negotiate a merger with a minority of the board of directors after the majority had turned it down.

457. My colleague, Professor Mark Roe, has detailed a variety of ways in which overhanging contingent tort liabilities can bring about the firm's operational collapse. See Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 856–62 (1984). He focuses

then later plaintiffs may sometimes find that they hold only paper claims against an insolvent firm. For both these reasons, claim pooling and an early resolution can be desirable for both plaintiffs and defendants. Yet, as the *Silicone Gel* experience underlines,<sup>458</sup> corporate defendants may be reluctant to enter into global settlements that are effectively open-ended because of the possibility of delayed opt outs by future claimants.

Still, if early resolution of mass tort liabilities is desirable, it does not follow that it should be purchased at any price. The real question becomes: What alternative means to this end are feasible? Here, a comparison is necessary between the utility of the mass tort class action and a bankruptcy reorganization. Unfortunately, many commentators have simply taken it as self-evident that corporate bankruptcy carries unacceptably high costs, both for the class members themselves, and other constituencies (such as employees and local communities).<sup>459</sup> Underlying this approach is probably an anthropomorphic fallacy: Bankruptcy tends to be equated with corporate death. In fact, however, Chapter 11 may be a far more flexible instrument by which to rehabilitate a financially strained firm.<sup>460</sup>

Both substantively and procedurally, bankruptcy reorganization has comparative advantages over a mass tort class action as a means of achieving an equitable resolution of mass tort liabilities that is fair to tort creditors. Substantively, bankruptcy reorganizations have long been guided by two basic principles: (1) absolute priority; and (2) temporal equality.<sup>461</sup> The first principle seeks to ensure that creditors are compensated in full (and according to their level of seniority) before stockholders share in the firm's value; the second principle requires that creditors within the same class be treated equally, regardless of when their claims mature. Thus, in the typical bankruptcy, all bondholders of the same level of sen-

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in particular upon: (1) blocked access to the capital markets; (2) the slow liquidation of the firm; (3) the incentive to undertake high risk, negative present value investments; (4) the barrier to efficient mergers; and (5) the diversion of managerial time.

458. See *supra* notes 254-264 and accompanying text.

459. For a representative example of this mode of analysis, see Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 *Harv. J. on Legis.* 383, 396 (1993). For a critique of this view, see Siliciano, *supra* note 18 (manuscript at 13-16).

460. See Roe, *supra* note 457, at 850-64; Smith, *supra* note 61, at 372-78. Interestingly, the best documented criticism of Chapter 11 is that it provides too much protection to corporate debtors, allowing them to remain in reorganization for too long and thus delay their creditors. See Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 *Wis. L. Rev.* 729, 745-49. While this may reduce the value of the recovery to tort creditors, it reduces the injury and disruption to other constituencies and certainly does not support the claim that bankruptcy means operational cessation.

461. See Roe, *supra* note 457, at 850-51. For a fuller discussion of the normative foundations of bankruptcy law, see Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain*, 91 *Yale L.J.* 857 (1982). The absolute priority rule is today reflected in the Bankruptcy Code's requirements for confirmation of a plan of reorganization. See 11 U.S.C. § 1129(b)(2) (1994). These provisions prohibit confirmation of a plan that permits a junior class to participate in the distribution unless the claims of all senior classes are paid in full.

iority will receive the same prorated amount, whether their claims matured the day before insolvency, the month after, or are scheduled to mature in a decade.

Although in practice bankruptcy reorganizations may not always fully comply with these two normative principles, mass tort class action settlements violate both principles openly and egregiously. Absolute priority is not even recognized as a relevant goal in class action settlements. For example, the claim that a "limited fund" justifies a mandatory, non-opt out class action is essentially a claim that the firm is insolvent and cannot fully pay its tort creditors. In the bankruptcy context, the principle of absolute priority would require that tort claimants receive full payment of their provable claims before stockholders could share in the firm's value. But, as the *Ahearn* and *Hayden* cases show, the reverse happens in class action settlements: stock values soar, while tort creditors are either scaled back or forced to rely on thinly funded or unspecified settlement funds.<sup>462</sup> Although both class actions and Chapter 11 are costly,<sup>463</sup> the bottom line difference between them is that a corporation filing for a Chapter 11 reorganization can anticipate having to surrender the majority of its equity to a settlement trust and has no hope of escaping with only an assignment of its insurance policies.<sup>464</sup>

The goal of temporal equality is even more systematically violated by mass tort class action settlements. When present claimants receive more in inventory settlements than will future claimants (as happened in *Georgine*<sup>465</sup>), the principle of equality within the class has been breached. Worse, distant future claimants may receive far less in mass tort settlements than those tort claimants whose claims mature earlier, both because inflation may erode their recovery and because the settlement fund may be depleted if the eventual number of claims exceeds those predicted. While the date of maturity does not count in bankruptcy, it will often be critical in class actions resolved through settlement funds.

Procedurally, bankruptcy reorganizations are governed by well-known and largely settled legal rules that give creditors specific voting rights and that recognize distinct subclasses. In contrast, a principal attraction of the mass tort class action is that it permits an end run around

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462. For the sharp increase in Fibreboard's stock price on the announcement of its settlement, see *supra* notes 231-233 and accompanying text. In *Hayden*, the primary defendant also claimed to be on the edge of insolvency. See *supra* note 272.

463. The direct costs of corporate reorganization have been estimated at 2.8% of the issuer's assets. See Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. Fin. Econ. 285, 289 (1990). For the typical costs in mass tort litigation, see *supra* note 15.

464. The contrast alluded to in the text is that between the Johns-Manville reorganization and the *Ahearn* settlement. For a fuller discussion of the Johns-Manville experience, see Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 Am. Bankr. L.J. 69 (1988).

465. See *supra* text accompanying notes 187-214.

this known legal regime. Instead, the settling parties can ask the court to serve as a mediation forum where virtually anything goes and formal legal constraints are lacking.<sup>466</sup>

Perhaps the most important advantage of the bankruptcy forum is that it tends to alleviate the conflict of interest overhanging plaintiffs' counsel in a class action. First, the corporation filing for reorganization cannot select the counsel for the various classes of its creditors in bankruptcy (as defendants may be able to do in some "settlement class" actions). Second, while the plaintiffs' attorneys' fee award in a "settlement class" action is subject to the major contingency that the two sides must reach a settlement, this contingency largely vanishes in the case of a bankruptcy reorganization, because once the bankruptcy petition is filed, it becomes a virtual certainty that the reorganization will proceed to some final resolution. The elimination of this contingency is critical, because for plaintiffs' attorneys, the failure to reach a settlement in a mass tort class action spells financial disaster. In bankruptcy, however, this risk is minimized, and as a result the possibility decreases of a collusive deal in which the plaintiffs' attorney trades a reduced settlement for a higher fee award.

Ultimately, the proof is in the pudding. Some mass tort bankruptcies have worked well<sup>467</sup> and have shown that Chapter 11 enables a sophisticated court to preserve the economic viability of a financially strained firm.<sup>468</sup> In addition, bankruptcy courts may find it easier to monitor fees and to restrict the percentage of the award that goes to plaintiffs' attorneys, thus ensuring a greater net recovery to the victims.<sup>469</sup>

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466. The Third Circuit has acknowledged this inherent danger in the use of settlement classes. See *In re General Motors Pick-up Truck Fuel Tanks Prods. Liab. Litig.*, 55 F.3d 768, 787 (3d Cir. 1995).

467. For this conclusion, see Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *Fordham L. Rev.* 617, 651-60 (1992).

468. For this assessment, see Siliciano, *supra* note 18 (manuscript at 14-15). In terms of its capacity for debtor rehabilitation, the bankruptcy reorganization has distinct advantages: First, the corporation can obtain low-cost, federally-guaranteed debtor-in-possession financing in bankruptcy, but not in a class action. Second, the reorganization plan need not involve any cash payment to the tort creditors, but can (as in *Johns-Manville*) transfer a majority block of its stock to a settlement fund (to be sold or managed by the fund's trustees for the benefit of the tort creditors). Thus, bankruptcy reorganizations need not involve any drain on the firm's cash flow. Third, management is not automatically removed under Chapter 11. Rather, the presumption is the reverse: namely, that Chapter 11 allows the debtor-in-possession to retain management and control of the debtor's business operations unless a party can prove that appointment of a trustee is warranted. See *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 167 (Bankr. S.D.N.Y. 1990). Chapter 11 does, however, threaten the incumbent management that has proved inferior, and this may be the real reason for its unpopularity. See Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 *Cornell L. Rev.* 597, 610-11 (1993) (in 70% of the large reorganization cases studied, there was a change of CEO during the pendency of the Chapter 11 proceeding).

469. Bankruptcy fee awards tend to be lower than in class actions, in part because there is less contingency risk. In turn, this means that more can go to the creditors. One

In contrast, no major mass tort class action appears yet to have played to favorable reviews.

This evaluation leads to three definite conclusions: First, the rationale that the corporation's funds are limited should not justify the certification of a non-opt out class action because such a class action appears at present to be an inferior substitute for a bankruptcy reorganization. Second, that delayed opt outs and any procedural tightening of the rules applicable to the mass tort class action may chill some global settlements is an acceptable cost and may even be desirable to the extent that it induces some firms to use instead the superior alternative of a bankruptcy reorganization. Third, the appropriate role of the mass tort class action should be to resolve the tort liabilities of the solvent firm. As long as solvency is assured, the fact that a delayed opt out right may make the settlement potentially open-ended will neither foreclose the corporation's access to the capital markets nor, as a practical matter, result in any other significant inefficiency. In any event, the corporation whose financial situation does worsen can always resort to the bankruptcy alternative.

In sum, given the long latency periods associated with mass torts and the shot-in-the-dark character of contemporary efforts at epidemiological prediction, open-ended settlements should be a necessary condition before a mass tort class action can truly be found to be "superior to other available methods for the fair and efficient adjudication of the controversy."<sup>470</sup>

#### CONCLUSION: TOWARD CONSTRAINED AUTONOMY

Class action developments have given rise to a new legal technology that threatens to strip tort victims of their legal claims, sometimes decades before they even mature. Effectively, this technology has created a jury-rigged substitute for corporate reorganization, but without the safeguards attending that statutory proceeding. If fully exploited, these techniques—particularly the use of mandatory classes, settlement classes and future claimant classes—could create a new, even more protective form of limited liability for corporations.<sup>471</sup> But, curiously, this legal transition has been entirely procedural (that is, the substantive law of torts has

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of the motivating factors that induced Johns-Manville to elect Chapter 11 was its sense "that too little was going to the victims." Kesner, *supra* note 464, at 72 n.10. It believed that the bankruptcy court or the settlement trust could more easily restrict excessive contingency fees. Of course, class action courts have also attempted to do this—but with the negative consequence of encouraging opt outs. See *supra* note 300. To state the obvious, plaintiffs' attorneys cannot opt out of bankruptcy proceedings.

470. Fed. R. Civ. P. 23(b)(3).

471. Many today would doubt that corporations should receive greater limited liability. See, e.g., Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 *Yale L.J.* 1879 (1991) (favoring unlimited shareholder liability for corporate torts); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 *Yale L.J.* 1, 65 (1980) (limited liability for involuntary debts undermines deterrence).



changed little over the same period), and the entire process has been engineered by courts, not legislatures.

To explain and address this phenomenon, one needs to consider its political context. On the simplest level, recent developments can be viewed as a consequence of changing perceptions of the class action. As individual mass tort cases mounted and the burden on the docket grew, an increasing number of civil procedure scholars began to discover the utility of the mass tort class action.<sup>472</sup> Law review notes, in turn, began to suggest limitations on the right to opt out.<sup>473</sup> Partly in response, judicial attitudes changed. Now with the 1990s, the legal community is witnessing the actual reality of mass tort class actions. Some already find the results sordid.<sup>474</sup> Thus, some will be tempted to urge a return to litigant autonomy and the traditional bipolar model of individual litigation. From this Article's perspective, however, any such return to a traditional model is unlikely because of the impact of mass tort cases on the federal docket.

Politically, mass tort procedural law is the product of the collision of three sets of interests: (1) mass tort victims (and their attorneys, whose interests can admittedly deviate markedly from those of their clients); (2) defendants, who fear exposure to liability and their own legal fees almost equally; and (3) trial courts, for whom the prospect of an unending stream of individual actions clogging their dockets has proved unacceptable. The fairest generalization about recent developments in the mass tort field is that the last two parties in this triad have increasingly, but tentatively, reached a *de facto* coalition that has protected their own interests at the expense of tort victims.

More generally, the performance of courts in handling mass tort class actions appears to have varied in direct proportion to the amount of docket pressure under which the trial court has perceived itself to be. Faced with suspicious settlements, federal and state courts have rejected doubtful settlements in property damage cases,<sup>475</sup> but, in the far more sensitive mass tort personal injury context, courts have accepted far more suspicious signs of collusion: inventory settlements, settlements classes reached not only before certification but before case filing, classes narrowly defined to include only future claimants, and chilling restrictions on opting out. The generalization that best summarizes these cases is

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472. See, e.g., Mullenix, *supra* note 11; Rosenberg, *supra* note 8; Sherman, *supra* note 11.

473. See, e.g., Baughman, *supra* note 2, at 232-41; Friedman, *supra* note 6, at 756-63; see also Bruce H. Nielson, Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation, 25 *Harv. J. on Legis.* 461, 490 (1988) (proposing an amendment to Rule 23(b)(1) requiring mandatory classes "when the court deems class action treatment necessary to protect the rights of potential claimants").

474. See Koniak, *supra* note 4 (manuscript at 104-05). I should indicate that I believe Professor Koniak's outrage to be justified and eloquent. This still leaves open, however, the question of what reforms will work.

475. See *supra* notes 283-289 and accompanying text.

that provided by Judge Posner in *Rhone-Poulenc Rorer*. "The number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules."<sup>476</sup> Once bent, legal rules tend to stay bent, and legal rationalizations tailor-made for the asbestos context will inevitably be cited and, to a considerable extent, followed in other mass tort cases as well.

As a result, although others have principally focused on the alleged ethical violations of the settling parties,<sup>477</sup> this Article's contention is that the fact of judicial self-interest must be placed at center stage. Its centrality leads to three distinct policy conclusions: First, the least acceptable reform proposals are those that simply increase the discretion of the trial judge.<sup>478</sup> Given such discretion, the right to opt out would soon wither, and litigant autonomy might increasingly become a nostalgic memory.

Second, reformers are best advised to address their proposals to appellate courts and place little hope in legislative reform. In any lobbying contest before the legislature, corporate defendants are far better positioned and equipped to do battle than are public interest representatives on behalf of inchoate future claimants. In contrast, appellate courts are less directly affected by docket congestion and fear less the prospect of mind-numbing tedium from repetitive tort cases.<sup>479</sup>

Third, reformers must recognize the necessity of constraining litigant autonomy. The issue is not whether, but how. Unrestrained advocacy of each citizen's "day in court" is exploited by mass tort defendants to justify settlement practices that would have been unthinkable just decades ago. The more prudent line of defense lies in the proposition that constraints on litigant autonomy should observe the principle of least drastic means. That is, because fundamental due process rights are implicated by attempts to draft the individual litigant to serve as a faceless soldier in group litigation, the least restrictive alternative should be preferred that can realize the social goals sought.<sup>480</sup>

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476. In re *Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995).

477. See *Koniak*, supra note 4 (manuscript at 108-46, 190-202).

478. Such proposals are now being considered. See *Bone*, supra note 24, at 83-86.

479. Cases, such as *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), provide some basis for optimism, particularly in the Third Circuit panel's clear recognition of the powerful "hydraulic pressures confronted by courts adjudicating very large and complex actions" that can "erode the protections afforded by [Rule 23] almost entirely." *Id.* at 799.

480. This Article has argued that the litigant autonomy interest most deserving protection is the right of the "high stakes" plaintiff to secure an individualized damages determination. This could be realized by "limited" class actions in which the individualized determination was made by a state court or an arbitration forum or through delayed opt out rights (in the case of future claimant classes). Conversely, the litigant autonomy interests least capable of protection and most susceptible to constraint are the individual litigant's desire to receive punitive damages and to obtain an individual jury trial.

To the extent that litigant autonomy can be made to co-exist with reforms that control the growth of the federal docket,<sup>481</sup> federal courts can be expected to preserve and protect the individual litigant's desire to seek an individual recovery. Defendants will predictably resist, but at this point a very different political coalition may form.

Attempts to balance litigant autonomy and group litigation must inevitably face some problematic trade-offs. One such trade-off is the possibility that recognizing a right to exit for litigants with cases of above average litigation strength will reduce the settlement that defendants offer to the remaining class members. In principle, this seems the logical outcome, but there is a countervailing consideration: the right to exit (through delayed opt outs and the ability to contest damages on a *de novo* basis in some forum) may serve a checking function that deters collusive settlements. Today, the average claimant may lose more in settlement value because the settling parties can engage in various forms of structural collusion than such claimant would lose in settlement value under a legal regime in which claimants with above average cases exercise a right to opt out.<sup>482</sup>

Based on this premise that real reform will require securing the compliance of trial judges who today feel threatened by mass tort individual actions, this Article has proposed three fundamental principles on which procedural reforms should be based.

1. Settlement class actions must be monitored by the only participants with the appropriate incentives to monitor: namely, other plaintiffs' attorneys. Although the first step toward reform is the recognition of the same standards for class certification in the "settlement" class context as in "litigation" class actions, the more important and second step is to deny the defendant the ability to select the plaintiffs' counsel. The use of representative steering committees may be the simplest means by which to minimize the opportunistic discretion of the individual plaintiffs' attorney.

2. Future claimants are uniquely exposed in class actions. Time and time again, they have lost not only to defendants, but also to present claimants (and their attorneys). On balance, they appear to fare marginally better in bankruptcy proceedings, whereas the corporation's share-

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481. Legal rules that more equitably allocate cases hold particular promise. When the JPML decided to transfer all pending asbestos personal injury litigation to a single forum, it chose the Eastern District of Pennsylvania in part because "more asbestos personal injury or wrongful death actions [were] pending in that district than any other." *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422-23 (J.P.M.L. 1991). This may be the most perverse and counterproductive criterion to use (if one is concerned about the danger of non-adversarial settlements) because it ensures that the settlement process will be supervised by a judge who is under more pressure than any other to achieve a settlement at all costs.

482. Independent of their impact on average settlement values, reforms that increase litigant autonomy can be defended on grounds of natural justice. This topic is beyond the scope of this Article.

holders fare significantly better in mass tort class actions. Given the limited judicial ability to project either the number and character of future claimants in mass tort cases or the rate of inflation in the distant future, lump sum settlements should be accompanied by a safety valve: some right on the part of the individual litigant to opt out if actual economic benefits are less than projected. In general, open-ended settlements should be preferred, both because the lump sum alternative essentially shifts residual risk from the firm to its tort creditors and because the bankruptcy process performs marginally better when a definitive resolution of the firm's tort liabilities is necessary for its survival.

3. The right to opt out needs to be modified and updated to the extent that "future claims" classes are permitted. A delayed right to opt out, triggered by the discovery of a previously latent mass tort injury or illness, would solve many of the problems of both future claimants and settlement classes.

To sum up, judicial competence is limited. Attempts to peer decades into the future have uniformly failed. In that light, a cautious and conservative definition of what courts can do will protect both tort victims and, in the long run, courts themselves.