

# Appendix C

## Mass Torts Problems & Proposals

### *A report to the Mass Torts Working Group*

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This report was undertaken at the request of the Mass Torts Working Group and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. This work has been reviewed by Center staff and publication signifies that it is regarded as responsible and valuable. The analyses, conclusions, and views expressed are those of the author and not necessarily those of the Federal Judicial Center.

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## Introduction

This report was prepared at the request of the Mass Torts Working Group created by Chief Justice William H. Rehnquist in February 1998. Specifically, the report reviews and organizes current legal and empirical literature on mass torts to address two questions posed by the Working Group:

1. What problems are associated with mass torts litigation?
2. What proposals have been advanced to address those problems?

Part I begins by asking whether there are mass torts problems that require special legislative or rule-making attention and proceeds to identify criteria and comparative bases for recognizing problems. The core of part I is devoted to examining the multifaceted and often overlapping problems, such as costs, delays, scientific uncertainties, and procedural unfairness, that have been associated with mass torts litigation. The consensus view is that mass torts have created a multidimensional and complex set of problems, but a minority view points to an ad hoc series of evolutionary actions that have created a coherent response to the demands of mass torts.

Part II examines three types of proposals to respond to perceived problems posed by mass torts claims: case-management, legislative, and rule-making. Under case-management proposals, we examine aggregation proposals from a number of angles, including the timing, the use of and judicial review of settlement classes, litigation classes, proposals to aggregate potential claimants who were exposed to risk-based tortious activity, and proposals to employ statistical sampling to resolve mature mass torts. We also look at case management in the form of using court-appointed experts, enhancing cooperation between state and federal courts, employing alternative dispute resolution procedures, and invoking the bankruptcy process. Discussion of bankruptcy integrates recent legislative proposals by the National Bankruptcy Review Commission with discussion of current bankruptcy case-management practices. Discussion of state-federal cooperation includes consideration of a legislative proposal because it is closely related to the case-management discussion.

Under legislative proposals, we present Professor Edward Cooper's "bold approach" to mass torts problems. This allows us to identify at the outset the parameters of a truly comprehensive resolution of mass torts. We follow with extensive discussion of the American Law Institute's Complex Litigation Project and the majority and dissenting positions of the American Bar Association's Commission on Mass Torts. We compare the major features of all of the above plans and summarize critiques published in the legal literature. Next we focus on proposals to address choice-of-law issues and critiques of such proposals. Then we examine federal substantive law approaches that might moot some or all of the seemingly intractable choice-of-law problems. Federal jurisdictional approaches come next, including an examination of a bill-of-peace proposal. The federal vaccine

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compensation program is described and discussed briefly. We end the section with a discussion of class action rules changes (e.g., treating a non-opt-out class, rather than the individual members, as the legal entity; or regulating attorneys' fees in class actions) that arguably involve substantive changes and require legislative action.

Discussion of rule-making proposals focuses primarily on class actions, especially proposals dealing with settlement classes, including a summary of Rules Enabling Act limits. Novel approaches to class action trial structure are examined briefly, as are suggestions for addressing the adequacy of class representation. Finally, we close with a brief examination of proposals to create new rules designed to address ethical issues that arise in mass torts lawyering and judging.

In exploring the above issues, we need a working definition of *mass torts litigation* to distinguish it from what we call *ordinary litigation*. Mass torts litigation involves cases, generally numbering in the thousands, that include claims of personal injuries or property damage caused by exposure to a product or substance or a set of similar products or substances or a single event.<sup>1</sup> All other litigation will be referred to as ordinary litigation. As discussed below, more precise definitions may be needed in statutes or rules.

### I. Problems

#### A. Overview

Before we summarize and categorize the various mass torts problems that commentators have identified, we address the threshold issue of whether there are any problems. Then we discuss briefly, by way of caveat, the unintended effects of prior solutions to perceived problems. In the core of this section we approach the identification of perceived problems in two ways: first by presenting a number of idealized criteria for judging success in resolving mass torts problems and then by describing and categorizing the host of specific problems that various commentators have advanced.

1. While property damage litigation is included in this definition of mass torts, such litigation often has a lesser degree of complexity than litigation that involves bodily injury. Assessment of damages in personal injury cases typically varies considerably from individual to individual, while property damage typically exhibits less variation.

**B. Are there any problems?**

To avoid overstating the complexity of mass torts problems and solutions, we need to establish a frame of reference. One way to do so is to ask: How do mass torts problems differ from problems that the civil justice system as a whole has manifested over the years? To illustrate the force of that question, let us look at a specific instance of an asserted problem. Commentators have frequently identified high transaction costs, especially attorneys' fees, as a central problem in mass torts litigation.<sup>2</sup> An oft-cited 1983 RAND report on the costs of asbestos litigation tells us that plaintiffs in that study received, on average, 37 cents of every dollar that defendants and insurers spent on asbestos litigation.<sup>3</sup>

Missing from the above analysis, however, is any baseline information about the costs of ordinary litigation. Assuming that in a typical case there is a one-third contingent fee plus another 7% for plaintiff's expenses and assuming equivalent costs for defendants, a plaintiff would ordinarily receive 42 cents of every dollar spent on the litigation.<sup>4</sup> In fact, later RAND research showed that in non-automobile tort litigation plaintiffs receive, on average, 43% of total costs and compensation.<sup>5</sup>

Some commentators, explicitly using the baseline of ordinary civil litigation, have concluded that mass torts do *not* represent a serious problem for the judicial system. For example, Professor Siliciano asserts that "long delays, high transaction costs, defendant bankruptcies, and unpaid claimants" are not pathologies unique to mass torts, but they are conditions that "will naturally and inevitably arise when any liability-based system of injury compensation confronts large numbers of similar cases."<sup>6</sup> Indeed, he argues that,

2. See, e.g., Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 13 (March 14, 1991) [hereinafter Ad Hoc Committee Report] ("The transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease."); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961, 963 ("transaction costs are excessive, far outstripping the amounts paid out in compensation").

3. James S. Kakalik et al., *Costs of Asbestos Litigation* (1983). Another 37 cents went to defendants' attorneys' fees and expenses while 26 cents went to plaintiffs' attorneys' fees and expenses. *Id.* at vii-viii, Table S.2.

4. To illustrate, assume that a settlement or verdict is \$100. Plaintiff receives \$60; her attorney receives \$40 for fees and expenses. Defendants and insurers incur an additional \$40 in fees and expenses. The total payments are \$140, of which plaintiff receives \$60 or 42%. In asbestos litigation before 1983, plaintiffs' attorneys' fees and expenses were 41% and defendants' attorneys' fees and expenses were 58%, but we do not know whether such high defense fees and expenses are typical or whether they remain at such a high level.

5. James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* 74, Fig. 7.2 (1986).

6. John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 991 (1995).

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in asbestos litigation, aggregating cases in response to perceived problems causes an identifiable problem: the presence of a large proportion of asbestos claims in which the plaintiffs have no physical impairment. Were the cases handled individually, he asserts, non-impairment cases could be screened out on the merits, preventing the one problem he concedes has arisen.

Along similar lines, lawyers have argued that class certification in mass torts cases may complicate legal processes, not streamline them, and create, not resolve, mass filings.<sup>7</sup> They contend that courts can effectively approach mass torts by using conventional procedures such as strictly applying joinder rules, limiting consolidations and coordinations to discovery and pretrial issues, weeding out non-meritorious claims through aggressive use of summary judgment and other devices for scrutinizing the merits, using ADR procedures, and, in the end, trying cases.<sup>8</sup> The resulting pattern of jury verdicts “will reflect a consensus, or at least a pooling of judgment, of many different tribunals.”<sup>9</sup>

While not asserting a lack of problems, other commentators have observed the evolution of a mass torts system by a gradual trial-and-error approach through common-law policymaking. The system that has emerged “has made some functional adaptations while retaining certain features that . . . many . . . view as dysfunctional.”<sup>10</sup> Examples of judicial managerial adaptations include “novel claims aggregation techniques, statistically-derived outcomes, . . . more systematic alternative dispute resolution efforts, and coordinated federal state court proceedings.”<sup>11</sup> In the absence of legislative action, judges, attorneys, and litigants have created a system that responds ad hoc to problems as they emerge through litigation.

7. See Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 490 (1996) (“class certification encourages litigation by claimants who otherwise would not participate in the legal process”); see generally Ronald D. Krist, *Wide View of Tort Reform*, 24 Pepp. L. Rev. 889 (1997) (challenging the empirical premises of tort reform and arguing that mass tort litigation has served as the watchdog of safety).

8. McNeil & Fancsali, *supra* note 7, at 486, 503–07.

9. *Id.* at 506–07 & n.143 (quoting *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299–1300 (7th Cir. 1995)).

10. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 988 (1995).

11. *Id.* at 956–57 (footnotes omitted).

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Whether the evolution of such a system is a good or bad idea remains a normative judgment.<sup>12</sup> For purposes of this report, it is sufficient to say that some commentators present credible arguments that there is a system evolving that satisfactorily addresses the major problems with mass torts. That is definitely a minority view.

On a more limited plane, Judge Weinstein has expressed the opinion that there is no problem with the current class action rules. His premise appears to be that the class action device can successfully control mass torts litigation. Judges can use the existing rule by subclassing, appointing independent lawyers to represent future claimants and unrepresented subclasses, exercise close judicial control of the proceedings, and strictly monitor lawyers' fees and client relations.<sup>13</sup>

#### ***C. Unintended effects of solutions***

Policymakers who examine problems and proposed solutions in the complex arena of mass torts should also be aware of the history of past proposals. Many past efforts at solutions—often innovative adaptations of existing procedural rules, statutes, and substantive common law rules—have generated new problems. For example, the use of class action devices to settle asbestos litigation has run afoul of standards for adequate representation and procedural fairness for potential claimants whose injuries remain latent. Innovative pursuit of unprecedented aggregative remedies in *Amchem* and *Cimino* appears to have the unavoidable effect of adding years in which individual cases were not scheduled for trial.<sup>14</sup> Efforts to address the needs and interests of future claimants outside of the bankruptcy context have revealed new problems relating to procedural fairness, such as notice to and adequate representation of future claimants who may not be aware of their risk of injury.

Most importantly, success itself may breed problems by creating demand in the form of new cases. Francis McGovern states it succinctly: “The more successful judges become at dealing ‘fairly and efficiently’ with mass torts, the more and larger mass tort filings become.”<sup>15</sup> This has come to be known more simply as the “highway” or “Field of Dreams”

12. See Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 Cornell L. Rev. 1022, 1027 (1995).

13. See Jack B. Weinstein, *Notes for a Discussion of Mass Tort Cases and Class Actions*, 63 Brook. L. Rev. 581, 585 (1997) [hereinafter, Weinstein, *Mass Tort Class Actions*].

14. This is not to say that aggregative procedures in those two cases had no effect. Most of the *Cimino* cases settled before trial, and settlement of present claims apparently continued in *Amchem* while the case worked its way to the Supreme Court. The parties can continue to use the settlement frameworks created in those two cases.

15. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822 (1995) [hereinafter McGovern, *Mass Torts for Judges*].

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phenomenon, depending on one's frame of reference. The aphorism is, "If we build it, they will come." Professor McGovern's writings convert the aphorism into a more qualified prescription: "Don't build the highway prematurely," a prescription that calls for subtle judgments about the life cycles of cases, maturity, elasticity, and judicial roles.<sup>16</sup>

Problems with costs and delays may also have been compounded by the elusive search for a comprehensive solution. For example, Chapter 11 reorganizations represented an inescapable resolution for many asbestos defendants. In the natural course of handling each reorganization separately, the parties and the courts have created a proliferation of asbestos claims resolution facilities that appear to generate unnecessarily duplicative transaction costs and may also contribute to further delay in the final resolution of claims.<sup>17</sup> Unavoidably, it seems, solutions give birth to a new generation of problems.

#### ***D. Idealized criteria***

One approach to identifying mass torts problems is to examine the general principles underlying proposals to reform the mass torts system. The gap between those principles and the apparent reality of reported experiences represents a measure of the problems. As noted above, this approach ignores the baseline problems in ordinary litigation and seeks a more perfect resolution of mass torts cases.

Judge Jack Weinstein has advanced seven desirable criteria for addressing the demands of mass torts litigation:

- 1) The concentration of decisionmaking in one or a few judges; 2) a single forum responsible for resolving legal and factual issues; 3) a single substantive law; 4) adequate judicial support facilities; 5) reasonable fact-finding procedures, particularly as to scientific issues; 6) a cap on the total cost to defendants such as by limiting punitive damages and allocations for pain and suffering and a method of allocating the cost among multiple defendants; and 7) a single distribution plan with fairly inflexible scheduled payments by injury based on the need of those injured, rather than the social and economic status of plaintiffs, and tailored to the availability of private resources.<sup>18</sup>

16. *See id.* at 1841–45.

17. At the urging of Judge Charles Weiner, the Judicial Panel on Multidistrict Litigation considered transferring all of the bankruptcy cases to Judge Weiner's court for coordinated or consolidated proceedings. In the face of "serious concerns that transfer would adversely impact the . . . bankruptcy cases," the panel declined to consolidate the proceedings and urged the bankruptcy judges and Judge Weiner to coordinate their efforts. *In re Asbestos Bank. Litig.*, No. 950, Order (J.P.M.L. Dec. 9, 1992).

18. Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 131–32 (1995), *quoted in* Francis E. McGovern, *Judicial Centralization and Devolution in Mass Torts*, 95 *Mich. L. Rev.* 2077, 2082 (1997) [hereinafter McGovern, *Centralization and Devolution*].

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Judge Weinstein's criteria imply that there are problems with dispersal of decision-making authority among many judges and forums, a proliferation of substantive laws to be applied, lack of adequate judicial support facilities, and so forth. By starting with "desirable criteria," such proposals look to an idealized resolution of problems. Such criteria make it clear that the measure of successful resolution of the mass torts litigation problems will require creating a system that will be markedly different from existing systems for managing ordinary litigation.

Along similar lines, District Judge William W Schwarzer (N.D. Cal.), a former director of the Federal Judicial Center, posited eleven specific standards that a national solution to asbestos litigation would ideally satisfy. Such a solution would:

- 1) address the problems of potential claimants whose disease either remains latent or has not reached its most disabling stage; 2) incorporate all state and federal asbestos-related cases and grant the power to stay proceedings in courts that are not involved in implementing the national solution; 3) encompass all claims against all potential defendants relating to exposure to asbestos; 4) create or authorize federal laws, standards, or rules to govern treatment of discovery, procedural motions, evidence, and substantive law issues, such as punitive damages; 5) provide an alternative to bankruptcy reorganization, enabling defendants to continue to operate viable businesses; 6) create a fund for present and future victims by identifying and securing the maximum feasible contributions from each defendant through either bankruptcy or a new alternative; 7) design a mechanism for existing trusts, generally created under Chapter 11 of the Bankruptcy Code, to link into a single fund with a single administrative structure; 8) reserve punitive damages until the claims of present and future claimants for compensatory damages have been satisfied; 9) formulate a streamlined procedure for making claims; 10) provide a reasonable method for compensating counsel in proportion to the time necessary to present claims to the tribunal(s); and 11) give priority to claimants and their dependents when the claimant is seriously impaired and has an urgent need for immediate compensation to pay expenses and replace lost earnings.<sup>19</sup>

Note that these two sets of criteria approach the issues from different angles. Combining the two approaches would result in an even more complex and ambitious blueprint for resolving perceived problems. We present these two sets of criteria for their value in conceptualizing the range of interlocking issues that need to be addressed in crafting an ideal solution to national mass torts problems.

19. *Asbestos Litigation Crisis in Federal and State Courts: Hearings before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong. 126-127 (1992) (statement of William W Schwarzer, Senior U.S. District Judge and Director, Federal Judicial Center) [hereinafter Schwarzer, *Asbestos Testimony*].

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Both approaches represent conceptually powerful ways of identifying possible problems and solutions. On the other hand, implementing these principles will clearly require legislative actions designed to alter dramatically the status quo. For that reason, achieving the desired outcomes may be politically impractical. We do not examine these criteria in depth at this time, but we examine legislative proposals in Part II.B. For now, we present the Weinstein and Schwarzer criteria to demonstrate the multidimensional complexity of mass torts problems. Their criteria provide vivid testimony as to why comprehensive solutions have eluded policy makers.

#### ***E. Problems***

As the look at idealized criteria shows, one can examine asserted problems in mass torts litigation from a number of angles and levels. Proposed solutions should be commensurate with the scope and level of the problem addressed. For example, problems inherent in the mass production of potentially dangerous products cannot be addressed at the core through procedural rule making. Legislatures and administrative bodies have the primary roles in defining the standards by which the safety of mass products will be judged.

##### *1. Defining mass torts*

While we posited an arbitrary definition above, referring to thousands of claims, there is a serious definitional problem that must be resolved before concrete measures to address mass torts problems can be drafted and applied. What volume and maturity levels should be required before a group of cases should be treated like a mass tort?

A difficult threshold question is whether a single definition of mass torts can capture the variety of cases that share the name. As we will see in the discussion at section II.B.5 (“Rheingold dissent and proposal”), there are the rare mass torts, like asbestos and Dalkon Shield, that encompass hundreds of thousands of individual claims. Can these case congregations be treated the same way as cases like DES and Bendectin that include “only” thousands of claims? As we will see, there is dissent on that point.

The American Bar Association Commission on Mass Torts found that mass torts “might well include relatively minor personal injury or property damage claims as well as claims for economic loss. Similarly, ‘mass tort litigation’ could run the gamut from traditional negligence or product liability claims to antitrust, securities litigation or a variety of consumer claims.”<sup>20</sup> The commission chose to define “mass tort litigation” as involving “at least 100 civil tort actions arising from a single accident or use of or exposure to the same

20. American Bar Association Commission on Mass Torts, Report to the House of Delegates 5 (1989) [hereinafter ABA Commission Report].

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product or substance, each of which involves a claim in excess of \$50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property.”<sup>21</sup> In contrast, a dissenting member of the ABA Commission, Paul Rheingold, argued for a definitional threshold of “10,000 present and reasonably to be expected cases,” to distinguish between routine and problematic mass torts.<sup>22</sup> We cite this example simply to illustrate the definitional problem. Other definitions are possible and may be warranted depending on the purpose one has in mind.

A problem related to the definition of mass torts is the extent to which qualifying a type of litigation as a mass tort lies largely in the hands of attorneys. Given contemporary mechanisms for recruiting clients by advertising or by screening programs established by unions or consumer organizations, attorneys can routinely build an inventory of cases involving a specific product. Damage thresholds can be met when claimants allege serious injuries but have not established the likely cause of those injuries.

In such self-defined mass torts, the volume of cases creates pressure for resolution, even global resolution, before courts have made determinations about the merits of the claims. In Professor McGovern’s words, “premature global resolutions can be problematic” because they create the “potential of a prolonged and volatile tail to the tort,” raise “unrealistic expectations,” and “generate claims that would otherwise have remained dormant.”<sup>23</sup>

#### *2. Volume of litigation: mass production and marketing*

From one vantage, the source of mass torts problems lies in the economic arrangements that modern industrial society uses to produce and market its products. As Judge Paul Niemeyer has observed, “[a]s efficiency in production and manufacturing has increased, . . . design errors are multiplied by factors measured in the millions. An ill conceived pill or a negligently designed fastener, costing but a few cents each, can place a huge corporation at risk [and] cause serious injury to individuals whose claims cannot be resolved . . . simply because of the numbers similarly injured.”<sup>24</sup> Similar observations can be made

21. *Id.* at 12.

22. *Id.* at 8e.

23. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1844–45.

24. Paul V. Niemeyer, *Remarks to the Institute for Law and Economic Policy*, 39 *Ariz. L. Rev.* 719 (1997).

25. For example, in his comprehensive study of the Bendectin litigation, Professor Michael Green noted the changes in the state-of-the-science findings in the decade between the first cases and the MDL trial in 1985. In 1976, scientific evidence was quite uncertain. Epidemiological studies were undertaken because of the litigation and were able to be completed because the latency period was relatively short, bounded by the length of a pregnancy. See Michael D. Green, *Bendectin and Birth Defects* 314–15 (1996). The litigation had a life span of twenty years because it took that long for the science to evolve and be applied to existing cases.

about environmental damages. If the volume of potential cases is the root cause of mass torts litigation problems, mass production appears to be the root cause of that volume.

### 3. Scientific uncertainty

Another aspect of our economic institutions is that we have created a complex biochemical environment into which we introduce novel products. Individual are exposed to multiple products in the course of daily life. Unanticipated biochemical interactions may provide regular grist for the mass torts mill. Yet, whether a specific product has caused—or is even capable of causing—injuries to its users represents a difficult question for scientists as well as generalist judges and juries to answer.

For some products, such as asbestos and tobacco, injuries are so numerous within a defined population that statistically powerful epidemiological studies can yield definitive results. Yet even with asbestos and tobacco, the interactive effects of these two products raise complex legal causation questions. For other products, such as Bendectin or dioxin, measurable exposure is limited to a relatively small portion of the population, and epidemiological studies have been more difficult to conduct and interpret.<sup>25</sup>

One author concludes, for example, that “[f]or most potentially toxic substances, there will not be a solid body of epidemiological evidence on which to rely.”<sup>26</sup> In such an environment, some see the failure to test the safety of a product as the root cause of speculative litigation that has ensued.<sup>27</sup> Indeed, another author labeled as “outrageous fortune” the phenomena of “blameworthy-but-fortunate” defendants who discovered through post-marketing research that products like silicone gel breast implants may not cause the harms that some feared, but who had not ruled out those harms through premarket testing.<sup>28</sup>

Other aspects of uncertainty complicate mass torts litigation. Even when science pro-

26. *Id.* at 316.

27. “[T]he time lag between the act and an inference of causation strains the notion of wrongdoing by imposing an obligation to avoid an act whose adverse consequences may not become known for years.” Margaret A. Berger, *Eliminating General Causation: Notes Toward a New Theory of Justice and Toxic Torts*, 97 Colum. L. Rev. 2117, 2132–33 (1997) (citing Ernest J. Weinrib, *Causation and Wrongdoing*, 63 Chi.-Kent L. Rev. 407, 429–30 (1987) (stating that the origin of the harm is “the defendant’s wrongful risk creation”). See also Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 Cornell L. Rev. 773, 774–75 (1997) (asserting that “[n]o toxicity research is available for over eighty percent of the chemicals in commerce,” that “current common-law liability rules act to penalize” such research, and that a “manufacturer that conducts no research can generally avoid liability because plaintiffs and government research programs are unlikely to conduct scientific research on their own.”).

28. Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 Mich. L. Rev. 1121 (1998) (discussing appropriate sanctions for such behavior).

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vides a clear answer that a product has the capacity to cause particular types of injuries, those scientific findings do not determine whether a plaintiff's exposure to a product was the proximate cause of this plaintiff's injuries.<sup>29</sup> Unless cases are consolidated or treated as a class, these decisions must be made on a case-by-case basis, and even if cases are aggregated, the need to show specific causation on a case-by-case basis may persist.

Scientific uncertainty and the consequent legal uncertainty also have significant social and economic effects. Manufacturers' decisions about whether to market innovative products are undoubtedly affected by the scientific and legal uncertainties. With marginally useful products, this uncertainty may provide incentives to test products or refrain from putting risky products on the market. With essential products, such as vaccines, uncertainties can inhibit the marketing of a product whose benefits clearly outweigh its harms. In section II.B.9.g ("Vaccine compensation-type program"), we discuss one approach to this dilemma.

#### *4. Economic incentives: attorneys' fees*

Regardless of whether mass torts cases are handled individually or in aggregates, the volume of the litigation can create opportunities for attorneys on both sides of the litigation to collect large fees. Many assert that these incentives influence or exacerbate problems with mass torts.<sup>30</sup> Representation of individual plaintiffs on a contingent fee basis becomes more lucrative as the likelihood of recovery increases. Judge Weinstein emphasizes the need for judges to take "[p]articular care . . . in mass tort cases to ensure that the contingency fee system and the incentives that it is founded upon operate properly and are not distorted by the nature and size of the cases."<sup>31</sup> Amassing an inventory of cases through advertising or a system of referrals can create attractive economies of scale. Aggregation of claims into a class or consolidated treatment can yield fees that are calculated as a percentage of a large common fund without regard to the number of lawyer hours needed to achieve that result.<sup>32</sup>

On the other side of the litigation, defending mass claims in a bet-the-company case

29. See William W Schwarzer, *Settlement of Mass Tort Class Actions*, 80 Cornell L. Rev. 837, 838 (1995) ("even when general causation may be established with reasonable certainty, specific causation of particular injuries is frequently speculative, both because of the limits of science knowledge and the nature of the disease") [hereinafter Schwarzer, *Mass Tort Settlements*].

30. See generally Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469, 526–32 (1994) [hereinafter Weinstein, *Ethical Dilemmas*].

31. *Id.* at 529.

32. See, e.g., Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts 73* (Federal Judicial Center 1996) (median fee recovery rates ranged from 27% to 30% in class actions studied, but not including any mass torts cases).

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gives an attorney incentives and opportunities to protract the litigation.<sup>33</sup> This attorney's client may have converging incentives to wear an opponent down by litigating in a "scorched earth" manner.<sup>34</sup>

#### 5. Costs and delays

A standard problem asserted regarding mass torts litigation is that it costs too much and take too long. For example, one report states that "cases take an inordinately long time to reach disposition, sometimes concluding long after a plaintiff's death," and "transaction costs are excessive, far outstripping the amounts paid out in compensation."<sup>35</sup> As indicated above, such assertions should be placed in the context of costs and delays in ordinary litigation. In mass torts litigation, a major element of the cost is the seemingly unnecessary repetition of discovery, pretrial motions, and trials for cases that raise the same or similar issues.

Accurate data on cost and delay are elusive. Complaints about transaction costs typically refer back to a study that was based on data from asbestos cases that closed between January 1, 1980, and August 26, 1982.<sup>36</sup> Such data provide scant support for current generalizations to asbestos or other mass torts for two reasons. First, asbestos litigation is generally regarded as unique; part of its uniqueness lies in the large number of defendants sued in each case. Because each defendant has costs, defense costs naturally tend to be higher than in ordinary litigation.<sup>37</sup> Second, these data were obtained relatively early in the history of asbestos litigation, before joint defense ventures like the Asbestos Claims Facility and the Center for Claims Resolution came into existence, before formulas for settling cases came to be routine, and before aggregative procedures, including assignment of an MDL judge, were tried.

Data on delays in the asbestos arena are no more precise. Because asbestos cases typically involve scores of defendants, partial settlements do not lead to case terminations. Regularly kept statistics simply do not allow us to differentiate between the case in which 95% of the defendants have settled and those in which none have settled.

33. See Weinstein, *Ethical Dilemmas*, *supra* note 30, at 532. ("Defense counsel in mass tort cases can, in effect, benefit from their clients' allergy to conceding liability even when counsel believe that such a concession is ultimately inevitable.")

34. See *id.* at 528–29 & n.238 (quoting defense counsel in *Haines v. Liggett Group*, 814 F. Supp. 414, 421 (D.N.J. 1993) as saying "the way we won those cases was not by spending all of [the company's] money, but by making that other son of a bitch spend all of his").

35. Hensler & Peterson, *supra* note 2, at 963.

36. See Kakalik et al., *supra* note 3, at 10.

37. See *id.* at 3 (finding an average of 20 defendants per case and 300 different defendants overall: "Usually, 20 different defense teams prepare for and participate in the litigation.")

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Another problematic aspect of transaction costs relates to the duplication involved in having multiple claims facilities in the form of trusts arising out of Chapter 11 reorganizations or class action settlements.<sup>38</sup> In asbestos litigation, these facilities were created at different times as a result of separate negotiations with each defendant. In mass torts like asbestos that involve numerous defendants, coordination of payment activity may be difficult.

As to delays, the length of the queue may extend so long as to raise questions of fairness, of meaningful access to the courts. Judge Parker concluded his due process analysis in *Cimino* this way: “unless this plan or some other procedure that permits damages to be adjudicated in the aggregate is approved, . . . plaintiffs are facing a 100% confidence level of being denied access to the courts.”<sup>39</sup>

The timing of rulings on the merits is often problematic in mass torts litigation, and courts face difficulties in finding procedures that are fair to all parties and suited to the maturity level of the litigation. Plaintiffs generally desire prompt adjudication and seem especially disadvantaged by delays. Defendants may also suffer from delays associated with having immature claims of dubious merit go through a costly and lengthy pretrial process before being addressed on the merits. Early trials of individual cases may appear to be a solution, but such cases may be atypical in that they would not have the benefit of comprehensive discovery conducted in a multidistrict proceeding. Test cases of bellwether claims may founder on the difficulty of identifying typical claims. At the other extreme, aggregated trials of immature mass torts claims may bias juries in favor of plaintiffs, at least on liability issues.<sup>40</sup>

An element of asserted problems with delay is that courts have apparently been unsuccessful in establishing a priority for claimants with serious injuries over those with minor injuries. For example, Judge Robert Parker noted that “[f]our hundred and forty-eight members of the [*Cimino*] class have died waiting for their cases to be heard.”<sup>41</sup> Courts have established pleural registries to defer action on asymptomatic asbestos cases and prevent them from clogging the regular docket,<sup>42</sup> but such registries depend on the cooperation of the parties. Whether registries have been successful has not been evalu-

38. See discussion *supra* note 17.

39. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 666 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

40. See generally Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 *Law & Hum. Behav.* 209 (1988).

41. *Cimino*, 751 F. Supp. at 651.

42. See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 75 *Judicature* 318 (1992).

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ated empirically. Complaints about asymptomatic plaintiffs continue to be heard, and the *Amchem* settlement seemed to be motivated in substantial part by a desire to pay only those claimants who are impaired by asbestos disease.<sup>43</sup>

#### 6. Burden on the courts

Yet another vantage point for examining problems in mass torts litigation looks at the burdens that such cases pose for judges and courts. Judge Robert Parker concretely illustrates this perspective in chronicling the first two decades of the “odyssey of asbestos litigation in the Eastern District of Texas.”<sup>44</sup> He reports that the class action trial he presided over “consumed 133 days of trial time and produced 25,348 pages of transcript prepared as daily copy. The docket sheet . . . is 529 pages long. The court has entered 373 signed orders.”<sup>45</sup> On the other hand, handling the 2,298 cases individually at a rate of thirty cases per month would have taken six and a half years, during which time 5,000 new cases would have been filed.<sup>46</sup> Burdens like those documented by Judge Parker illustrate the “pressures generated by mass tort litigation” that Judge William Schwarzer finds “are driving the justice system toward comprehensive aggregation procedures.”<sup>47</sup>

On the other hand, data from the Federal Judicial Center’s 1987–1993 district court time study as well as other sources suggest that the nationwide burden of asbestos litigation may have been lower per case than some expect. Apparently because such cases are often handled in groups and because, as a mature tort, settlement values are relatively well-established, judicial burdens are limited. In the FJC time study, district judges reported time spent on asbestos cases that justified a case weight of 0.19.<sup>48</sup> In other words, in calculating a court’s weighted caseload, a single asbestos case counts as 19% of an average federal civil case. In comparison, a non-asbestos product liability case filed originally in federal court has a case weight of 1.74. Asbestos cases are weighted as less burdensome than social security cases (0.48) and prisoner civil rights cases filed against a non-U.S. defendant (0.28).

43. The terms of the settlement provided no compensation to class members who did not have symptoms of scheduled injuries, but class members became eligible for compensation whenever symptoms developed. See Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies* 51–52 (Federal Judicial Center 1998).

44. *Cimino*, 751 F. Supp. 649, 650.

45. *Id.* at 653.

46. *Id.* at 652.

47. Schwarzer, *Mass Tort Settlements*, *supra* note 29, at 839.

48. Federal Judicial Center, *New Case Weights For Computing Each District’s Weighted Filings Per Judgeship* (1993) (unpublished memorandum and table on file with the author).

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FJC and RAND studies of asbestos litigation in the 1980s concluded that most courts did not devote substantial resources to asbestos cases.<sup>49</sup> Of course, these data do not address the strong possibility that courts spent less time per case on asbestos litigation because they did not have the resources available to spend more time. The Judicial Panel on Multidistrict Litigation's referral of asbestos cases to the Eastern District of Pennsylvania presumably further reduced the burden per case.

#### *7. Dispersal of cases in federal and state courts*

A major source of problems in mass torts litigation is the absence of a single body of law that can be applied to cases that arise in different states. This issue has its roots in a federal system that has traditionally left to the states decisions about standards of conduct like those implicated in tort law. Mass torts based on products marketed nationally often are dispersed among most or all of the state and federal courts. As a practical matter, with limited exceptions, the lack of a single applicable law has limited the availability and effectiveness of aggregative treatment to state courts dealing with cases arising in that state or single federal districts.<sup>50</sup>

The absence of a uniform choice of law rule compounds the problem. A judge in a multidistrict proceeding, for example, may be unable as a practical matter to rule on the merits of pretrial motions to dismiss or motions for summary judgment because of the need to apply the conflict-of-law rules as well as the substantive rules of many states. In such circumstances, peripheral defendants whose cases arose in a number of states may have no escape from an often extensive and costly pretrial process.<sup>51</sup>

49. Deborah R. Hensler et al., *Asbestos In The Courts: The Challenge Of Mass Toxic Torts* 79 (1985) ("No court for which we have information devotes more than 1 percent of its judicial resources to asbestos case management even when asbestos cases account for a substantial portion of the civil caseload.") [hereinafter Hensler et al., *Asbestos in Courts*]; Thomas E. Willging, *Trends in Asbestos Litigation* 110 (Federal Judicial Center 1987) [hereinafter *Trends*] ("Most courts have not allocated resources sufficient to schedule asbestos cases for trial within the same time period as similar nonasbestos cases.").

50. Even those instances are not without choice-of-law problems because in some cases a state's choice of law rules may direct the forum court to apply the law of another state. See, e.g., Steven P. Zabel & Jeffrey A. Eyres, *Conflict-of-Law Issues in Multistate Product Liability Class Actions*, 19 *Hamline L. Rev.* 429 (1996) ("courts dealing with mass tort litigation have routinely recognized the need to apply the law of the individual class members' states to their claims").

51. Even if there were a single substantive law or a single choice-of-law rule, problems of consistency and cost might remain if that law were applied by judges and juries dispersed throughout the federal and state systems. Management of cases by one or a few judges is one of the criteria noted by Judge Weinstein. Weinstein, *Individual Justice*, *supra* note 18, at 131–32.

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Limits on the reach of the federal multidistrict litigation procedure have allowed plaintiffs' attorneys to avoid federal discovery controls by filing cases in state courts.<sup>52</sup> While most types of cases are dispersed throughout the legal system, in mass torts the dispersal is more problematic because the exact same conduct resulting in the same types of injuries may lead to different consequences in different jurisdictions. This, of course, is also a problem with ordinary litigation of similar cases with similar injuries.

#### *8. Outcome fairness and consistency*

Problems arise that can be characterized as falling short of achieving major goals of the tort system, which include compensating the injured and deterring and punishing wrongdoing. In commenting on mass torts class actions, Judge Schwarzer reminds us that a central problem is the difficulty of accomplishing the primary objective of the tort system, which is "to compensate injured parties in fair and rational ways."<sup>53</sup> A subsidiary element of that objective is to treat equivalent cases equivalently (which is not to say that all cases should be treated alike).<sup>54</sup>

Whether mass torts litigation involves more inconsistency in verdicts and settlements than ordinary litigation remains unclear. A study of asbestos litigation in the early 1980s concluded, without citing data, that the "variation in outcome among asbestos victims whose lives have been seriously disrupted is a complex problem."<sup>55</sup> A related study from the same period, however, analyzed data from closed asbestos files and revealed seemingly rational relationships between asbestos compensation and factors such as type of injury, occupational exposure to asbestos fibers, age, smoking, living or deceased status, and whether the case was settled or tried.<sup>56</sup> Variations across jurisdictions—a byproduct of federalism that is certainly not unique to mass torts—may account for the apparent inconsistencies.<sup>57</sup>

52. See Weinstein, *Ethical Dilemmas*, *supra* note 30, at 478–79.

53. See Schwarzer, *Mass Tort Settlements*, *supra* note 29, at 837.

54. Indeed, *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2236 (1997), stands for the proposition that courts need to provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected" by a mass tort class action settlement.

55. Hensler et al., *Asbestos in Courts*, *supra* note 49, at 113; *see also* Hensler & Peterson, *supra* note 2, at 963 ("outcomes are highly variable, often seeming to have little relationship to plaintiffs' injuries or defendants' culpability").

56. James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses 18–53* (1984).

57. *See id.* at 36–38, Table 2.18. *See also* Schwarzer, *Mass Tort Settlements*, *supra* note 29, at 838 ("multiple jury trials in numerous jurisdictions having different rules of law lead to inconsistent outcomes, complicating the evaluation of cases").

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Recent studies of variability in the tort system as a whole have concluded that in general jury awards are related to the magnitude of plaintiffs' losses and that juries exhibit no greater variability in their damage estimates than do experienced trial lawyers and claims adjusters.<sup>58</sup> Nevertheless, regional variations in jury awards, punitive damages,<sup>59</sup> and other means of compensation for similar injuries, if true, raise questions of outcome fairness and consistency that may be more acute in mass torts because the source of the injury is the same product or incident.

Deterrence and punishment may become problematic in the mass tort system. While there is some evidence that products liability claims outperform other approaches to regulating dangerous products,<sup>60</sup> there are plausible complaints that the volume of mass torts litigation results in multiple punitive damages awards that may exceed reasonable bounds for deterring or punishing defendants.<sup>61</sup>

#### *9. Procedural fairness*

As discussed above, problems of costs and delays raise issues of procedural fairness. In addition, when the dominant mode of case disposition in the civil justice system becomes a pretrial legal ruling or settlement, litigants do not generally experience any personal involvement with the process; they do not get their "day in court." In other contexts, research has indicated that litigants often perceive a process that involves appearance before a third party at a trial or arbitration hearing to be fairer than a process that is simply based on two-party settlement negotiations or judicial settlement conferences.<sup>62</sup> In mass

58. See Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 *Ariz. L. Rev.* 849, 884–85 (1998).

59. See, e.g., Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 *Wisc. L. Rev.* 15, 34, finding that "[f]ifty of the ninety-five asbestos [punitive damages] verdicts were assessed by Southern juries."

60. See George Eads & Peter Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation* (1985).

61. See Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 *Wisc. L. Rev.* 237, 285 ("Punitive damages can—and almost certainly do—have important economic effects, some of them socially desirable [such as hastening the withdrawal of hazardous products and deterring the withholding of reports to regulatory agencies] and others socially undesirable [such as limiting the availability of socially valuable products and encouraging use of hard-to-interpret warnings]."). See also Rustad, *supra* note 59, at 20–36 (data show that the overall incidence of punitive damages is low, that punitive damage awards in products liability cases are less frequent than in other types of litigation, and that the amounts awarded are directly related to the severity of plaintiffs' injuries).

62. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Soc'y Rev.* 953, 965–67 (1990)

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torts, the number of cases and their similarities to each other make it more likely that individual cases will be disposed of without trial or hearing, raising questions of procedural unfairness in terms of satisfying litigant interests in participating meaningfully in resolving their cases. Unfortunately, there are no empirical studies of mass torts litigants' procedural goals or needs and the extent to which the current system satisfies those aspirations.<sup>63</sup>

To the extent that aggregation of cases through class actions becomes the solution, the distance between attorneys and clients results in less client opportunity to participate in the litigation, whether through an individually retained plaintiffs' attorney or personally as a class member.<sup>64</sup> Some participants report that similar changes in relationships have occurred when individual law firms represent a large number of claimants whose cases are settled in a group.<sup>65</sup>

For all parties and the courts the burden of engaging in repetitive discovery, pretrial motions, and trials raises issues of procedural fairness. Policy makers and attorneys have failed to agree on acceptable procedures that balance defendants' rights to due process of law with plaintiffs' rights to meaningful access to the courts.<sup>66</sup> That failure itself raises questions of fundamental fairness. Delay in resolving the *Cimino* appeal illustrates this problem and implies a deep value conflict centered on mass torts litigation.<sup>67</sup>

#### 10. Latent diseases and future claimants

Mass torts litigation has brought to the surface a unique problem. Epidemiologists often are able to predict with reasonable scientific certainty that some number of individuals within a specified group will contract a disease because of a previous exposure to a product or substance. We do not know with certainty which individuals will contract the dis-

63. 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 (1995) ("it is time to bring plaintiffs into the dialogue on mass personal injury litigation") [hereinafter Hensler, *A Glass Half Full*]. For a view of traditional client participation in ordinary litigation, see generally Douglas Rosenthal, *Lawyer and Client: Who's In Charge?* 7 (1974).

64. See generally Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296 (1996).

65. See John D. Aldock & Richard M. Wyner, *The Use of Settlement Class Actions to Resolve Mass Tort Claims after Amchem Products, Inc. v. Windsor*, 33 Tort & Ins. L.J. 905, 909–10 (1998).

66. See, e.g., American Law Institute, *Complex Litigation Project* 19 (1993) ("The procedural fairness achieved by processing claims individually may sacrifice the fairness of reaching a just result in a timely fashion.").

67. The *Cimino* appeal was filed on May 3, 1993, and was decided on August 17, 1998. *Cimino v. Raymark*, 751 F. Supp. 649, 650 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (1998).

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ease and how many of those individuals will sue when their injuries become manifest.<sup>68</sup> Unlike the future automobile accident or assault and battery, the perpetrator of the future injury is known and likely has limited assets available to compensate victims. How to manage competing present and future claims to those assets raises complex problem involving prediction of claiming rates and financial planning to reserve funds for future claimants.

Traditional aggregative methods for resolving litigation resolution—such as through an opt-out class action or setting a time limit for filing a claim in bankruptcy—do not fit latent claims.<sup>69</sup> A major problem with future claims is the challenge of providing notice to those who are not yet aware that they are potential claimants.<sup>70</sup>

#### 11. Claiming rates

Social scientists have established that for traditional torts a small portion of those injured file suit to recover damages.<sup>71</sup> One social scientist concluded that “[o]ne of the most remarkable features of the tort system is how few plaintiffs there are” in relation to in-

68. See discussion *infra* notes 71–73.

69. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1354 (1995).

70. See Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 Cornell L. Rev. 858, 894–95 (1995) (“Unless claimants with unmanifested claims are absolutely protected against having to decide now whether to exclude themselves from a class action, the ultimate question for mass tort class actions is whether they can adequately identify and inform absent class members of their rights.”); Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs’ Due Process: Implications for Mass Tort Litigation*, 28 U.C. Davis L. Rev. 871 (1995) (analyzing the issue of plaintiffs’ due process in mandatory settlement class actions and concluding that mandatory class actions that provide damages without providing due process protection for plaintiffs may be constitutionally deficient); Ralph R. Mabe & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. Rev. 745, 785–86 (1993) (concluding that due process requirements do not prevent the discharge of future claims in bankruptcy, but the bankruptcy code “omits the roadmap”).

71. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & Soc’y Rev. 525, 544–45 (1981) (3.8% of tort grievances result in court filings; 0.8% of discrimination grievances resulted in court filings); Deborah R. Hensler et al., *Compensation for Accidental Injuries in the United States* 110 (1991) (“overall, about one injury in ten leads to an attempt to collect liability compensation. But about half of all those injured in motor vehicle accidents make some informal or formal attempt to collect from another party to the accident. In contrast, in non-work, non-motor-vehicle accidents, only three injuries out of 100 lead to liability claims.”); Patricia M. Danzon, *Medical Malpractice: Theory, Evidence, and Public Policy* 25 (1985) (“at most, 1 in 10 incidents of [medical] malpractice resulted in a claim . . . and at most 1 in 25 received compensation”).

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stances of negligent injury.<sup>72</sup> In mass torts litigation, however, the rates of filing claims appear to be much higher. This may flow from notice campaigns that are required by the aggregate treatment of such claims in bankruptcies or class actions. Higher rates may also flow from the incentives and opportunities that attorneys have to advertise and amass an inventory of claims.

In assessing whether higher claim rates are a problem, one needs to identify potential benefits as well. While higher claiming rates impose burdens on courts, defendants, and other plaintiffs, they may also represent a more complete form of justice. Aggregating mass torts claims may provide an opportunity to correct more systematically the harms that products have caused, to meet more consistently and completely the compensation goals of the tort system, and to calibrate the deterrent effect to the magnitude of the harm.<sup>73</sup>

#### *12. Limited, uncertain funding*

Linked to compensation of future claimants is the problem of identifying the assets that might be used to satisfy their claims. Standards have not been established to guide courts and parties in deciding how to allocate the assets of an ongoing business and protect the interests of current and future claimants. The alternative procedures invoked include Chapters 7 and 11 of the Bankruptcy Code and, if it passes constitutional muster in the *Ahearn* case, the mandatory limited fund class action under Federal Rule of Civil Procedure 23(b)(1)(B). Such devices for final national (or, sometimes, global) resolution of litigation were not designed for mass torts; each application to mass torts has been problematic. In the absence of clear legal standards, courts have often waited patiently for the parties to negotiate the amounts to be allocated to financing the on-going business and to compensating mass torts victims.

#### *13. No exit*

An elastic mass torts litigation based on latent claims has no natural termination. The lack of a suitable conclusion is a byproduct of the latency of the claims. A willing, even repentant, defendant cannot bring together all its liabilities, pay fair value, and terminate

72. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1183 (1992) (citing empirical studies of medical malpractice activity, general civil grievances and disputes, and actions by people with disabling injuries).

73. See David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. Rev. 210 (1996) [hereinafter Rosenberg, *Individual Justice*].

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the litigation. Even by seeking bankruptcy reorganization,<sup>74</sup> which most companies seem to want to avoid, corporate defendants have no dependable way of arranging for peace.

Avoiding the conflicts of interest identified in *Amchem* still leaves a residue of difficult, if not intractable, problems relating to notifying future claimants as well as unsettled questions relating to the authority of federal courts to enjoin litigation of related claims in state courts. Because of the magnitude of mass torts class settlements and the high degree of attorney control over relevant information, establishing judicial standards and procedures for reviewing class action settlements seems essential. Such standards and procedures would guide judges in exercising meaningful oversight of mass torts settlements.<sup>75</sup>

#### *14. Institutional limitations*

For the judiciary to address problems with mass torts litigation raises questions of the limits of its institutional powers. Substantive tort law was not designed to address latent mass torts. Congress has been reluctant to federalize products liability laws because they have traditionally been within the province of the states. Most of the problems we identified have substantive law overlays, particularly problems relating to choice of law, substantive liability and damage standards, bankruptcy mechanisms, and jurisdictional bases. Even adapting the multidistrict litigation statute to the needs of mass torts litigation will require congressional action. Modifying procedural rules will generally not suffice to resolve the major issues that have been raised. Beyond legislation, constitutional due process limits may lead the courts to exercise self-restraint in addressing potential solutions related, for example, to mandatory class actions or to binding future claimants in bankruptcy proceedings.

#### *F. Summary*

Commentators agree that mass torts litigation poses problems for our system of civil litigation and that such problems are of a far greater magnitude than problems posed by ordinary civil litigation. While there are limited empirical data to support that assessment, the vast numbers of cases generated under the mass torts rubric seems to have led many commentators to ignore the lack of systematically collected empirical information. Commentators present what is—at least when viewed in a composite form—a multidi-

74. See Mabey & Gavrin, *supra* note 70, at 749 (observing that the Manville reorganization did not discharge future claims, but channeled them into a trust because that was “the pragmatic solution to an intractable problem”)

75. See Schwarzer, *Mass Tort Settlements*, *supra* note 29, at 838, 843–44.

mensional mosaic of a complex set of problems. In counterpoint, several commentators paint a somewhat different picture—one of an ad hoc series of evolutionary actions that have created a system capable of coping in rational ways with the volume of cases undeniably associated with the mass torts phenomenon.

## **II. Proposals to address mass torts problems**

In Part II, we present and examine proposals that commentators have advanced for addressing the myriad problems posed. We examine three types of proposals:

- case-management approaches, which assume that current law, rules, and procedures apply;
- legislative approaches, which seek to change the substantive and procedural laws governing mass torts; and
- rule-making approaches, which are limited to the authority granted the judicial branch under the Rules Enabling Act.

Because the case-management approach supplies the techniques that support the evolutionary argument summarized at the end of Part I, we start by examining case-management proposals. We include discussion of legislative proposals related to state-federal cooperation and to bankruptcy because those discussions are closely related to case-management proposals discussed in this section.

### ***A. Case-management proposals***

#### ***1. Aggregation***

Aggregation—combining hundreds or even thousands of similar claims into a single unit for case management—is designed to address primarily problems of volume and accompanying issues of costs and delays. Tension arises between addressing those goals and arguably competing goals of ensuring procedural fairness to all parties.

The fundamental debate regarding case management of mass torts litigation has been over whether or not to aggregate cases for pretrial and trial or settlement purposes. Even the commonly held view that aggregation for discovery is desirable<sup>76</sup> seems to be open to question given recent experiences with the repetitive stress injury cases.<sup>77</sup>

76. For example, an articulate and vigorous opponent of aggregation for trial asserts that “joint discovery on common issues is desirable in most mass tort cases.” Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 782 (1985) [hereinafter Trangsrud, *Joinder Alternatives*].

77. See discussion *infra* notes 101–111.

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The consequences of aggregation can be to create a mass tort. To capsule a now-familiar metaphor, Professor McGovern has coined the mantra: “If you build a super-highway, there will be a traffic jam.”<sup>78</sup> Professor Siliciano, arguing that the mass torts phenomenon is a crisis of rhetoric, attributes the asbestos problems to a failure to apply the groundrules of the tort system, allowing unmeritorious claims to clog the new super-highway.<sup>79</sup> Whether there is a middle ground—a way of resolving numerous meritorious claims by dismissing those without merit—seems unclear.

The aggregation debate became crystallized in the *Cimino* litigation and in other cases that have followed the *Cimino* model. In that district-wide class action, Judge Robert Parker, with the consent of the plaintiffs, used stratified<sup>80</sup> statistical sampling and extrapolation from the sample to produce verdicts for a class of 2,298 claimants based on jury verdicts for 160 representative plaintiffs. The U.S. Court of Appeals for the Fifth Circuit reversed and held that the sampling and extrapolation procedure violated defendant Pittsburgh-Corning’s Seventh Amendment right to an individualized jury trial on actual damages to each plaintiff.<sup>81</sup> Before we examine that debate in depth, for background, we review materials related to less dramatic forms of aggregation.

#### a. Background

In the early years of asbestos litigation, when the term “mass torts” was still fresh, courts routinely consolidated asbestos litigation, generally under Federal Rule of Civil Procedure 42, for pretrial purposes, and, in some courts, for trial purposes as well.<sup>82</sup> Published in 1985, the Manual for Complex Litigation, Second<sup>83</sup> [MCL 2d] devoted a chapter to “Mass Disasters and Other Complex Torts Cases” in which the board of editors urged courts to assign related cases to the same judge<sup>84</sup> and observed that “[c]ases may frequently be consolidated for pretrial proceedings, and even for trial.”<sup>85</sup> Because of the Advisory Committee’s familiar caveat, courts were “reluctant to authorize class action treatment of personal injury claims,” but the authors of MCL 2d found the class action approach to be “not necessarily impermissible in all mass tort litigation.”<sup>86</sup> Empirical

78. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1840.

79. Siliciano, *supra* note 6, at 1010–11.

80. The sample is considered stratified because the court took separate samples from groups consisting of individuals with one of five distinct asbestos diseases.

81. *Cimino*, 151 F.3d 297, 322 (5th Cir. 1998).

82. See Thomas E. Willging, *Asbestos Case Management: Pretrial and Trial Procedures 15–17* (Federal Judicial Center 1985) [hereinafter *Asbestos Case Management*].

83. *Manual for Complex Litigation, Second* at 291–303, § 33.2 (Federal Judicial Center, West ed., 1985).

84. *Id.* at 293.

85. *Id.* at 297.

86. *Id.* at 298.

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studies of asbestos litigation confirmed that courts were following the invitation in the MCL 2d and aggregating cases into consolidations and, in a few instances, class actions.<sup>87</sup>

As the volume of mass torts litigation increased, class action treatment expanded. In 1991, the Judicial Conference's Ad Hoc Committee on Asbestos Litigation looked toward aggregative solutions to asbestos litigation, recommending that "Congress consider legislation to expressly authorize consolidation and collective trial of asbestos cases."<sup>88</sup> The report, which was adopted by the Judicial Conference in March 1991, expressly urged authorization for "class action . . . trials," noting that legislation would "obviate present objections to that procedure under Rule 23."<sup>89</sup>

The Ad Hoc Committee's report apparently contemplated using the class action-sampling-extrapolation approach that Judge Parker used in *Cimino v. Raymark*, despite referring to that approach as "the most radical solution."<sup>90</sup> The Judicial Conference, in adopting the Ad Hoc Committee's report, requested the Standing Committee on Rules of Practice and Procedure to "direct its Advisory Committee on Civil Rules to study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation."<sup>91</sup> The Advisory Committee's efforts in that regard are the direct antecedents of the creation of the Mass Torts Working Group.

In 1995, the Manual for Complex Litigation, Third noted that "courts have increasingly utilized class actions to avoid duplicative litigation in mass torts cases, although primarily in the context of settlement."<sup>92</sup> Coincidentally, about the time MCL 3d was published, mass torts class actions underwent a period of intense scrutiny and disfavor, the long-term effects of which remain to be seen. Several courts of appeals rejected class certification in mass torts contexts.<sup>93</sup> To a considerable extent, these decisions are grounded

87. See Trends, *supra* note 49, at 90–98; see also Hensler et al., Asbestos in Courts, *supra* note 49, at 52–67.

88. Ad Hoc Committee Report, *supra* note 2, at 36. This recommendation was a backup to the Ad Hoc Committee's plea for a national legislative asbestos compensation approach. Professor Robert Bone reports that the Ad Hoc Committee "recommended sampling in an earlier draft report," but did not include that explicit recommendation in its final report. Robert G. Bone, *Statistical Adjudication, Rights, Justice, and Utility in a World of Process Scarcity*, 46 Vand. L. Rev. 561, 565 (1993).

89. Ad Hoc Committee Report, *supra* note 2, at 36.

90. *Id.* at 21, 41.

91. *Id.* at 2, 37–39.

92. Manual for Complex Litigation, Third § 33.262 (Federal Judicial Center 1995) [hereinafter MCL 3d].

93. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996).

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in the serious difficulties associated with choosing substantive laws to be applied in a nationwide class action that spanned states with different choice of law and substantive law rules. In *Amchem Products, Inc. v. Windsor*,<sup>94</sup> the Supreme Court affirmed the Third Circuit's decision that a "sprawling" nationwide opt-out settlement class of present and future asbestos claimants failed to satisfy the predominance and adequacy of representation standards of Federal Rule of Civil Procedure 23 [Rule 23].

It is in this post-*Amchem* world that we examine questions of case management and aggregation as proposed solutions to mass torts problems. Other forms of aggregation, such as bankruptcy and Judicial Panel on Multidistrict Litigation (MDL Panel) consolidations will be discussed separately.

b. When and whether to aggregate?

Arguably the most important decisions in mass torts litigation involve whether to aggregate cases and, if so, when. Various commentators express varying opinions on whether and when and for what purposes cases should be aggregated. Opinions on the issue continue to evolve as the system gains experience with various types of mass torts. Early experience with asbestos litigation may have set a high mark for aggregation as individual courts generally decided to consolidate cases within their own districts and assign them to single judges.<sup>95</sup> Combined with the J.P.M.L.'s decision not to consolidate the cases on a national level, local consolidations of asbestos cases produced a system in which aggregation played a major role in the midst of a wide range of experimental case management.

While we need to discuss the asbestos experience, we should keep in mind that asbestos provides a poor model for policy makers to follow. Because of what we now recognize as its elasticity, asbestos was the first and most dispersed of the major mass torts. For that reason, it has provided the baseline mass torts experience for many judges, lawyers, and researchers. Yet, as many have observed, asbestos is a unique mass tort, one that has not been duplicated in the two or more decades of mass tort litigation. Not only is asbestos a mature mass tort, it approaches senility. Not only is it elastic, it may be endless.<sup>96</sup> Lessons

94. 521 U.S. 591 (1997).

95. See Trends, *supra* note 49, at 31–46.

96. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 605–06 (1997) [hereinafter McGovern, *Defensive Class Actions*] ("The asbestos litigation is highly elastic in that the reservoir of potential plaintiffs is virtually limitless and plaintiffs will emerge as long as damages can be obtained cost effectively . . . . There is no light at the end of the asbestos tunnel . . . .").

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about when and whether to aggregate other mass torts cases should come from elsewhere.<sup>97</sup>

Professor McGovern recommends that judges “adopt multiple strategies” for coping with the timing questions, “letting the marketplace of litigation play out in the early stages and using more comprehensive case-management techniques as the mass tort matures.”<sup>98</sup> Even when a case has been consolidated by the MDL Panel for pretrial discovery, the pretrial (transferee) judge retains the option of trying single cases rather than pursuing a global solution prematurely.<sup>99</sup>

J.P.M.L. consolidation for pretrial purposes itself involves aggregating federal cases and may confer mass tort status on case congregations that might otherwise be resolved in a disaggregated fashion. At a minimum, MDL consolidation means that all parties to the litigation will invest considerable resources in discovery and other pretrial activity, pitting organized and well-financed plaintiffs’ attorneys against organized and well-financed defendants’ attorneys.<sup>100</sup>

In the repetitive stress injury [RSI] cases (which ultimately focused on injuries allegedly caused by computer keyboards), defendants “vigorously opposed” MDL consolidation and the panel declined to transfer cases.<sup>101</sup> Individual trials in seven different jurisdictions resulted in defense verdicts or judgments. Those outcomes, according to one commentator who has been involved on the defense side of the litigation, led to a dramatic reduction in the rate of filing of new computer keyboard claims.<sup>102</sup> While the RSI story may not be finished, what was once compared to asbestos litigation and described as “the mass tort of the nineties”<sup>103</sup> seems to have paused far short of that mark.

The above is not to suggest that the approach in the computer keyboard-RSI cases should be applied across the board to all potential mass torts. The appearance of success,

97. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1836–37. (“These [asbestos] torts are unique and need not taint our understanding of other mass torts.”).

98. *Id.* at 1844. McGovern defines maturity as occurring when “there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in plaintiffs’ intentions.” *Id.* at 1843.

99. *See id.*

100. *See* Debra E. Pole, Effective Management of Mass Tort Litigation, ALI-ABA Course of Study 169, 172–74 (July 19, 1996).

101. George M. Newcombe, *RSI Defendants Fight for Due Process: “Mass Torts” Needn’t Always Be Massive*, 63 Def. Couns. J. 36, 39 (1996). The panel was “not persuaded . . . that the degree of common questions of fact among these actions rises to the level” required by section 1407. *In re* Repetitive Stress Injury Prods. Liab. Litig., No. 955, 1992 WL 403023 at \*1 (J.P.M.L. Nov. 27, 1992).

102. Newcombe, *supra* note 101, at 40.

103. Stanley J. Levy, *Repetitive Trauma: The Mass Tort of the Nineties*, in Practising Law Institute, Commercial Law and Practice Course Handbook Series, Sept. 6, 1995.

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especially in the early stages of a potential mass litigation, can be controlled by a defendant's careful choice of cases to litigate, settling the more meritorious ones and trying the rest.<sup>104</sup> The appearance that such cases do not have merit may prove to be deceptive, but one expects that if there are many meritorious cases, they will surface eventually. If there are enough meritorious cases, settlement of those cases can be expected to keep the litigation alive.

The repetitive stress injury cases also were unusual in the disparity of claims. Plaintiffs sought to consolidate a host of claims about computer terminals, cash registers, super-market workstations, stenographic machines, and computer "mouse" devices, manufactured by different defendants, used in different work settings, and allegedly causing a "diverse array" of ailments.<sup>105</sup> Resisting aggregation may be particularly apt when the litigation is so "sprawling."<sup>106</sup>

On the other hand, rejecting all forms of aggregation (including MDL consolidation) may deprive all litigants of the opportunity to save discovery costs. Many commentators assert that consolidation for pretrial purposes is generally a good idea for both sides of the litigation. For example, Debra Pole, an attorney representing defendants in mass torts litigation, asserts that "[c]entralization is the key for effective management of mass tort litigation" and that for defendants, "consolidation of cases for pre-trial matters may prove to be much less expensive than handling mass tort litigation pre-trial on an individual basis."<sup>107</sup> In the Bendectin litigation, after some initial plaintiffs' verdicts and equivocal regulatory actions led to increased filing, defendants sought MDL consolidation "to mitigate the litigation demands of multiple, geographically dispersed cases on the company and its counsel."<sup>108</sup>

McGovern observes that the "Judicial Panel on Multidistrict Litigation and analogous state entities locate potential mass torts early in their life cycle in order to consolidate pretrial discovery."<sup>109</sup> Yet, despite its familiarity and routine invocation, the decision to consolidate for pretrial purposes may be the crucial stage in defining a mass tort. The

104. See, e.g., Paul D. Rheingold, *The MER29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116, 138 (1968), cited in Richard L. Marcus & Edward F. Sherman, *Complex Litigation* 127 (3d ed. 1998) ("The defendant could and did select the cases it wanted tried. Good cases approaching trial were settled. . . . The success of these tactics is evident in verdicts for the defendants in the first three cases tried.")

105. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 371 (2d Cir. 1993).

106. *Amchem*, 117 S. Ct. at 2250.

107. Pole, *supra* note 100, at 171.

108. Green, *supra* note 25, at 164, cited in McGovern, *Centralization and Devolution*, *supra* note 18, at 2085–86.

109. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1844.

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alternative of initial case-by-case adjudication seems to have become submerged as the art of managing mass torts has evolved.<sup>110</sup> As Professor Resnik has commented, “the aggregation of civil cases . . . has moved from being the exceptional and specially justified event to the more ordinary and expected response whenever patterns of similar cases appear in federal courts.”<sup>111</sup>

In his continuing chronicles of evolving approaches to mass torts litigation, McGovern highlights the “devolution” model, which has reemerged in the 1990s. In that model, decision making regarding immature and elastic mass torts devolves in a decentralized manner to local non-MDL judges and to litigants themselves. Devolution counters the trend of the 1980s toward increasing aggregation.<sup>112</sup> In calling for multiple strategies, McGovern urges that the strategy of trying cases in the “one-riot, one-Ranger mode” needs to give way—at least in the early stages of a mass tort’s life cycle—to the “original concept of trying single cases even under the rubric of the MDL.”<sup>113</sup> The call is for selective use of all the options, depending on the characteristics of tort cases presented to the courts.

Generally, current statutes and rules provide little or no guidance about the timing of consolidation.<sup>114</sup> The American Law Institute’s (ALI) Complex Litigation Project proposes to change that situation in two ways. First, the project proposes standards to govern the consolidation of cases within the federal courts, including specific factors relating to the fairness of consolidation to the parties.<sup>115</sup> As to timing, one of the factors to be con-

110. For example, the MCL 3d assumes that there should be centralized management from the outset, deferring question of how trials should be handled. MCL 3d § 33.21 (“All related litigation pending in the same court . . . should ordinarily be assigned to the same judge, at least for pretrial management. . . . The court may determine that separate trials should be held of individual actions . . .”).

111. Judith Resnik, *From “Cases” to “Litigation,”* 54 *Law & Contemp. Probs.* 5, 6 (1991).

112. McGovern, *Centralization and Devolution*, *supra* note 18, at 2079–81.

113. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1844.

114. Aside from its reference to pretrial proceedings, the Multidistrict Litigation statute, 28 U.S.C. § 1407, gives no guidance on the timing of the decision. The panel sometimes denies consolidation because one or more of the cases are approaching trial. *See In re Asbestos & Asbestos Insulation Materials Prods. Liab. Litig.*, 431 F. Supp. 906, 909–10 (J.P.M.L. 1977). Likewise, Fed. R. Civ. P. 42 permits consolidation whenever “actions involving a common question of law or fact are pending before the court.” While Fed. R. Civ. P. 23(c)(1) directs a determination on class status “[a]s soon as practicable after commencement of an action brought as a class action,” its language does not limit the timing of a motion to convert an ordinary action into a class action.

115. American Law Institute, *supra* note 66, at section 3.01 (Standard for Consolidation).

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sidered is “the stages to which the actions already commenced have progressed.”<sup>116</sup> Second, the Project calls for the creation of a special Complex Litigation Panel to make the consolidation decisions.<sup>117</sup>

The MCL 3d cautions that “aggregation, whether through consolidation or class action treatment, may not be appropriate for some litigation.”<sup>118</sup> Judge Weinstein recommends that courts should evaluate the merits “at every phase of a litigation,” including the decision on whether or not to certify a class.<sup>119</sup> Others recommend that courts use summary judgment and other pretrial scrutiny of the merits to “weed out non-meritorious cases that often accompany a mass case.”<sup>120</sup> Presumably this level of screening would precede decisions on whether to aggregate or not.

Experimental social science research has shown that aggregating cases for trial purposes can have distinct effects on jury verdicts. Horowitz and Bordens systematically examined the effect of giving a jury information about the number of people affected by defendant’s alleged conduct. When informed that hundreds of individuals claimed injuries arising from the same exposure to toxic chemicals, “juries quite rationally concluded that when a great many people claimed injuries, the defendant was more likely to have been culpable [than if the jury were not so informed].”<sup>121</sup> Combining cases that involve separate incidents or even separate acts by different defendants, as in the original RSI litigation,<sup>122</sup> may disadvantage those defendants.

On the other hand, depriving juries of information about related cases by trying mass injury cases separately seems likely to affect case outcomes to the disadvantage of plaintiffs. The concept of a “case congregation,” defined as “a group of cases that . . . share common features, that are shaped by a common history, that are subject to shared con-

116. *Id.*

117. *Id.* § 3.02. For a discussion of those factors and a comparison with the prerequisites for certification of a class action, see Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. Rev. 879, 898–921.

118. MCL 3d, *supra* note 92, at section 33.26, citing *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993).

119. Weinstein, *Mass Tort Class Actions*, *supra* note 13, at 590 (1997); see also McNeil & Fancsali, *supra* note 7, at 517 (without determining the merits, courts should look beyond the pleadings and down the road of the litigation in deciding whether class certification is appropriate).

120. McNeil & Fancsali, *supra* note 7, at 504.

121. Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 *Judicature* 22, 27 (1989); see also Horowitz & Bordens, *supra* note 40, at 217–19.

122. See Newcombe, *supra* note 101, at 38.

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tingencies, and that lean into a common future”<sup>123</sup> may be helpful when deciding whether aggregating—and allowing juries to see the full context—is appropriate.

As noted above, the current state of the art of mass torts case management is based on the premise that “different judicial strategies should be used at different stages of the life cycle.”<sup>124</sup> Specifically, in the early stages, judges should employ a traditional approach, which is to “view each case discretely, thus ignoring the effects of cases on one another.”<sup>125</sup> At the latter stages, “once the full dimensions of the tort are recognized, a more activist model is appropriate.”<sup>126</sup>

Following the above approach, a judge would “learn all aspects of the litigation and develop a comprehensive management plan to resolve the cases in an orderly manner.”<sup>127</sup> This should occur only after the litigation has reached a level of maturity in which “a rough equilibrium of case values ensues as the cases become more routinized and the parties’ contentions become more defined.”<sup>128</sup>

Once a mass tort reaches maturity, Professor McGovern has outlined a four-step process for resolving mature mass torts. His proposal directly addresses defendants’ expressed need for a way to end the litigation and may also address ways of treating future claimants fairly. The steps are: (1) consolidating all cases of a single mature mass tort into one forum; (2) resolving all common issues in that forum; (3) collecting information concerning all injuries; and (4) developing a systematic process for resolving all remaining issues.<sup>129</sup>

While waiting for maturity before aggregating a mass tort appears to be the procedure advocated by the vast majority of commentators, there are dissenting views. Elizabeth Cabraser, an experienced plaintiffs’ class actions attorney, argues that the “immature tort” is an “immature concept.”<sup>130</sup> In her view, the danger lies in applying a purportedly rigorous, scientific-sounding concept such as that of “immature tort” before determining whether there is evidence that individual litigation and trials of the plaintiffs’ claims will

123. Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 *Hastings L. J.* 301, 308 (1992), quoting Marc Galanter, *Case Congregations and Their Careers*, 24 *Law & Soc’y Rev.* 371, 372 (1990).

124. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1841.

125. *Id.* at 1840.

126. *Id.* at 1842.

127. *Id.* at 1840.

128. *Id.* at 1843.

129. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 *B.U. L. Rev.* 659, 690–94 (1989).

130. Elizabeth J. Cabraser, *The Road Not Taken: Thoughts on the Fifth Circuit’s Decertification of the Castano Class*, SB24 ALI-ABA 433, 450 (1996).

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actually be cost-effective for the litigants and the court system. Further, Cabraser argues that there is no accepted objective standard as to how many trial outcomes would constitute maturity. The concept of the “immature tort” is largely unsupported, at least to date, by any widely accepted body of evidence or jurisprudential consensus.<sup>131</sup> Cabraser’s view seems compatible with Judge Weinstein’s view, stated above, that judges should take into account the merits of litigation before deciding whether or not to aggregate.<sup>132</sup>

At a more conceptual level, Professor David Shapiro argues for a class action model that views the class as the entity that drives a class action. Under this model, “it makes little sense to defer class certification of what appears to be a mass tort . . . until the requisite number of individual actions have been ground through the system.”<sup>133</sup> He poses an alternative that might retain many of the benefits of the maturity theory, that is, to certify a class provisionally, conduct discovery and perhaps bellwether trials, then revisit the certification issue.<sup>134</sup> Similarly, as we will discuss below, Professor David Rosenberg would aggregate all mass exposure cases and provide compensation to all who develop injuries arising from the exposure.<sup>135</sup> Rosenberg’s approach makes the question of maturity less relevant, if not moot.

Implementing the majority view on the timing of aggregation seems to call for substantial judicial restraint in the face of pressures to manage mass torts collectively. A challenge is to focus on individual aspects of immature mass torts cases when large groups of such cases are filed together. The culture of mass torts case management that developed in the past two decades created institutional patterns that encourage and support early and active case management.

#### c. Aggregation—settlement classes after *Amchem*

As noted above, in *Amchem Products, Inc. v. Windsor*<sup>136</sup> the Supreme Court affirmed the Third Circuit Court of Appeals’ rejection of a proposed nationwide settlement class action involving hundreds of thousands of class members and twenty defendant asbestos manufacturers who constituted the Center for Claims Resolution. In an opinion by Justice Ginsburg, the Court observed that the proposed class was “sprawling” and ruled that its common elements failed to meet the predominance requirement of Fed. R. Civ. P. 23(b)(3).<sup>137</sup> The Court also held that the class did not meet Fed. R. Civ. P. 23(a)(4)’s

131. *Id.*

132. See discussion *supra* note 119.

133. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 935 (1998). For further discussion of Professor Shapiro’s model, see text *infra* notes 614–22 and 673–75.

134. *Id.* at 935–36.

135. See discussion *infra* notes 185–98.

136. See discussion *supra* notes 93–94.

137. *Amchem*, 117 S. Ct. at 2250.

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adequacy of representation requirement because the interests of some class members and representatives conflicted with interests of other members and representatives, especially those of future claimants.<sup>138</sup> The Court also expressed concern about—but did not rule on—the difficulties of providing adequate notice to future claimants who might not know that they were exposed to asbestos dust or injured by it.<sup>139</sup>

In a set of case studies prepared for the Federal Judicial Center, Professor Jay Tidmarsh extracted the following three propositions from the *Amchem* decision:<sup>140</sup>

1. “class actions can sometimes be used to resolve mass tort controversies;”<sup>141</sup>
2. “a settlement class action . . . [in the mass tort context] must meet most but not all of the requirements of litigation class actions, such as fairness, predominance of common issues, and adequacy of representation, but a court may take the settlement into account in determining whether a class action is a superior way to adjudicate the controversy;”<sup>142</sup> and
3. “the decision to certify a settlement class action in *Georgine* [*Amchem*] was erroneous” because it failed to satisfy the adequacy of representation requirement of Rule 23 (a) (1) and the predominance of common issues requirement of Rule 23(b) (3).<sup>143</sup>

Other commentators, including a number of judges, have made similar points. Case law after *Amchem* has cautiously continued to permit the class action device to be used to settle mass torts and fraud cases. Attorneys John Aldock and Richard Wyner, who both represented the Center for Claims Resolution in *Amchem*, conclude that the Court’s decision “is merely a call for caution, and not an invalidation of settlement class actions.”<sup>144</sup> District Judge Alicemarie Stotler, then Chair of the Standing Committee on Rules, said “if there was one word to distill the result of the *Amchem* decision . . . it would probably be highlighted in yellow, all caps, bold, and italicized, saying ‘CAUTION.’”<sup>145</sup> Judge Edward Becker, author of the Third Circuit opinion that was affirmed in *Amchem*, concluded that “class actions are or should be alive and well, but not everything after *Amchem* is going to survive.”<sup>146</sup>

138. *Id.* at 2251.

139. *Id.* at 2252.

140. Tidmarsh, *supra* note 43.

141. *Id.* at 25.

142. *Id.* at 26–27.

143. *Id.* at 27–29.

144. Aldock & Wyner, *supra* note 65, at 920.

145. Stephen A. Saltzburg (moderator), *The Future of Class Actions in Mass Tort Cases: A Roundtable Discussion*, 66 *Fordham L. Rev.* 1657, 1662 (1998).

146. *Id.* at 1690.

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Commentators seem generally in accord that the central limits of *Amchem* seem to be cohesiveness, adequacy of representation, and notice to future claimants. We address them in that order.

Aldock and Wyner observe that while Justice Ginsburg said that “the fact of settlement is relevant and eliminates any need to inquire as to manageability,” she also indicated that “other, unnamed Rule 23 criteria warranted undiluted or even heightened scrutiny—presumably, the criteria that relate to the ‘cohesiveness’ of the class.”<sup>147</sup> Judge Becker succinctly noted a similar dichotomy in the Court’s analysis of manageability: “I think sprawling classes are done.”<sup>148</sup> Indicia of sprawl in *Amchem* were the wide range of differences in the asbestos products, claimants’ exposures to asbestos, medical histories, severity of injuries, and smoking history.<sup>149</sup> Cases with similar disparities in the products involved, levels of exposure, severity of injuries, and other contributing factors should be carefully scrutinized under the *Amchem* standard.

Likewise, Aldock and Wyner conclude that settlement classes can be crafted that will satisfy the adequate representation prong of *Amchem*. They assert that a “prudent reading” of the *Amchem* Court’s holding “would suggest that subclasses, with separate representatives and counsel, should be established where a strong case can be made that groups of class members have conflicting settlement goals.”<sup>150</sup> Other commentators concur.<sup>151</sup> The call for subclasses may also be necessary to address what might otherwise be intractable choice-of-law problems in nationwide mass torts class actions.<sup>152</sup>

147. Aldock & Wyner, *supra* note 65, at 913.

148. Saltzburg, *supra* note 145, at 1680. Judge Becker saw the opinion’s statement that “[s]ettlement may be taken into account” as evidence of a compromise “because it is one line, unexplained” and “she gives it with one hand, she takes it away with the other.” *Id.* at 1673. On the cohesiveness point, see also Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 Am. J. Comp. L. 675, 687 (1997) (“the Court found that the ‘sprawling class’ of future asbestos claimants, some of whom suffered present injuries and some of whom were only exposed, did not satisfy Rule 23 requirements”).

149. *Amchem*, 117 S. Ct. at 2250.

150. Aldock & Wyner, *supra* note 65, at 914.

151. See Saltzburg, *supra* note 145, at 1681–82 (Judge Weinstein recounts his experience in the Manville case in which the first settlement was “properly reversed” for lack of subclasses and then resettled “on a different basis”); Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Asbestos Mass Tort Litigation*, 33 Tort & Ins. L. J. 127 n.95 (1997) (“The Supreme Court’s pronouncement on subclasses is a procedural hurdle rather than a substantive obstacle in future class actions.”).

152. See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 584–87 (1996); American Law Institute, *supra* note 66, at section 6.01(e) (Statutory Recommendations and Analysis). Professor Kramer also notes that using statewide class actions may be a better approach to consolidating dispersed mass tort cases. See also discussion *infra* notes 509–525.

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Before *Amchem* was decided, Professor Roger Cramton wrote that “[a]dequate representation of a huge class of future tort claimants is possible, if at all, only if the lawyers negotiating for the class are representative of all the major divisions and groups within the class.”<sup>153</sup> He suggested two ways of doing so: the trial judge could either “designate the lawyers for the class, giving careful consideration to the differing interests of various class members” or “appoint lawyers for identifiable subclasses to supplement the class counsel.”<sup>154</sup> Those suggestions seem particularly apt after *Amchem*.

The *Amchem* Court articulated concerns about “the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous” as the *Amchem* class.<sup>155</sup> Commentators on the notice issue have expressed caution about whether or not the Court’s concerns could be addressed satisfactorily. Cramton finds it “difficult or impossible to give . . . future claimants [who do not have a present awareness of injury or who have no current legal claim] the required notice of the class action and opportunity to opt out that the due process clauses . . . require.”<sup>156</sup> Providing such class members a “back-end opt-out,” as in the heart valve and breast implant litigation, would be an alternative way to provide due process.<sup>157</sup>

Similarly, Burbank and Silberman see the notice procedure used in *Amchem*, with its “heavy reliance on media announcements,” to have tested “the outer limits of due process, let alone of Rule 23.”<sup>158</sup> In their opinion, approval of such notice “may require renewed attention to other interests at the expense of actual notice.”<sup>159</sup>

The lawyers are more optimistic that notice issues can be addressed. Aldock and Wyner rely on historical tests of notice—that it only need be “reasonably calculated” to achieve actual notice and that it be compared to other customary and feasible substitutes.<sup>160</sup>

153. Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 Cornell L. Rev. 811, 828 (1995).

154. *Id.*

155. *Amchem*, 117 S. Ct. at 2252.

156. Cramton, *supra* note 153, at 835–36.

157. *Id.* at 836. A back-end opt-out permits the class member to make the decision about opting out after an injury has become evident, rather than at the time of the class certification or settlement approval.

158. Burbank & Silberman, *supra* note 148, at 687.

159. *Id.*

160. Aldock & Wyner, *supra* note 144, at 920.

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Several commentators conclude that a major effect of *Amchem* will be to drive settlement class actions into state courts.<sup>161</sup> Elizabeth Cabraser predicts that the “trend toward the litigation and settlement of nationwide personal and non-personal injury product claims in state, rather than in federal courts, has likely been accelerated by the near confluence of *Amchem* and the Supreme Court’s affirmation of state court jurisdiction to resolve nationwide class claims (including exclusively federal claims).”<sup>162</sup>

After *Amchem*, lower courts have continued to approve class action settlements. In two of the most important mass torts settlement class actions, Rule 23(b)(1)(B) “limited fund” classes were involved. In what is commonly known as the *Ahearn* litigation,<sup>163</sup> the court of appeals reaffirmed its decision to uphold the district court’s approval of a settlement involving a single asbestos defendant. In addition to distinguishing *Amchem* on the grounds that common interests in a limited fund predominate, the court of appeals noted that decisions about allocating the fund among class members were not made under the settlement but were assigned to the post-settlement claims administration process. Thus, “all members of the future claimant class are treated alike.”<sup>164</sup> The Supreme Court granted certiorari, and the mass torts world awaits the Court’s guidance.

In the orthopedic bone screw litigation,<sup>165</sup> Judge Louis Bechtle approved a limited fund settlement with a single defendant, Acromed Corporation. As was the case in *Ahearn*, the bone screw settlement was not “sprawling” and all claimants were treated equally, leaving individual damage allocation to a post-approval claims administration process. Unlike both *Ahearn* and *Amchem*, there were no future claimants in the bone screw litigation; all claimants were likely to know soon after surgery whether they had a claim.<sup>166</sup>

161. See Saltzburg, *supra* note 145, at 1663 (Melvyn Weiss, an attorney specializing in plaintiffs’ class actions, predicted “there will be more cases filed in the state courts . . . the Court has opened the door to defendants to get global relief in a state court case”); Cabraser, *supra* note 130, at 19–21 (*Amchem* accelerates the trend toward nationwide class actions in state courts).

162. Cabraser, *supra* note 130, at 19, citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

163. *In re Asbestos Litig.*, 134 F.3d 668 (5th Cir.), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

164. *Id.* at 670.

165. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997). Professor Elizabeth Gibson is preparing a detailed case study of that litigation for the benefit of the Mass Tort Working Group.

166. *Id.* at 173 (“Individuals who have undergone this type of procedure know that the surgery has occurred.”).

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Outside the mass torts context, consumer fraud and other settlement class actions continue to be approved after *Amchem*.<sup>167</sup> On the other hand, an equal number of settlement class actions appear to have been rejected during the first year of the post-*Amchem* era.<sup>168</sup>

While *Amchem* has provided a roadmap for mass torts settlement classes, the question remains as to whether such settlements should continue to be proposed and approved and under what circumstances. The debate that preceded the *Amchem* decision was vigorous, even vituperative, and summarizing it exceeds our current needs.<sup>169</sup> Commentators attacked the settlement class format as inviting collusion and providing incentives for a “reverse auction” in which defendants would sell *res judicata* to the lowest bidder.<sup>170</sup> After *Amchem*, we can expect that debate about settlement class actions to continue.

In papers presented before *Amchem* and published shortly after, Professor McGovern reviews the arguments for and against settlement class actions, from the left, the right, the courts, and the pragmatists. He leaves us with this question: “whether the mass tort phenomenon has created such burdens on our system that tinkering, radical solutions, or inaction are the warranted solutions.”<sup>171</sup>

Professor John Leubsdorf rejects McGovern’s suggestion that parties could consent to class settlements that would benefit both sides. On the one hand he argues that in the case of asbestos such consent appears to have been coerced by the refusal of the MDL judge to set federal cases for trial.<sup>172</sup> On the other hand, he argues that the pragmatic justification of using settlement classes to stem the flow of an unlimited supply of asbestos cases could better be answered by either better judicial screening or by consigning the tortfeasors to pay or go into bankruptcy.<sup>173</sup>

167. See Elizabeth Cabraser, *Trends and Developments in Mass Torts and Class Actions in Year One of the Post-Amchem Era* 7–11, ALI-ABA Course of Study (Aug. 19–21, 1998). After the above article was written, the Third Circuit approved a settlement class resolution of a major consumer fraud case. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998).

168. See Cabraser, *supra* note 167.

169. See generally Symposium, *Mass Torts: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995).

170. See generally Coffee, *supra* note 69; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995).

171. McGovern, *Defensive Class Actions*, *supra* note 96, at 614.

172. John Leubsdorf, *Class Actions at the Cloverleaf*, 39 Ariz. L. Rev. 453, 459 (1997), citing McGovern, *Defensive Class Actions*, *supra* note 96, at 612.

173. Leubsdorf, *supra* note 172, at 460.

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#### d. Litigation class actions after *Amchem*

Despite *Amchem* and the host of court of appeals decisions rejecting litigation class actions prior to the *Amchem* decision,<sup>174</sup> federal courts have recently certified several mass torts litigation class actions. In one mass exposure case, a district judge certified a class that he had previously decertified because of an adverse circuit ruling in another mass exposure case. His opinion carefully analyzed the proposed classes, certified subclasses for medical monitoring, negligence, and strict liability claims, and rejected a subclass for punitive damages.<sup>175</sup> Where differing laws of various states might produce different results, the court created subclasses of the major groups of state laws.

In another mass exposure case, this one also post-*Amchem*, the district judge conditionally certified a medical monitoring class and two property damages classes that asserted claims that defendant's release of radioactive and other hazardous materials increased plaintiffs' risk of contracting serious latent diseases, such as cancer, and contaminated their property.<sup>176</sup>

Not surprisingly, given the additional scrutiny called for by *Amchem*, a number of courts have refused to certify mass torts class actions or have decertified them since the Supreme Court's decision.<sup>177</sup> All in all, it seems that courts are likely to continue to use class actions, including settlement class actions, in mass torts litigation on a highly selective case-by-case basis.

#### e. Judicial role in reviewing mass torts class settlements

*Amchem* dealt primarily with standards for certifying a settlement class. While the Court held that a finding that a settlement was fair was no substitute for findings that the putative class met the standards set by Rule 23(a) and 23(b)(3),<sup>178</sup> the Court did not reach the question of whether the lower court's findings of fact regarding the merits of the settlement could be upheld.<sup>179</sup>

Several commentators, including two district judges, have proposed guidelines that may help guide judges in reviewing class action settlements. Judge William Schwarzer

174. See *supra* notes 163–68.

175. *In re* Teletronics Pacing Sys., 172 F.R.D. 271 (S.D. Ohio 1997) (class of implantees with allegedly defective lead “J” wires in their pacemakers).

176. *O'Connor v. Boeing N. Am., Inc.*, No. 97-1554 (C.D. Cal. order re class certification filed July 13, 1998).

177. See Aldock & Wyner, *supra* note 65, at 915–16.

178. *Amchem*, 117 S. Ct. at 2248–49.

179. For the district court's extensive review of the fairness of the settlement, spanning 18 days and hearing from 25 witnesses, see *Georgene v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994); see also Tidmarsh, *supra* note 43, at 46–58.

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proposes a list of eleven factors for a court to consider under Rule 23(e), including:

- “whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;”
- “whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;” and
- “whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members.”<sup>180</sup>

Following the *Amchem* ruling, Judge Manuel Real of the Central District of California urged that judges “know the details of how a settlement has been reached,” which “may require consultation with independent experts—available under Rule 706 of the Federal Rules of Evidence—who have knowledge of the business or industry that gave rise to the injury or damages.”<sup>181</sup> Courts also need to scrutinize the ability of defendants to “fulfill the obligations undertaken either in terms of money, action, or inaction.”<sup>182</sup> Finally, “[t]rial judges should actively oversee the settlement process and should try to accomplish the following:

- “Ensure absent class members are properly represented, notified, and accorded due process;
- “Prevent collusion between counsel for the class and defendant during the settlement process;
- “Evaluate the effects of res judicata and collateral estoppel on the proposed settlement and record objections to settlement on the record; [and]
- “Assess fairness and reasonableness of the settlement to all class members, and make findings as to the value to each individual plaintiff.”<sup>183</sup>

Other commentators have provided discussion of principles to guide judges in reviewing class settlements.<sup>184</sup>

180. Schwarzer, *Mass Tort Settlements*, *supra* note 29, at 837, 843–44. For further discussion in the context of rule-making proposals see text *infra* notes 660–664.

181. Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Torts, and Settlement*, 31 *Loy. L.A. L. Rev.* 437, 448–49 (1998).

182. *Id.* at 449.

183. *Id.*

184. See generally, e.g., Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 *Cornell L. Rev.* 1159 (1995); see also Cramton, *supra* note 153.

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#### f. Aggregation proposals

In this section we discuss two types of aggregation that are controversial: collectivization of claims in risk-based mass exposure torts and statistical sampling to calculate individual damages in a class action trial. Some commentators assert that statistical sampling is clearly unconstitutional and at least one court of appeals has so held regarding one particular use of statistical sampling in asbestos litigation. Collectivization is equally controversial. Why should we even discuss these radical proposals when they seem to be either academic or moot? Our main reason for discussing them at some length is that the concepts underlying these proposals seem to have helped shape private settlements in mass torts litigation. Also, these concepts arguably have influenced and may continue to influence the development of the common law on questions of mass exposure. Both the shaping of settlements and the underlying common law regarding aggregate treatment of risk-based behavior have obvious implications for managing mass torts litigation.

##### *i. Mass exposure in risk-based torts*

A leading proponent of aggregation of certain mass torts claims—he calls it collectivization—is Professor David Rosenberg.<sup>185</sup> One knowledgeable commentator remarked that “the most striking feature of his model is the extent to which common-law courts have already incorporated its main elements—class actions, proportional liability, damage scheduling, averaged judgments, insurance-fund judgments, fee- and cost-shifting arrangements—into the current mass tort system.”<sup>186</sup>

Rosenberg’s view of the benefits of collective treatment of “mass exposure” or “risk-based” cases (i.e., cases in which individuals have been exposed to a product or substances that increased their risk of incurring harm in the future) draws from substantive tort law policies of deterrence and compensation. In brief, he argues that collective treatment of such cases fully achieves both deterrence and compensation goals.

To illustrate the concepts that Rosenberg addresses, let us sketch out a concrete example. In the Bjork-Shiley heart valve litigation, plaintiffs as a class alleged that they had

185. See generally, Rosenberg, *Individual Justice*, *supra* note 73; see also David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 Harv. L. Rev. 849 (1984) (proposing a “public law” view—that is, one that enhances deterrence as well as compensation goals—that mass exposure cases should be allowed to proceed as class actions and that causation should be determined based on the proportion of fault attributable to manufacturers of toxic agents and also proposing remedies such as damage scheduling and insurance-type judgments).

186. Schuck, *supra* note 10, at 981. For example, Schuck finds that the “global settlements in *Georgine* and the silicone gel breast implant litigation include damage schedules which are, in effect, insurance-fund judgments for future claims.” *Id.* at 981–82.

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been exposed to an elevated risk that their heart valves might fail without warning. Although consensual (at least in the sense that counsel for the class and counsel for defendant agreed), the settlement in that case shows how collective adjudication of a mass exposure case might operate. Among other remedies, the settlement provided a standing offer to pay any class member whose valve fractured between \$500,000 and \$2,000,000, depending on the claimant's age and income.<sup>187</sup> This standing offer to settle future claims operated like an insurance policy.

Rosenberg asserts that collectively providing the equivalent of insurance to those who suffer harm as a result of the mass exposure fully satisfies compensation goals. In his words, "the insurance model fully justifies class action settlements that trade fear of cancer and other risk-based mental distress claims for corresponding increases in scheduled payments to compensate for the accrued ultimate injury."<sup>188</sup> As in the heart valve settlement, the damage schedule provides fair compensation in the individual case by taking account of the severity of injuries. Those who do not incur injuries are not compensated. Fear of harm is mitigated by the insurance features, which mirror an economic institution society has created to deal with fear of injury or death. Insurance is a method of compensation that rational claimants would agree to before knowing the extent of any injuries they might incur.<sup>189</sup>

Rosenberg posits that "[o]ptimal deterrence is achieved by threatening the defendant with the aggregate, average loss (pecuniary and nonpecuniary) attributable to its tortious conduct."<sup>190</sup> Where a defendant knowingly increases a toxic-related risk, deterrence goals can only be met by aggregating claims based on the proportion of the risk attributable to defendant's conduct. Indeed, Rosenberg asserts, collective treatment of damages so com-

187. See *Bowling v. Pfizer, Inc.* 143 F.R.D. 141 (S.D. Ohio 1992), *affirmed*, 103 F.3d 128 (6th Cir. 1996), *cert. denied sub nom. Ridgeway v. Pfizer, Inc.*, 118 S. Ct. 263 (1997). Plaintiffs could reject the settlement offer and proceed to arbitration or litigation, in which case they would be subject to all defenses. The class action settlement also provided a modest payment to recipients to address the fear of failure, earmarked funds to be used for research to improve the ability to identify and remove defective valves, and permitted and paid for an operation to remove valves in limited circumstances. The court approved an opt-out class settlement. See Tidmarsh, *supra* note 43, at 33–45 for a description and analysis of the settlement. Tidmarsh characterized the litigation as "relatively immature." *Id.* at 34.

188. Rosenberg, *Individual Justice*, *supra* note 73, at 245.

189. See *id.* at 245–47. Professor Resnik makes the related point that aggregative procedures are more likely to provide compensation to a fuller range of the injured than is case-by-case litigation. See Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. Davis L. Rev. 835, 843–44 (1997) [hereinafter, Resnik, *Litigating and Settling*].

190. Rosenberg, *Individual Justice*, *supra* note 73, at 239.

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pletely accomplishes deterrence goals that punitive damages become superfluous.<sup>191</sup> Collectivization and individual compensation values might possibly conflict in other contexts, but Rosenberg's analysis of the tort system's deterrence and compensation functions shows such clashes do not occur in his proposed way of responding to mass exposure torts.

According to Rosenberg, collective litigation adds objectivity to the legal process. Tort concepts such as negligence, failure to warn, and strict liability are premised on notions of objective reasonableness that may get lost in the subjectivity of examining a single plaintiff's story in individual litigation. For example, a failure to warn claim can get focused on what a particular plaintiff knows about the dangers of a product, in contrast to what a typical user might know. Aggregating claims encourages plaintiffs' and defendants' to direct their resources toward providing objective proof applicable to the aggregate.<sup>192</sup>

All of the above benefits, Rosenberg asserts, outweigh individuals' interests in participating in the litigation or having their day in court. He asserts, provocatively, that plaintiffs "are never made better off by being vested with a property right . . . to an inefficient day in court, to personal control over their claims, and to other anticollectivist procedures."<sup>193</sup> He argues that his "hypothesis is confirmed by empirical evidence of the high rate of purchase of insurance with subrogation, and of settlement of most civil litigation—settlements based on patterns of averaged liability and compensation values derived from a few fully tried cases."<sup>194</sup> In the subrogation and settlement contexts, individuals bargain away their opportunity to present their own claims to a court in exchange for a fixed and certain payment.

Rosenberg recognizes that procedural values relating to individual participation in and control of litigation serve important functions in certain contexts ("individual justice values"). He argues, however, that such values have no place when, because of collective treatment, claims—such as many individual's fear of cancer claims—gain access to the courts that they would not have otherwise, usually because of the limited amount at

191. *Id.* at 242.

192. *See id.* at 248–52. Judge Weinstein makes the related point that "consolidation may be necessary as a resource-pooling device to initiate and fund scientific research needed to determine liability." Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *Ohio St. J. on Disp. Resol.* 241, 268 (1996) [hereinafter Weinstein, *Privatization of Justice*].

193. Rosenberg, *Individual Justice*, *supra* note 73, at 256–57.

194. *Id.* at 257.

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stake.<sup>195</sup> Similarly, there can be no dispute about the value of collectivization when cost savings make all claimants better off than they would have been in separate litigation or when a defendant's limited assets must be identified, preserved, and rationed among claims that exceed those assets.<sup>196</sup> The frequency with which collectivization's cost savings make all claimants better off, even those with injuries likely to result in high jury verdicts, seems an open question.

Rosenberg's proposal focuses on a subset of mass torts, those in which there has been exposure to a hazardous product or condition that creates a risk of future, latent injuries. Such a mass exposure case may or may not be classified as an immature mass tort, depending on the minimum latency period and the timing of the litigation. If injuries have occurred and claims have been presented, collective treatment would be directed primarily at future claims, with prior cases having established values from which to determine the collective future claims. If the tort is immature, however, practical difficulties of estimating damages and apportioning risks have to be addressed.

Elsewhere, Rosenberg argues for applying the collective justice model to all mass torts, without invoking what he sees as a slippery and indeterminate standard of maturity.<sup>197</sup> Attempting to apply a maturity threshold hinders the operation of deterrence in cases that may not warrant the investment necessary to surpass that threshold.<sup>198</sup> On the positive side, using collective approaches at the outset allows for a fair test of the merits, one in which each side has incentives to invest the resources needed to uncover and present its best evidence on the merits.<sup>199</sup>

195. *See id.* at 237. Rosenberg's assumption seems to be that class members in such cases do not have an expectation of individual participation and control beyond the right to object to a settlement or opt out of a class.

196. *Id.*

197. David Rosenberg, *Comment: Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 707–09 (1989).

198. *See id.* at 710. *See supra* notes 128–35 for a discussion of maturity.

199. *See id.* at 708–10. Another commentator has advanced a proposal similar to Rosenberg's. This proposal would allow tort law recovery for the increased risk of contracting a harmful disease, allowing the plaintiff to enter the judicial system upon wrongful exposure to a harmful product rather than after the onset of the disease. Parent's theory is that all who have been put at risk against their will deserve to be compensated. Steven J. Parent, *Comment: Judicial Creativity in Dealing with Mass Torts in Bankruptcy*, 13 Geo. Mason U. L. Rev. 381, 407–08 (1990). Similar proposals for altering causation rules are discussed *infra* notes 541–554.

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*ii. Statistical sampling in mature mass torts*

Another aggregation approach has been applied to mature mass torts. Based on Judge Robert Parker's handling of the *Cimino* asbestos litigation, Professors Michael Saks and Peter Blanck present a model for aggregation as an integral component of mass torts trials, focusing on the assessment of damages. As noted above, this model was implicitly endorsed by the Ad Hoc Committee on Asbestos Litigation.<sup>200</sup> In *Cimino*, Judge Parker certified a class of 3,031 plaintiffs, all of whom had pending asbestos claims in the Eastern District of Texas. Settlements and dismissals reduced the class to 2,298 claims.<sup>201</sup> Five defendants that manufactured asbestos products remained in the case at the time of trial.

Judge Parker conducted trials of these cases in three phases. In Phase I, a jury resolved all the issues that were common to the plaintiffs in the litigation, using procedures that Judge Parker had created and applied—and, most importantly, the court of appeals had approved—in *Jenkins v. Raymark*.<sup>202</sup> The issues were whether the asbestos products were defective and unreasonably dangerous, whether the warnings were adequate, and whether the state of the art or fiber type defenses were viable.<sup>203</sup> The jury also considered the issue of punitive damages and returned its Phase 1 verdict after about seven weeks of trial.<sup>204</sup> In addition to finding defective products, the jury found all five defendants to be grossly negligent and, in response to a special interrogatory, found punitive damages multipliers ranging, for the five defendants, from \$1.50 to \$3.00 for each \$1.00 of actual damages.

Phase II was designed for another jury to establish levels of exposure for various worksites and crafts for defendants, including those defendants who settled, and to apportion percentages of causation among the defendants. As it turned out, defendants stipulated to findings on all of the issues in Phase II.<sup>205</sup>

Phase III dealt with damages. The court divided the cases into five disease categories based on plaintiffs' injury claims and selected a random sample of cases from each disease category. The categories, total numbers, and sample sizes (in parentheses) were: mesothelioma-32 (15); lung cancer-186 (25); other cancer-58 (20); asbestosis 1,050 (50), and pleural disease-972 (50).<sup>206</sup> Two new juries were impaneled and they sat together for five days to hear general medical testimony. They then sat separately and heard testimony, group-by-group, on cases from each of the five injury groups and returned separate dam-

200. *Supra* notes 88-89.

201. *Cimino*, 751 F. Supp. at 652-53.

202. 782 F.2d 468 (5th Cir. 1986).

203. *Cimino*, 751 F. Supp. at 653.

204. *See id.*

205. *See id.* at 653-54.

206. *See id.*

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age verdicts for all the cases from each group over a period of approximately three months.<sup>207</sup> The juries considered the groups in descending order of severity, starting with the mesothelioma cases.<sup>208</sup> Judge Parker reviewed the verdicts and ordered remittiturs in thirty-four pulmonary and pleural cases and in one mesothelioma case.<sup>209</sup> According to Professor Mullenix, in a case study of *Cimino*, Judge Parker “used almost every known technique for aiding jury comprehension, including extensive pretrial and posttrial jury instructions, jury notebooks, notetaking, interim summations, and witness photographs to refresh the jury’s memory.”<sup>210</sup>

Based on statistical evidence presented at a post-trial hearing, Judge Parker found that the sample cases were in fact representative of the total population on all relevant variables.<sup>211</sup> Defendants did not challenge the statistical evidence. After calculating the remittiturs and including cases with zero verdicts, the court applied the average damage awards within each disease category to the remaining cases within that category. Plaintiffs waived any rights to individual damage determinations.<sup>212</sup> Defendants objected on due process grounds. The court rejected those challenges, saying that “unless this plan or some other procedure that permits damages to be adjudicated in the aggregate is approved, these cases cannot be tried.”<sup>213</sup>

Defendants appealed. The appeal was filed on May 3, 1993, and on August 17, 1998, a panel of the court of appeals unanimously held that the sampling procedures violated the Seventh Amendment and also failed to apply Texas law as required by Rules of Decision Act, 28 U.S.C. § 1652. The court squarely held that “the findings of the actual damages for each of the individual Phase III plaintiffs cannot control the determination of, or afford any basis for denial of, Pittsburgh-Corning’s Seventh Amendment rights to have a jury determine the distinct and separable issues of the actual damages of each of the extrapolation plaintiffs.”<sup>214</sup> Although the court did not directly address defendant’s due process rights, the court seemed to find a due process violation as well.<sup>215</sup>

207. *See id.*

208. *See* Kenneth A. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 *Law & Psychol. Rev.* 43, 45–46 (1998).

209. *Cimino*, 751 F. Supp. at 657.

210. Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 *Wm. & Mary L. Rev.* 475, 572 (1991).

211. *See Cimino*, 751 F. Supp. at 664.

212. *See id.* at 653.

213. *Id.* at 666.

214. *Cimino*, 151 F.3d at 320–21.

215. *See id.* at 311 (“Although we do not separately address the due process contention as such, we conclude that the *Cimino* trial plan is invalid in these respects . . .”).

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Long before the court of appeals reversed Judge Parker's trial plan, two commentators, representing plaintiffs in a nationwide class action of asbestos litigants, proposed using the *Cimino* approach on a national level. After common issues trials established liability, and a representative number of damage cases were tried in each federal district, the results would be extrapolated to other cases on a district-by-district basis.<sup>216</sup>

Judge Parker's approach in *Cimino* has been used as part of a trial plan on at least two occasions. In a set of consolidated cases filed in the 8th Judicial District Court for Clark County, Nevada dealing with approximately 17,000 property damage subrogation lawsuits arising from a chemical explosion, counsel for one of six defendants proposed a trial plan using stratified sampling of the insurance claims at issue. Because the cases settled before trial the plan was not used.<sup>217</sup>

In *In re Chevron USA*,<sup>218</sup> the district judge faced claims filed by 3,000 plaintiffs and intervenors relating to personal injuries, wrongful death, and property contamination allegedly caused by defendant's knowing sale of contaminated land for residential development. The district court approved a trial plan that proposed a bellwether trial of thirty claims, fifteen selected by plaintiffs and fifteen selected by defendants "to establish bellwether verdicts to which the remaining claims could be matched for settlement purposes."<sup>219</sup> The court rejected defendant's proposed plan of taking a stratified sample of the claims and defendants filed a petition for a writ of mandamus, arguing that the plan to use unrepresentative bellwether plaintiffs was an unfair method of determining its liability in a unitary trial.

The Court of Appeals granted the writ in part and denied it in part. Circuit Judge Robert Parker, now sitting as a member of the Fifth Circuit, wrote the opinion for the court. The court of appeals barred the district court from applying the results from the bellwether trials to the remaining 2,970 cases. The court also ruled that the district court had discretion to proceed with the 30 cases to produce individual judgments. In reaching that result, the court stated that "the results that would be obtained from a trial of these thirty (30) cases lack the requisite level of representativeness so that the results could

216. See Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419, 446-47 (1991).

217. Howard Ross Cabot & Alan A. Matheson Jr., *The Use of Statistics to Wrest Control Over the Trial of Mass Damage Claims*, 7 Inside Litig. (Mar. 1993) at 16.

218. 109 F.3d 1016 (5th Cir. 1997). For a thorough discussion of the context and arguments in that case, written by an attorney for the defendant, see Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 Tex. Tech L. Rev. 779 (1998).

219. *Chevron*, 109 F.3d at 1017.

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permit a court to draw sufficiently reliable inferences about the whole that could, in turn, form the basis for a judgment affecting cases other than the selected thirty.”<sup>220</sup>

Judge Edith Jones concurred in *Chevron* on “the narrow basis that the court’s adoption of nonbellwether methods for conducting a bellwether trial is uniquely harmful and unauthorized.”<sup>221</sup> She expressly declined to endorse the use of statistical sampling, asserting that “the technique may deprive nonparties of their Seventh Amendment jury trial right.”<sup>222</sup>

Statistical sampling was also used in the case of *Hilao v. Estate of Marcos*,<sup>223</sup> a class action composed of individuals with claims against the former president of the Philippines for damages resulting from official torture, summary execution, and disappearance. This is a unique mass tort, one that might be considered both immature and somewhat elastic, but contained in time and place, with cases identifiable enough to be aggregated. More than 10,000 claims were submitted.

A random sample of 137 claims was selected and those claimants were deposed. Their claims and depositions were reviewed by a special master who found 6 (about 4%) to be invalid. He issued a report setting damage levels for the 131 sample claims, calculating the average awards for torture, execution, and disappearance categories and extrapolating those averages to the class as a whole, recommending a total award of \$767,491,493. A jury that had found liability and a punitive damages multiplier in previous trials reconvened to hear testimony from the 137 sample claimants and from a statistical expert. The jury was instructed that it could accept, modify, or reject the special master’s award. After five days of deliberations, the jury “generally adopted the [special] master’s recommendations, although it did not follow his recommendation in 46 instances.”<sup>224</sup>

Defendant’s appeal was limited to the method used to determine the number of invalid claims, not the method of finding total compensation. The court of appeals, in a 2-1 ruling, held that the “unorthodox” methodology “can be justified by the extraordinarily unusual nature of this case.”<sup>225</sup> The court applied the *Mathews v. Eldridge*<sup>226</sup> three-part

220. *Id.* at 1020.

221. *Id.* at 1023.

222. *Id.* But see Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 Loy. L.A. L. Rev. 395, 401 (1998) (indicating that the *Chevron* plan is “unlikely to ever pass muster”). This judgment, of course, does not apply to stipulated use of statistical sampling based on bellwether cases.

223. 103 F.3d 767 (9th Cir. 1996). For further background on the case, see Sol Schreiber & Laura D. Weissbach, *In re Estate of Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 Loy. L.A. L. Rev. 475 (1998).

224. *Hilao*, 103 F.3d at 784.

225. *Id.* at 786.

226. 424 U.S. 319 (1976).

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balancing test, examining (1) the private interests affected, (2) the risk of erroneous deprivation and the probable value of additional safeguards, and (3) the interests of the party seeking the procedure as well as any ancillary government interests. While the court found that statistical sampling of valid claims “obviously presents a greater risk of error in comparison to an adversarial adjudication of each claim,” it found that, on balance, the procedure did not violate due process.<sup>227</sup> Unlike *Cimino*, the *Hilao* case did not include a Seventh Amendment challenge or an issue of state law, and the *Cimino* court distinguished it on those grounds.<sup>228</sup> Dissenting in *Hilao*, Judge Rymer focused on the compensatory damage awards and argued that “even in the context of a class action, individual causation and individual damages must still be proved individually.”<sup>229</sup>

In *Cimino*, Judge Parker set out to create a solution to an overload of asbestos cases on his docket. In the course of addressing that problem, he necessarily dealt with another problem, that of variability of case outcomes arising from differences in decision making by juries. Social scientists, lawyers, and law professors have studied the use of sampling and extrapolation in *Cimino* and arrived at mixed evaluations, with assessments that suggest the limits of the techniques employed as well as ways of improving the process. While the tone of these assessments varies, there is considerable, indeed comforting, consensus on some basic points. The appraisals were conducted by scholars with varied backgrounds, including law, philosophy, social psychology, and statistics. We now summarize their assessments.

Michael Saks and Peter Blanck are most optimistic in their appraisal of the potential of the *Cimino* process. They conclude that “aggregation adds an important layer of process which, when done well, can produce more precise and reliable outcomes.”<sup>230</sup> Starting from the premise that jury verdicts in individual litigation are highly variable,<sup>231</sup> Saks and Blanck argue that under some conditions, sampling can reduce variation in damage awards. “The aggregation process refines the decision by averaging out of existence the undesirable variations and bringing the systematic and legally relevant relationships into sharper

227. *Hilao*, 103 F.3d at 786–87.

228. *Cimino*, 151 F.3d at 319. The district court in *Hilao* rejected a Seventh Amendment claim on the grounds that “the jury did determine the facts of the case,” that there “would be no benefit to either side in having the entire class testify given the repetition in the claims,” and that “Rule 23 of the Federal Rule of Civil Procedure does not mandate the presence of each member of the class.” *In re Estate of Marcos*, 910 F. Supp. 1460, 1468–69 (D. Haw. 1995). Apparently, the defendant did not appeal from that decision.

229. *Hilao*, 103 F.3d at 788.

230. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *Stan. L. Rev.* 815 (1992).

231. This premise is supported by experimental research: see Bordens & Horowitz, *supra* note 208, at 59.

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relief.”<sup>232</sup> They indicate, however, that the more the cases within a disease category or other grouping “vary from each other in legally relevant ways, the more we move away from aggregation’s accuracy-producing benefits and move toward its error-producing harms.”<sup>233</sup>

Examining participatory values underlying due process, such as having control of the presentation of one’s own case and the opportunity for a “day in court,” Saks and Blanck emphasize that these values have to be compared to the reality of the current system of deciding individual mass torts cases. They cite findings from Deborah Hensler’s study of mass torts to the effect that

tort lawyers and their clients in mass tort cases communicate remarkably little about their cases and that clients have little control over the course of the litigation. Even in the absence of formal aggregative procedures, lawyers informally aggregate cases by representing hundreds or thousands of clients and meeting with them in large groups.<sup>234</sup>

In their judgment, “[s]uch informal aggregation is dangerous because it lacks the procedural safeguards of formal aggregation.”<sup>235</sup>

Saks and Blanck suggest several ways of improving the sampling process, such as attending to changes in the mix of cases (e.g., by settlements or dismissals), that might convert a representative sample into an unrepresentative one;<sup>236</sup> grouping like cases together (e.g., by type or severity of injury);<sup>237</sup> using larger samples for heterogeneous categories of cases;<sup>238</sup> and using more juries, assigned randomly to the subgroups, for the purpose of reducing the risk that single juries will alter their decision making in the course of hearing a host of cases as well as the risk that a single jury may itself be an outlier.<sup>239</sup>

Kenneth Bordens and Irwin Horowitz are both social psychologists who have done extensive experimental research on the effects of procedural differences on jury decision

232. Saks & Blanck, *supra* note 230, at 836.

233. *Id.*

234. *Id.* at 840 (citing Deborah Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 92–97).

235. *Id.* at 840.

236. *Id.* at 841–42.

237. *Id.* at 844–45 (citing Francis E. McGovern, *The Cycle of Mass Tort Litigation* 15 (Yale Program in Civil Litigation Working Paper No. 122 (1990)), for the proposition that in *Jenkins v. Raymark* “fewer than ten variables . . . can explain approximately 90% of the variation among case values”).

238. *Id.* at 845.

239. *Id.* at 849.

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making.<sup>240</sup> They examined the court's approach in *Cimino v. Raymark*, using data from the jury decisions in *Cimino* and comparing those data with results from their experiments. In general, Bordens and Horowitz express sympathy with the Saks and Blanck analysis, but their bottom line appears to be that their reservations about the procedure used in *Cimino* "may vitiate the force of the Saks and Blanck logic."<sup>241</sup>

In their review of the *Cimino* data, Bordens and Horowitz found that one of the "other cancer" cases presented to one of the jury groups was an "outlier," a case in which the injuries were considerably more severe than other "other cancer" cases (plaintiff had his jaw removed because of the cancer and was awarded \$1.5 million, substantially more than others in the group), possibly contaminating the decision making of that jury in relation to other members of that group and subsequent groups.<sup>242</sup> Bordens and Horowitz also were critical of the structure of the juries' consideration of groups of cases, observing that the juries started with the mesothelioma cases and proceeded from the more severe to the less severe injury groups. Knowledge of the serious injuries experienced by some may have influenced the juries' judgments about the merits of the later groups.<sup>243</sup> Finally, Bordens and Horowitz criticized the procedure because it averaged the outcomes of the two juries' decisions. Such a procedure raised questions for them about the underlying validity of the process because the two juries exhibited two different verdict patterns. One jury generally gave higher monetary awards than the other. Bordens and Horowitz conclude that "[s]eparate juries, comprised of different individuals, cannot be expected to produce verdict patterns uniform enough for any reasonable combination of their awards."<sup>244</sup>

To address these problems, Horowitz and Bordens suggest remedies quite similar to those proposed by Saks and Blanck. For example, Bordens and Horowitz recommend that a court "have the plaintiffs in each sample [subgroup] judged by a separate jury" and make the groups "as homogeneous as possible" by looking at multiple variables (such as

240. In the interest of full disclosure, I should mention that I have collaborated with Professors Horowitz and Bordens on a number of projects over the past twenty years and that the three of us are coauthors of Irwin A. Horowitz, Thomas E. Willging & Kenneth S. Bordens, *The Psychology of Law* (1998).

241. Bordens & Horowitz, *supra* note 208, at 44.

242. *Id.* at 61. This concern is based on experimental findings in which Horowitz and Bordens examined the effect a high-damages outlier's inclusion in a consolidation had on jury awards in other consolidated cases and found (1) that the outlier received a lower award in a consolidated trial than would have been received in a separate trial and (2) that the presence of an outlier in a consolidated trial increased the awards for other plaintiffs. *See generally* Horowitz & Bordens, *supra* note 40.

243. *See* Bordens & Horowitz, *supra* note 208, at 60–61.

244. *Id.* at 65.

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severity of injury or strength of the evidence) as opposed to simply the category of the disease.

If the disparity in verdicts between multiple juries, as happened in *Cimino*, is indeed a problem,<sup>245</sup> a remedy seems readily available: use only one jury for each subgroup. The problem, however, does not seem that straightforward. Variability could arise from variations in the facts of the cases in the two groups or from variability in the decision-making styles of the different juries. If we take as a given the variability of jury verdicts that Horowitz and Bordens have shown in the laboratory and which the *Cimino* experience seems to confirm, one could argue that averaging two or more juries' verdicts in cases from each subgroup would reduce the variability that otherwise exists in resolving ordinary civil litigation.

Social scientists posit other remedies for dealing with the variability of jury verdicts. In a thorough review of the social science literature on jury variability, Professor Neil Vidmar of Duke Law School found that several studies linked variability of verdicts to the seriousness of the underlying injuries.<sup>246</sup> Other studies found, however, a wide range of jury damages verdicts within categories of injury severity, albeit not wider than lawyers' estimates of damages.<sup>247</sup> Vidmar suggests several approaches to dealing with variability in assessing damages, including: (1) providing jurors with a matrix of values that would fix damages according to the seriousness of the injury and the age of the plaintiff; (2) giving jurors a set of scenarios with associated dollar values that would serve as non-binding benchmarks for the jury; and (3) employing a series of flexible floors and ceilings that vary with severity of injury and plaintiff age rather than setting a single statutory cap.<sup>248</sup>

In reviewing the *Cimino* experience and the Saks and Blanck hypotheses, law professor Robert Bone combines his knowledge of philosophy and statistics. Philosophically, a case for sampling can be made rather easily on utilitarian grounds, while it is more difficult, but not impossible, to make a case on rights-based grounds.<sup>249</sup> Statistically, like Saks

245. Saks and Blanck did not identify the use of two juries as a problem, but this may be because they did not have the data that were available to Bordens & Horowitz. They may have assumed that there was little or no disparity between the two juries—or that any disparity was not relevant to their presentation.

246. Vidmar, *supra* note 58, at 895–96.

247. *See id.* at 896.

248. *Id.* at 881–82.

249. *See* Bone, *supra* note 88, at 595–617. He finds sampling “is especially troubling from a rights-based perspective because of its tendency to produce biased error,” especially if sample averaging rather than regression is used. *Id.* at 599.

Like Horowitz & Bordens's experimental finding described *supra* note 242, Bone asserts that in many situations, “sampling virtually guarantees that at least some high damage plaintiffs will receive verdicts substantially lower than the verdicts they would receive from an individual trial.” *Id.* at 600.

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and Blanck and Horowitz and Bordens, Professor Bone stresses that attempting to reduce heterogeneity of the groups or subgroups of cases is essential in seeking an acceptable level of accuracy of outcomes. Under those rationales, he concludes that the following conditions should be met:

- “verdicts should be calculated in the same way for all plaintiffs, including those in the sample group;”<sup>250</sup>
- “costs should be spread equally over the entire plaintiff population;”<sup>251</sup> and
- a regression model should be used, determining damages by looking at factors such as age, previous health history, future lost earnings, and medical expenses.<sup>252</sup>

Analysis from a process-oriented perspective, however, is a different matter. The “strongest objections” to sampling, he asserts, “have nothing to do with outcome accuracy;” rather, they derive from “a process-oriented view of adjudication that values participation for its own sake, not just for its impact on outcome quality.”<sup>253</sup> Nevertheless, after a lengthy jurisprudential analysis, he concludes that there are conditions under which sampling can be justified even though it diminishes individual rights to control litigation and participate in decisions that determine the outcome of individual cases.

Because litigants have equal rights to participate in litigation, courts should only limit process-oriented claims in ways that are consistent with the equality of such rights. A trial judge should “create as large an aggregation as possible,” allow the widest ranges of participation possible, perhaps by appointing litigation committees, and distribute participation rights either by auction or by random lottery if an auction is not feasible.<sup>254</sup>

Plaintiffs’ attorneys Joseph Rice and Nancy Davis reviewed the *Cimino* approach, which they called the “virtual verdict.” They noted that the *Cimino* approach has been hailed as efficient and statistically accurate, yet criticized as placing limitations on the opportunity for an individual trial and as using a small number of sample cases.<sup>255</sup>

250. *Id.* at 650–51. Saks & Blanck, *supra* note 230, at 849 make the same point, based on a different reasoning process. (“The best protection [from error based on the order in which cases were heard] would actually come from giving even tried cases the mean aggregate award rather than the one arrived at for it by the jury that heard the particular case.”).

251. Bone, *supra* note 88, at 651.

252. *See id.* at 584–87, 651. This recommendation seems comparable to Saks & Blanck’s recommendation that multivariate analysis be used to define the sample as well as to Bordens & Horowitz’s recommendation that multivariate analysis be used. Both regression and cluster analyses are multivariate statistical analyses.

253. *Id.* at 617, 619.

254. *See id.* at 651. An auction might not be feasible, for example, because it would interfere with the randomness of the selection of a sample of cases from which to extrapolate damages and, as a result, skew the accuracy of the outcomes. *See id.*

255. Rice & Davis, *supra* note 151, at 134–35.

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In sum, statistical, socio-psychological, philosophical, and legal reviews of Judge Parker's process in *Cimino* converge in finding both that the procedure is problematic and that problems can be addressed. The primary guidance from these analyses is that:

- outliers, such as cases with extraordinarily serious injuries, create problems and should be treated specially;
- judges should seek to stratify samples into groups that are as homogenous as possible;
- multivariate analyses should be used to assist judges in both identifying the sample group and in applying the verdicts to the rest of the cases; and
- separate juries should be used to consider each subgroup of cases.

In addition, apparently inspired by Judge Parker's *Cimino* trial plan, two University of Virginia law professors, Glen Robinson and Kenneth Abraham, propose an even wider-reaching application of aggregation approaches in tort law.<sup>256</sup> Their proposal would extend to all damage calculations in personal injury cases, not just mass torts. Their approach contemplates using statistical claim profiles to establish the value of tort claims. Profiles, resembling schedules for workers' compensation plans, would be built from data obtained from previous verdicts or settlements, incorporating all legally relevant information, such as the duration and severity of an injury, plaintiff's knowledge of a product's dangers, and the like.<sup>257</sup> Their proposal is designed to address the distortions that result from focusing on the idiosyncratic features of individual claims or on factors that should be irrelevant, like race, gender, and economic status. It would seem to do to damage calculations what sentencing guidelines have done to criminal sentencing, shifting from an individualized to a collective approach.

The above is not to imply that all of the commentators have been as positive as those summarized above. A sample of the critiques of aggregation give a sense of the centrality of the principles and values at stake. For example, Professor Martin Redish asserts that "even a casual examination of the aggregation devices employed by courts or suggested by commentators reveals that most of them threaten core elements of due process theory."<sup>258</sup> Contrary to the above commentators, he contends that aggregative devices

256. Glen O. Robinson & Kenneth H. Abraham, *Collective Justice in Tort Law*, 78 Va. L. Rev. 1481 (1992); see also Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claim*, 53 L. & Contemp. Probs. 137 (1990); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 Va. L. Rev. 845 (1987).

257. See Robinson & Abraham, *supra* note 256, at 1490–92.

258. Martin H. Redish, *Procedural Due Process And Aggregation Devices in Mass Tort Litigation*, 63 Def. Couns. J. 18–19 (1996).

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(including mass consolidation, issue consolidation, statistical sampling, and settlement class actions) “undermine both the goals of achieving an accurate decision and of legitimizing the adjudicatory process in the eyes of the litigants.”<sup>259</sup>

In Redish’s analysis, discussing the *Mathews v. Eldridge* test applied in *Hilao*<sup>260</sup> (and disagreeing with its utilitarian focus), “[t]he connecting link between accuracy and due process is the belief that the adjudicator is more likely to find the facts correctly if the parties possessing both the strongest interest in the outcome and the greatest access to the relevant information are provided a meaningful opportunity to present their cases to the fact finder.”<sup>261</sup> He also finds “non-instrumental” values to be implicated by aggregation. Values such as the appearance of fairness, equality, predictability, transparency, rationality, participation, and revelation are all “central to the maintenance of individual dignity or necessary to the legitimacy of the judicial process in the eyes of litigants.”<sup>262</sup>

As to statistical sampling, Professor Redish finds it “the most controversial of all aggregation devices,” and that “[r]easonable people may differ concerning on which side of the constitutional line sampling falls.”<sup>263</sup> At least to a certain extent, “the constitutionality of sampling may turn on the statistical accuracy of the samples chosen as predictors of the absent plaintiffs’ actual damages . . . an issue over which scholars have differed.”<sup>264</sup> He concludes, however, that incorporating statistical sampling into mass torts adjudication may require substantive law changes, along the lines of a workers’ compensation program. Finally, sampling procedure “does deprive defendants of the opportunity to challenge the actual damage claims of each plaintiff,” undermining significant interests served by the procedural due process guarantee.”<sup>265</sup>

Along similar lines, Professor Roger Tranchesi states the case against aggregation of mass torts claims. Though written before the *Cimino* case, his arguments are certainly relevant to the debate about statistical sampling. Tranchesi starts from the proposition that our common-law tradition has continuously supported individual autonomy for

259. *Id.* at 19.

260. See discussion *supra* notes 225–229.

261. Redish, *supra* note 258, at 20.

262. *Id.* at 21 (citing Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483–91 (1986)).

263. *Id.* at 23 (citing and applying *Mathews v. Eldridge*, 424 U.S. 319 (1976), which emphasizes the risk of erroneous deprivation of property as a major element of due process).

264. *Id.* at 25 (citing Saks & Blanck, *supra* note 230, and Bone, *supra* note 88).

265. *Id.* at 25.

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cases involving substantial personal injury and wrongful death.<sup>266</sup> Justifications for individual autonomy draw both from natural law values and from the “assumption that economic decisions are best made by the true owner of property.”<sup>267</sup> Trangsrud also critiques the rationales used to support aggregation—largely efficiencies in costs to the parties as well as consistency of results—as being dubious in the context of mass torts. Tort law has never held that all participants in the same accident should be treated the same. Nor are the savings clear. Savings are calculated as if all cases would be tried, whereas generally early trials will lead to settlement of similar cases.<sup>268</sup>

Finally, Professor Trangsrud asserts that mass trials are unfair because they impair the ordinary function of the jury by using procedures like trifurcation and special verdict forms.<sup>269</sup> They also distort the attorney-client relationship, causing tension between a lawyer’s substantial investment in the litigation and the client’s interests.<sup>270</sup> Finally, aggregation creates incentives for improper behavior by trial judges, such as questionable rulings on the underlying claims and incentives to press the parties to settle.<sup>271</sup>

Trangsrud proposes that the “better course is to coordinate and consolidate pretrial discovery and motions practice but then individually try the tort cases in an appropriate venue. After a number of cases have been tried substantial incentives will operate to encourage the private settlement of many of the remaining claims.”<sup>272</sup>

In summary, statistical sampling has generated controversy in case law as well as academic writing. It pits polar values of individual and collective justice against each other. Whether some reconciliation is possible remains to be seen. If parties find sampling to be a viable approach to establishing settlement values, that alone would justify its careful consideration. Whether courts can fashion forms of statistical sampling that are sufficiently intertwined with jury decision making to satisfy Seventh Amendment concerns appears to be the central legal issue. The procedure used by the *Hilao* court had elements of jury activity that differed from *Cimino*, but those elements of *Hilao* have not been

266. See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 70–71 [hereinafter Trangsrud, *Mass Trials*] (citing S. Yeazell, From Medieval Group Litigation to the Modern Class Action 211 (1987)). See also Trangsrud, *Joinder Alternatives*, *supra* note 76, at 782 (“balancing of efficiency versus fairness leads to the conclusion that the substantial damage claims of mass tort victims deserve an uncompromised due process . . . joint discovery on common issues is desirable in most mass tort cases”).

267. Trangsrud, *Mass Torts*, *supra* note 266, at 75.

268. See *id.* at 78–79.

269. See *id.* at 80–82.

270. See *id.* at 82–84.

271. See *id.* at 85–86.

272. *Id.* at 69.

reviewed by courts faced with a Seventh Amendment challenge or evaluated by commentators. Statistical sampling may be a concept in search of a means of integrating it with traditional legal values of due process of law and trial by jury.

## 2. Use of court-appointed experts

Federal Rule of Evidence 706 provides a mechanism for courts to appoint experts to address issues of scientific uncertainty. Inherent judicial power also allows a judge to appoint a technical advisor to assist the judge in understanding complex technical information.<sup>273</sup> Both powers have been used occasionally in mass torts contexts.

Extensive use of court-appointed experts and technical advisers has been made in the breast implant litigation. Two federal judges have used court experts in two distinctly different ways. In May 1996 in the MDL consolidated litigation, Judge Sam C. Pointer, Jr. (N.D. Ala.), acting pursuant to Fed. R. Evid. 706, appointed a national panel of neutral experts to provide evidence on scientific questions relating to the reliability of evidence linking systemic diseases with silicone gel breast implants.<sup>274</sup> The panel issued its report on November 30, 1998, finding that there was no strong scientific evidence that silicone gel breast implants are statistically associated with immune system or rheumatological diseases. Now that the report has been issued, the court plans to preside over videotaped depositions of the experts, which will be made available to all litigants. Given that a substantial amount of the breast implant litigation has been adjudicated or settled, questions have been raised about the timeliness of the process.

Also in 1996, Judge Robert E. Jones (D. Ore.) appointed four technical advisors in various scientific disciplines to assist him in his district's breast implant litigation (*Hall v. Baxter Healthcare Corp.*).<sup>275</sup> In a case-specific process that was quite distinct from Judge Pointer's multidistrict process, Judge Jones used the four expert-advisors to furnish him

273. See *Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988). See also *Ex parte Peterson*, 253 U.S. 300 (1920) (“[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties”) *Id.* at 312. See, e.g., the Fed. R. Evid. 706 Advisory Committee Note (noting that “[t]he inherent power of a trial judge to appoint an expert of his own choosing [was] virtually unquestioned” as the rules were adopted). See generally Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation, Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 *Emory L.J.* 997 (1994).

274. See *In re Silicone Gel Breast Implants Prod. Liab. Litig.* (MDL-926) (No. CV 92-P-10000-S) (Order No. 31E) (Oct. 31, 1996).

275. 947 F. Supp. 1387 (D. Or. 1996).

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with reports and consultations on the reliability and admissibility of complex scientific evidence under Fed. R. Evid. 104(a) in a *Daubert* hearing. Based in part on the experts' reports, Judge Jones decided to exclude plaintiff's proffered expert testimony.<sup>276</sup> While some critics of the use of court experts decry the influence of the experts on judges,<sup>277</sup> in *Hall* the court was criticized for not following the experts' reports closely enough.<sup>278</sup>

Court-appointed experts have also been used in asbestos litigation. Judge Jack Weinstein appointed a panel of experts to assist him in estimating future claims as a central part of his effort to restructure the original Manville Personal Injury Settlement Trust.<sup>279</sup> The panel estimated that 450,000 future claims could be expected between 1990 and 2049, but their estimate was accompanied by a 50% margin of error.<sup>280</sup>

Judge Carl Rubin appointed a standing panel of experts to review asbestos cases and give an opinion as to the presence or absence of asbestos-related disease. In approximately 80% of the cases, the experts found no asbestos disease, and in thirteen of sixteen cases in which the expert testified, the jury agreed with the expert.<sup>281</sup>

A Federal Judicial Center study examined cases in which judges had appointed experts and identified beneficial uses and limits in the use of court-appointed experts. Judges who used experts considered them to be helpful in extraordinary cases in which the adversarial system, for one reason or another, failed to generate sufficient information for the judge or jury—more often the judge—to render a reasoned decision.<sup>282</sup> Judges have used experts infrequently primarily out of respect for the adversarial system, but also because of difficulties in identifying the need for an expert in a timely manner, in locating a suitable expert, and in obtaining funding to compensate the expert.

Just as Rubin and Ringenbach found a strong relationship between the court-appointed experts' conclusions and jury verdicts, the FJC study concluded that "judges and juries

276. *Id.* Judge Jones deferred the effective date of his decision "pending the reports of the national Rule 706 Panel" in the MDL litigation. *Id.* at 1415.

277. See discussion *infra* notes 278–280.

278. See Joseph Sanders & D.H. Kaye, *Expert Advice on Silicone Implants: Hall v. Baxter Healthcare Corp.*, 37 *Jurimetrics J.* 113, 120–23 (1997).

279. See *In re Joint E. & S. Dist. Asbestos Litig.* 151 F.R.D. 540 (S.D.N.Y. 1993).

280. See Coffee, *supra* note 69, at 1361 n.59. Several years after the expert panel's report, Judge Weinstein estimated that between 300,000 and 600,000 claims could be expected by the year 2050. See Weinstein, *Ethical Dilemmas*, *supra* note 30, at 510 n.164.

281. See Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991). In their words: "The conclusion is inescapable: A Court's expert will be a persuasive witness and will have a significant effect upon a jury." *Id.* at 41.

282. Cecil & Willging, *supra* note 273, at 1069–70.

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alike tend to decide cases consistent with the advice and testimony of court-appointed experts.”<sup>283</sup> Given that a major reason for appointing experts is the absence of a clear basis for decision, it was not surprising that decision makers relied on the appointed experts to supply such a rationale.<sup>284</sup>

The FJC report outlines a pretrial procedure that judges may find helpful in addressing scientific issues in mass torts litigation. The suggested procedure, which will not necessarily lead to appointment of an expert, focuses on (1) early identification of issues likely to require expert testimony, (2) specification of disputed issues of science and technology, and (3) screening expected testimony by parties’ experts to determine admissibility.<sup>285</sup> In this post-*Daubert* era, those recommendations now seem commonplace.

Two programs—one established by the American Academy for the Advancement of Science (AAAS) and the other by the Private Adjudication Center (PAC) at Duke Law School—have as their goals identifying candidates for appointment as experts. The AAAS program will concentrate on matching experts with a judge’s needs in a given case while the PAC will focus on creating a roster of suitable experts for use in any number of cases. These programs address a major issue identified in the FJC report, the difficulty for a judge to identify neutral experts.

#### *3. State-federal cooperation*

Most mass torts claims are based on state law; state and federal courts have concurrent jurisdiction. The well-known result of sharing jurisdiction is that many mass torts lead to filings in both federal and state courts. In the next section, we review proposals to address the problem of multiple state-federal forums by expanding federal jurisdiction, creating federal substantive law for mass torts, or adding new opportunities to aggregate cases in the federal courts.<sup>286</sup> In this section we look first at innovative ways in which courts have dealt with cases filed in both federal and state courts, and then look at a closely related legislative proposal to alter the structure of federal-state relationships in mass torts cases.

283. *See id.* at 1041.

284. *See id.* at 1044–45.

285. *See id.* at 1058–65.

286. See discussion *infra* sections II.B.1 through II.B.7 (comprehensive proposals) and II.B.9.a (“Federal substantive law”).

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#### a. Voluntary innovations

Judge Schwarzer and co-authors from the Federal Judicial Center documented a host of innovative state-federal cooperative practices, most in the mass torts area.<sup>287</sup> State-federal cooperation has occurred in

- discovery, in the form of joint scheduling, planning, using special master in common, using common discovery output, ruling jointly on disputes, and creating joint document depositories;<sup>288</sup>
- settlement, in the form of joint alternative dispute resolution (discussed more fully in the next subsection), joint settlement conferences, delegation of power to one judge or settlement master to supervise settlement discussion, and coordination of settlement approaches;<sup>289</sup>
- pretrial management, by establishing joint pretrial orders or joint management plans, conducting joint pretrial hearings, and resolving conflicts between federal and state procedural rules;<sup>290</sup> and
- joint trial planning.<sup>291</sup>

In general, the state and federal judges who coordinated their activities found the experience to have promoted “economy, efficiency, and consistency.”<sup>292</sup> Conditions for effective coordination include appropriate, usually early, timing of the initial contact, often by the federal judge; maintaining continuous contact throughout the pretrial process; establishing a personal working relationship with the other judges; and enlisting the aid of the attorneys in identifying related cases and cooperating with each other.<sup>293</sup> Judges found some settings more conducive to effective coordination than others: where the courts are in close physical proximity, have aggregated their cases within each system, and have created a supportive judicial and legal community.<sup>294</sup>

287. William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992) [hereinafter Schwarzer, *Federalism in Action*].

288. *See id.* at 1707–14.

289. *See id.* at 1714–21.

290. *See id.* at 1721–26.

291. *See id.* at 1727–32. While no joint trials were held in the cases studied, one judge who planned to have a joint trial said that “I’m sure if we had had the trial, we wouldn’t have had any problems.” *Id.* at 1728.

292. *Id.* at 1732.

293. *See id.* at 1733–40.

294. *See id.* at 1740–42.

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In a cooperative effort at the national level, the Federal Judicial Center, the National Center for State Courts, and the State Justice Institute have published a manual to guide state and federal judges in their relations with each other in a variety of cases.<sup>295</sup> The manual discusses the issues described above in our summary of the FJC case studies<sup>296</sup> and includes sample pretrial case-management orders and a sample order for a joint trial.<sup>297</sup> The state-federal manual also includes a brief history of the Mass Tort Litigation Committee [MTLC], a standing committee of the Conference of Chief Justices.<sup>298</sup> MTLC, funded at one time by the State Justice Institute, brought together a dozen or more state judges to discuss and coordinate mass torts cases in their respective jurisdictions. Generally, one or more federal judge would attend as liaison. Judge Sandra Mazer Moss, MTLC chair, has documented a number of cooperative activities undertaken in the asbestos, breast implant, orthopedic bone screw, Norplant, and L-Tryptophan litigations.<sup>299</sup> MTLC's funding expired in March 1998, and the group now has no funding for face-to-face meetings.

#### b. State-federal legislative proposal

Judge Schwarzer formulated a proposal to empower federal judges to consolidate state and federal discovery as part of the multidistrict litigation process. His proposal adds these elements to the MDL procedures: (1) limited removal of related state court cases in which there is at least minimal diversity of citizenship (i.e., between two parties); (2) retaining merits decisions, including choice-of-law, in the state courts for state cases; (3) making the results of the coordinated discovery process binding in all subsequent proceedings; and (4) remanding the case to state court when it is ready for trial or summary judgment.<sup>300</sup> In Judge Schwarzer's words, "The purpose of the instant proposal is to pro-

295. James G. Apple et al., *Manual for Cooperation Between State and Federal Courts* (Federal Judicial Center 1997).

296. *Id.* at 15–30.

297. *Id.* at 119–49.

298. *Id.* at 31–34.

299. Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 *Tex. L. Rev.* 1573, 1573–76 (1995). For a discussion of the advantages and disadvantages of state–federal judicial cooperation, see generally Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 *UCLA L. Rev.* 1851 (1997); Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 *Hastings Const. L.Q.* 215 (1994).

300. William W. Schwarzer et al., *Judicial Federalism: A Proposal To Amend the Multidistrict Litigation Statute To Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 *Tex. L. Rev.* 1529, 1533 (1995).

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vide a procedure for coordination of discovery in cases dispersed in state and federal courts without implicating substantive law choices or delaying trials in state court.”<sup>301</sup>

Judge Pointer raises concerns about whether the proposal will be as innocuous a first step as its proponents claim and whether “the benefits achieved through such legislation justify the risk that it might divert and dissipate support for more effective solutions to the problems of large-scale multiforum litigation.”<sup>302</sup> Judge Pointer also expressed concern that the operation of the proposal would deprive federal courts of valuable resources that state judges have provided under a voluntary system.<sup>303</sup>

#### *4. Alternative dispute resolution*

##### *a. Background*

In this discussion, we use the term alternative dispute resolution [ADR] to refer to activities and programs that afford litigants alternatives to traditional dispute resolution, such as trials or judge-hosted settlement conferences. Common examples of ADR include arbitration, mediation, early neutral evaluation, and summary jury trials, but the list is limited only by the imagination of ADR sponsors. Some would define ADR narrowly to include only those programs that “compared with the traditional litigation process of adversarial negotiation and trial, enhance parties’ control over litigation outcomes or processes.”<sup>304</sup> Others define ADR to include judicial settlement efforts.<sup>305</sup> We use our definition—which excludes traditional judge-hosted settlement conferences and does not require that the alternative enhance litigant control—for clarity, not to resolve the differences noted above.

A key feature of mass torts is that they have a “high degree of commonality,” which means that “the outcome of any one case within the litigation . . . highly [influences] the outcome of other cases.”<sup>306</sup> Determining the value of individual cases—whether by trial or alternative means—opens the door to resolving large numbers of other cases. For that reason, ADR has found an integral place in federal courts’ management of mass torts litigation, often as a means of applying known values to the mass of the litigation. In

301. *Id.* at 1532.

302. Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1569, 1570 (1995).

303. *Id.* at 1571.

304. Hensler, *A Glass Half Full*, *supra* note 63, at 1619.

305. See Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 Tex. L. Rev. 1627, 1627–29 (1995).

306. Hensler, *A Glass Half Full*, *supra* note 63, at 1596.

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some jurisdictions, ADR has also been used to determine case values in the first instance. This seems especially apt when a mass tort arises from a single incident.

Early ADR mass torts efforts concentrated on gathering information to support evaluation of individual asbestos cases. For example, in 1982 Judge Thomas Lambros appointed Professors Francis McGovern and Eric Green as special masters to help address a backlog of asbestos litigation in the Northern District of Ohio. McGovern and Green devised a plan to streamline discovery to yield settlement-related information, and they devised a computer model containing hundreds of variables that could be used to compare the values of settled and pending cases.<sup>307</sup> Called the Ohio Asbestos Litigation (OAL), this system pioneered a method for identifying variables that could be used to evaluate mass torts cases. After extracting a range of individual case values from a computer, the parties and lawyers participated in a settlement conference. Using computer-generated data for similar cases, lawyers would argue briefly, in the presence of the plaintiff, about the similarities and differences between the previous settlements and the plaintiff's case. Plaintiffs were reported to have been satisfied that the settlement conference provided them a "day in court."<sup>308</sup> In an environment in which trials were increasingly unlikely, alternatives to trials became the most that litigants could expect.

As asbestos caseloads grew, ADR programs expanded to meet the demand for alternative approaches that could be applied more globally in mass aggregations, bankruptcy reorganizations, and even so-called global settlements. For example, McGovern organized a database to support jury decision making in a class action trial.<sup>309</sup> McGovern and other ADR professionals devised plans for administering claims resolution facilities.<sup>310</sup> With the consent of the parties, Judge Parker created an arbitration-based ADR program

307. See Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 478–91 (1986) (describing the Ohio Asbestos Litigation).

308. See Trends, *supra* note 49, at 67.

309. See *Jenkins v. Raymark*, 782 F.2d 468 (5th Cir. 1986). In *Jenkins*, the court used aggregate computer-based data about class claims to aid the jury in deciding a ratio of punitive damages to compensatory damages. Trends, *supra* note 49, at 63 n.148.

310. See generally, Francis E. McGovern (ed.), *Symposium, Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 Law & Contemp. Probs. 1 (1990); Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 Law & Contemp. Probs. 61 (1990) [hereinafter McGovern, *DDT Settlement*]; Kenneth R. Feinberg, *The Dalkon Shield Claims Trust*, 53 Law & Contemp. Probs. 79 (1990). For more recent descriptions of the operation of the Dalkon Shield Claimants Trust, discussed *infra* at notes 334 to 346, see Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 Loy. L.A. L. Rev. 79, 153–56 (1997) [hereinafter Vairo, *Georgine*]; Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 Fordham L. Rev. 617 (1992) [hereinafter Vairo, *The Dalkon Shield*].

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to handle the backlog of case remaining in the Eastern District of Texas after a class action trial in *Jenkins v. Raymark*.<sup>311</sup> Judge Lambros and others adapted summary jury trials to a mass torts context.<sup>312</sup> In the L'Ambiance Plaza building collapse, a federal and state judge jointly interviewed witnesses and plaintiffs, evaluated each case, and recommended settlement amounts that came to be incorporated in a global settlement.<sup>313</sup> Before L'Ambiance, Judge Louis Bechtle in the MGM Grand Hotel fire litigation had established the foundation for a global settlement by meeting individually with plaintiffs to assess the value of their cases.<sup>314</sup> ADR was clearly an integral part of the creative response of federal and state judges to the flood of mass torts litigation that suddenly appeared on their dockets.

#### b. Proposals and critiques

A number of proposals are directed at managing the volume of cases involved in mass torts litigation. Other proposals focus on enhancing the quality of mass torts dispute resolution, and, not surprisingly, a number of proposals address both aspects of ADR. We concentrate on ADR approaches to resolving individual claims. We do not discuss other possible applications of ADR techniques, which extend to the full range of litigation management, including pre-litigation mediation, insurance coverage disputes, alternative approaches to discovery and science issues, appointment of special masters, and other alternative judicial case-management techniques.<sup>315</sup>

Deborah Hensler challenges policy makers to “shape aggregative procedures to enhance litigant control and participation within the bounds of what is financially and logistically possible.”<sup>316</sup> She suggests appointing plaintiffs’ panels to represent diverse interests, including future claimants, in a given litigation. Such panels would monitor the

311. See Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 Wm. & Mary L. Rev. 475, 490–92 (1991) (describing ADR program); see also Trends, *supra* note 49, at 79–81.

312. See Trends, *supra* note 49, at 76–79 (reviewing summary jury trials in asbestos litigation and discussing concerns about unpredictability and efficiency).

313. See Schwarzer et al, *Federalism in Action*, *supra* note 287, at 1715–18.

314. See *id.* at 1719–20.

315. See *generally* Feature, ADR Recommendations for Mass Torts, 52 Disp. Resol. J. 78 (1997) (reporting twelve recommendations of an American Arbitration Association task force chaired by Kenneth Feinberg); see also Kenneth R. Feinberg, *Response to Deborah Hensler*, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 Tex. L. Rev. 1647 (1995) (“What I do is not really ADR. It is CJM—creative judicial management . . .”).

316. Hensler, *A Glass Half Full*, *supra* note 63, at 1624.

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litigation and negotiation process, “offer suggestions, and report back to the plaintiffs whom they represent.”<sup>317</sup> Hensler suggests that courts “could also use electronic bulletin boards and similar technologies to provide up-to-date information on the progress of a settlement negotiation.”<sup>318</sup> These suggestions would provide a way to begin to address the question of what claimants want from the civil justice system, particularly “how claimants would assess the justice of alternative compensation schemes . . . [or] what they might be willing to give up in order to provide more equitable compensation to others who share their injuries and experiences.”<sup>319</sup>

Social psychologist Tom Tyler echoes Hensler’s premise that mass torts claimants want to have procedures that call for their participation and give them an element of control over the type of procedure that will be used to resolve their case.<sup>320</sup> He finds that the design of mass torts claims resolution facilities “has not been based on an understanding of what claimants want from legal procedures” and concludes that “[m]ore careful attention to existing psychological research on claimants’ reactions to legal procedures could lead to substantial gains in both satisfaction with the disposition of mass torts cases and the acceptance of decisions resolving mass torts claims.”<sup>321</sup>

Attorneys Barry McNeil and Beth Fancsali have found that “*valuation* of claims is perhaps particularly suitable for mediation and arbitration” because “a facilitator can commit time and attention to reviewing considerable data and understanding the basis of each claim, in a manner and on a schedule simply unavailable to the court.”<sup>322</sup> They caution, however, that “the process should not be allowed to get ahead of itself” by being used before there is a “history of jury verdicts yielding a range of outcomes.”<sup>323</sup>

McNeil and Fancsali’s caution has broad support and may represent a consensus on the use of ADR, at least for immature, elastic mass torts. John McGoldrick, an attorney, argues that “ADR can make a mass tort out of no tort” and that it can play a role in “creating, sometimes just stirring, but even creating the feeding frenzy that is often the begin-

317. *Id.*

318. *Id.* at 1624. Some forms of group communication have been employed in the Agent Orange and breast implant litigations. *Id.* at 1625.

319. *Id.* at 1626.

320. See Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 *Law & Contemp. Probs.* 199, 200–04 (1990) (citing empirical studies of litigant satisfaction in general civil litigation and a comparative study of asbestos victims in England and the United States).

321. *Id.* at 204–05.

322. McNeil & Fancsali, *supra* note 7, at 506.

323. *Id.*

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ning of mass tort.”<sup>324</sup> Such comments lead commentators to conclude that ADR has its best application as a means of resolving the tail of mature mass torts litigation.

Another ADR model—called into question because of experiences with elasticity of some mass torts<sup>325</sup>—concentrates on class-wide litigation of common issues, such as liability and product defect, followed by ADR approaches to individual issues, such as specific causation and damages. Professor Carrie Menkel-Meadow recommends using “fast-track ADR procedures” like those used in the Dalkon Shield settlement trust to provide an opportunity for mass torts claimants to have individual hearings that are less than full-scale adjudications.<sup>326</sup> She would offer litigants a choice of such a hearing, on the rationale that “some claimants will want personal contact with some third party” and that other claimants “will simply want their money.”<sup>327</sup>

Similarly, Judge Weinstein sees a place for ADR in resolving the “residual disputes” that remain after an aggregated settlement, such as allocating shares of responsibility among defendants or arbitrating individual damage claims against a settlement fund.<sup>328</sup> And Professor John Coffee calls for “combining the class action with arbitration (and/or other alternative dispute resolution techniques) on the limited issues of damages and individual causation.”<sup>329</sup> He concludes that even though this approach would leave the final price tag for damages open-ended, the cost savings would give defendants a “substantial incentive” to accept such a process.<sup>330</sup>

As noted above, some commentators urge caution in using aggregation prematurely to achieve a comprehensive settlement.<sup>331</sup> McGovern, for example, advocates “letting the marketplace of litigation play out in the early stages and using more comprehensive case-management techniques as the mass tort matures.”<sup>332</sup> Whatever the mechanism for resolving the common issues, both sides of this debate concur that ADR is appropriate in addressing individual issues at the tail of the litigation.

324. Kenneth R. Feinberg (Moderator), *Debate: The Role of ADR in Mass Torts*, 53 *Disp. Resol. J.* 19, 21 (1998).

325. See generally McGovern, *Mass Torts for Judges*, *supra* note 15.

326. See Menkel-Meadow, *supra* note 184, at 1204–05.

327. *Id.* at 1216.

328. Jack B. Weinstein, *Privatization of Justice*, *supra* note 192, at 288.

329. Coffee, *supra* note 69, at 1439.

330. *Id.* at 1441.

331. See McGovern, *Mass Torts for Judges*, *supra* note 15, at 1841–45 (discussing stages in maturation process); McNeil & Fancsali, *supra* note 7, at 506 (call for a history of jury verdicts before using ADR).

332. McGovern, *Mass Torts for Judges*, *supra* note 15, at 1844.

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In fact, ADR has been used extensively in building claims facilities to process mass torts claims, especially in the context of a bankruptcy or a class action settlement.<sup>333</sup> An experienced consultant, B. Thomas Florence, Ph.D., has identified a set of standards that have emerged from establishing and operating a host of claims facilities. He summarizes these standards under the heading of affording equality of treatment, developing confidence among constituents, promoting settlement over litigation, and enhancing efficiency of operations.<sup>334</sup> We discuss the first three standards.

“Equality of treatment among claimants is the cornerstone of success in any mass tort facility,” says Florence.<sup>335</sup> He notes that methods of achieving equality “are contrary to the methods employed in normal tort settlement” in which “adversarial relationships . . . position each side to obtain the most favorable outcome in a single case.”<sup>336</sup> In the claims facility, the goal is to develop procedures “to guarantee that a claim receives the same settlement offer regardless of when the claim is filed, who receives it, or when it is reviewed.” Professor Georgene Vairo, Chairperson of the Dalkon Shield Trust Fund, documented efforts to implement equality of treatment, noting its corollaries that claimants without lawyers would be assisted in filing claims, that lawyers’ claims would be treated the same as those of unrepresented claimants, and that there would be no negotiation of the trust’s best final offer.<sup>337</sup>

Critics have charged that the approach leaves little room for meaningful participation by claimants because the arbitration offered had a relatively low cap and “the procedure may offer the mere appearance of ADR without much substantive reward.”<sup>338</sup> That view, as noted above, is based on a definition of ADR that contemplates an increase in client control.<sup>339</sup> Goals of equal treatment and consistency of outcomes, however, appear to be in conflict with client control in this instance. One wonders whether claimants in a mass torts setting expect to be treated individually and whether participation by representatives (e.g., consumer groups and attorneys) and neutrals (judges and special masters) in establishing a fair system would satisfy expectations for procedural justice. The bottom line is that there is no empirical research on these points.

333. See generally McGovern, *DDT Settlement*, *supra* note 310.

334. B. Thomas Florence, *Mass Tort Claims Processing Facilities: Keys to Success*, 31 Loy. L.A. L. Rev. 503 (1998); see also Vairo, *supra* note 310, at 130–31 (stating similar principles of fairness, efficiency, and settlement).

335. Florence, *supra* note 334, at 505.

336. *Id.*

337. Vairo, *supra* note 310, at 130–32.

338. Hensler, *A Glass Half Full*, *supra* note 63, at 1622.

339. See discussion *supra*, at notes 304–05.

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Dr. Florence's second standard is that the facility develop confidence among claimants and other constituents that settlements are fair and equitable. In addition to the equal treatment goal, this requires "frequent and open communication with claimants and counsel, and . . . user friendliness."<sup>340</sup> Meeting this goal entails regular newsletters, correspondence with claimant and counsel, telephone banks with staff who can give prompt answers, and procedures that simplify the claims process.<sup>341</sup> Again, we do not know at this time whether such communications satisfy claimants' desires for procedural justice, but evaluation of the Dalkon Shield trust might generate useful information.

As to the third standard, according to Florence "[v]irtually all facilities are designed to promote settlement over litigation."<sup>342</sup> Devices to accomplish that goal include "court orders channeling all claims to the claims facility; alternative dispute resolution mechanisms which the claimant must utilize prior to filings for litigation; and disincentives to litigate, such as award caps, elimination of punitive damages, court certification prior to entering a complaint in the tort system, and staggered payment of litigation awards."<sup>343</sup> Whether these devices are successful in achieving the stated goal of promoting settlement needs to be evaluated empirically.

In describing the Dalkon Shield Claimants Trust, Professor Vairo underscores the importance and difficulty in arriving at an accurate estimation of the amount and value of the claims to be expected.<sup>344</sup> After a notice process generated about 200,000 timely active claims, court appointed experts "sent a detailed questionnaire to a scientific sample of claimants"<sup>345</sup> and used that information to extrapolate to the claimant population. The resulting estimate created a fund that has proved to be more than sufficient to pay the claimants at the projected levels.<sup>346</sup>

In summary, there appears to be a consensus that ADR would be most useful in resolving individual claims for damages after the liability and general causation issues have been resolved. Architects of claims resolution facilities have articulated standards that are designed to achieve fairness and consistency in compensating individuals for their injuries. Whether they satisfy claimants' needs and interests in having a "day in court" remains in doubt. Claims of success in meeting these standards should be rigorously evaluated.

340. Florence, *supra* note 334, at 508.

341. *Id.* at 508-09; for a discussion of how the Dalkon Shield Claimants Fund implemented this standard, see Vairo, *The Dalkon Shield*, *supra* note 310, at 640-41.

342. Florence, *supra* note 334, at 509.

343. *Id.*

344. Vairo, *Georgine*, *supra* note 310, at 124-26.

345. *Id.* at 126.

346. *Id.*

## 5. Bankruptcy<sup>347</sup>

### a. Introduction

The bankruptcy process has certain unique advantages in resolving mass torts liability for a single defendant. Bankruptcy's advantages flow from, to name a few, the nationwide jurisdiction of the court and from a statutory structure that is designed to establish fair, equitable, and reasonably clear priorities among competing classes of interested parties (e.g., of creditors over equity holders; secured creditors over unsecured creditors; unsecured priority creditors over unsecured non-priority creditors) and to treat classes of claimants equally, vis-à-vis other members of the same class (e.g., present tort claimants and future tort claimants).

Despite these favorable features, the Bankruptcy Code obviously was not drafted with the resolution of mass torts liability in mind. Like other aggregative procedures, including the class action, treatment of future claimants in bankruptcy cases is a distinct, but not unsolvable, problem. In this section we will address the current treatment of future claims in bankruptcy as well as statutory proposals to improve bankruptcy's approach to future claims. Examining future claims necessarily involves looking at procedures for estimating the number and value of such claims.

### b. The bankruptcy process

First, we present some background on the procedures prescribed for Chapter 11 reorganization plans. The Bankruptcy Code explicitly requires that a Chapter 11 reorganization plan identify and designate separate classes of creditors' claims and equity holders' interests, specify the treatment to be afforded each class of claims or interests affected by the plan, provide equal treatment for each claim or interest within a particular class, and avoid benefiting directors, officers, and trustees at the expense of creditors and interest holders.<sup>348</sup> The latter rule, known as the principle of *absolute priority*, assures tort claimants of having their claims satisfied before equity claimants receive any value for their interest in the company. Another rule, known as the *best interests of the creditor* principle, guarantees that a Chapter 11 plan cannot be confirmed over the objection of a single

347. Brian Lang, a third-year law student at Ohio State University Law School, provided substantial research and drafting assistance for the bankruptcy section of the report, and Chief United States Bankruptcy Judge David S. Kennedy (W.D. Tenn.) provided insightful and invaluable comments on an earlier draft of this section.

348. See 11 U.S.C. §§ 1123(a)(1)–(7) and 1122(a)–(b). For a discussion of the policy underlying the absolute priority rule, see Elizabeth Warren, *Business Bankruptcy* 134–36 (Federal Judicial Center 1993).

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creditor (i.e., a dissenting member of a class) who would receive a better return in a chapter 7 liquidation case than in the proposed Chapter 11 reorganization.<sup>349</sup>

The Bankruptcy Code requires the court to conduct a confirmation hearing and determine whether a plan satisfies thirteen statutory requirements, including that the plan is feasible and that it satisfies the best interests of creditors test described above.<sup>350</sup> Judicial review of the plan must take place even if every impaired class of claims or interests has affirmatively accepted the plan.<sup>351</sup>

Even if an impaired class of claims or interests votes not to accept a proposed plan, the court nevertheless may confirm the plan (*cram down* is the term of art) if the court finds that the plan does not discriminate unfairly, and is fair and equitable.<sup>352</sup> For example, a Chapter 11 plan will be considered fair and equitable if dissenting *unsecured creditors* either receive the full value of their claims, as of the effective date of the plan, or if no claims that are junior to their own (generally equity claims) receive or retain any property.<sup>353</sup>

c. Defining future claims under current law

Defining when a “claim” arises serves as the linchpin of the bankruptcy system, especially in the mass torts arena. Unless future claims are included, they cannot, of course, be treated equally nor can the debtor achieve final resolution of liability for such claims. Congress clearly expressed an intent that the term “claim”<sup>354</sup> be given “the broadest definition possible . . . [contemplating that] all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.”<sup>355</sup>

349. See 11 U.S.C. § 1129(a)(7). For a discussion of the policy underlying the best-interests test, see Warren, *supra* note 348, at 139–40 (“If a Chapter 11 plan will reduce the payout to creditors then it cannot be confirmed without the consent of those injured. The best-interest test reinforces the goal of using reorganization to enhance value, not to diminish it.”).

350. See 11 U.S.C. §§ 1128(a) and 1129; see also Warren, *supra* note 348, at 30.

351. See Gerald F. Munitz & Karen M. Gebbia, *The Chapter 11 Plan, Confirmation and Cramdown*, in *Basics of Bankruptcy and Reorganization* 339, 355 (1992).

352. See 11 U.S.C. § 1129(b)(1)–(2); see also Warren, *supra* note 348, at 134–36.

353. See 11 U.S.C. § 1129(b)(2)(B)(i)–(ii), *cited in* Munitz, *supra* note 351, at 375.

354. 11 U.S.C. § 101(5) defines claim as a:

(A) right to payment, whether or not such right is reduced to judgment, liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

355. H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1997), *cited in* Barbara J. Houser et al., *Mass Torts and Other Future Claims*, Chapter 11 Business Reorganizations 99 (1997) (brackets in original).

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Two prominent mass torts cases—*Johns-Manville* and *A.H. Robins* (Dalkon Shield)—employed a *conduct* test to determine when claims arose.<sup>356</sup> “Under the ‘conduct test,’ a right to payment, and thus a bankruptcy ‘claim,’ arises when the debtor’s conduct giving rise to the alleged liability occurred.”<sup>357</sup> However, the conduct test defines “claim” so broadly that it would be possible for individuals who have had no contact with a debtor—for example, purchasers of a defective product that was manufactured before the bankruptcy filing, but purchased after a reorganization plan had been confirmed—to have their rights determined under the plan.<sup>358</sup> When a creditor’s claims are proposed for discharge before the creditor comes into contact with the debtor, constitutional due process concerns are magnified. How can such future claimants be notified and heard? Can a future claims representative adequately represent them? Some courts have formulated a *prepetition relationship* test to avoid such conundrums.

The prepetition relationship test requires that the “tortious conduct still must occur prepetition, but the future claimant must also have some relationship with the debtor.”<sup>359</sup> The classic prepetition relationship test was articulated in the *Piper Aircraft* case.<sup>360</sup> In *Piper*, the debtor attempted to define claimants to include unknown—and even unborn—persons who might, after Piper’s Chapter 11 reorganization plan was confirmed, assert a claim relating to aircraft or parts manufactured and sold by Piper before the plan was confirmed.<sup>361</sup> After objection, the bankruptcy court held that the definition of future claims was too broad. The district court affirmed, holding that a claim can arise only when there has been some sort of pre-petition relationship between the parties—“some way to connect the future claims to the debtor today.”<sup>362</sup>

Applying the prepetition relationship test would not have precluded recovery in asbestos or Dalkon Shield cases because even future claimants had been exposed to poten-

356. See *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir.), *cert denied sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988); *In re Johns-Manville Corp.*, 36 B.R. 743 Bankr. (S.D.N.Y. 1984). See also Richard B. Sobol, *Bending The Law: The Story of the Dalkon Shield Bankruptcy* 108 (1991).

357. Sobol, *supra* note 356, at 100.

358. See *id.* at 101.

359. Houser, *supra* note 355, at 101.

360. See *In re Piper Aircraft* 162 B.R. 619, 627 (Bankr. S.D. Fla.), *aff’d sub nom. Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 168 B.R. 434 (S.D. Fla. 1994), *aff’d*, 58 F.3d 1573 (11th Cir. 1995).

361. See *In re Piper Aircraft*, 162 B.R. at 627 n.1.

362. *Piper*, 168 B.R. at 439. “The bankruptcy court provided four examples of a prepetition relationship, namely ‘contact, exposure, impact, or privity between the debtor’s prepetition conduct and the claimant.’ ” *Id.*

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tially dangerous products before Chapter 11 petitions were filed. In dealing with harmful chemical, drugs, material, or intrauterine devices, courts would presume that some injury occurred at the time of initial contact.<sup>363</sup>

After *Piper* there remain serious gaps and uncertainties in the Bankruptcy Code's treatment of mass torts claims. *Piper*, after all, is a single case and it did not arise in a mass torts context. Several different approaches have been recommended.

#### d. Defining future claims: NBRC and NBC proposals

In an attempt to resolve disputes over what constitutes a future claim, the National Bankruptcy Review Commission (NBRC) proposed in October 1997 the following statutory definition of "mass future claim:"

[a] claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if: (1) the act(s) or omission(s) occurred before or at the time of the order for relief; (2) the act(s) or omission(s) may be sufficient to establish liability when injuries are ultimately manifested; (3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds; (4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and (5) the amount of such liability is reasonably capable of estimation.<sup>364</sup>

There has been little published commentary to date on the NBRC proposal. Judge Edith H. Jones (5th Cir.), a member of the NBRC, published an incisive critique of the mass torts proposals. Summaries of her comments will be interspersed throughout this discussion.<sup>365</sup>

To illuminate the issues in defining future claims, we will examine a prior proposal and some of the ensuing commentary. In 1994, the National Bankruptcy Conference (NBC) proposed an amendment to the definition of "claim" in section 101(5) to "provide that

363. *Piper*, 168 B.R. at 438 n.5.

364. National Bankruptcy Review Commission, Final Report: Bankruptcy: The Next Twenty Years (October 20, 1997) [hereinafter NBRC Report]

365. Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 Tex. L. Rev. 1695 (1998). In addition to the commentary discussed in the text, the Business Bankruptcy Committee of the American Bar Association has reviewed the NBRC proposals. G. Eric Brunstad, Jr. et al., *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 35 Bus. Law. 1381 (1998). In general, the committee's comments are that the recommendations on mass torts "constitute an improvement over the current law," *id.* at 1450, and that "the essential details of the proposals remain vague," *id.* at 1451 (referring to the mechanics of appointment of a future claims representative, the standards for issuing a channeling injunction, and the estimation procedures).

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the occurrence of one or more material acts or failures to act at the time of or before the order for relief creates a claim, if the plan proponent identifies with reasonable certainty the acts upon which the claim is based.”<sup>366</sup> Note that the NBC proposal does not include the NBRC requirements that there be numerous demands for payment, that future claimants be identifiable and that their claims be capable of estimation. Nor does the NBC proposal appear to require a prepetition relationship between the claimant and the debtor.

It is also worth noting that in 1994 Congress adopted the “Manville Amendments” to the Bankruptcy Code.<sup>367</sup> These amendments authorized courts to issue a channeling injunction in an asbestos-related reorganization, steering all claims and “future demands” to a trust that must meet statutory qualifications.<sup>368</sup> Congress did not take the opportunity to define claims to include future claims, but instead used the concept of future demands, a new statutory term that introduced new difficulties.<sup>369</sup>

Ralph Mabey and Peter Zisser are attorneys who advocate using bankruptcy extensively to deal with future claims.<sup>370</sup> They define 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.’”<sup>371</sup>

With the above definition in mind, Mabey and Zisser compare the Manville Amendments to the proposed NBC amendments, illuminating the advantages of the NBC proposals. First, as noted above, the Manville Amendments view future claims as future “demands,” thereby denying them statutory rights, especially voting rights, that flow from having a “claim” under the Bankruptcy Code.<sup>372</sup> Further, a single dissenting holder of a present claim may block the plan if recovery in liquidation would be greater than in the Chapter 11 proposed plan under the *best interests of the creditor* test noted above, but the holder of a future demand has no such right.<sup>373</sup>

366. National Bankruptcy Conference, Reforming the Bankruptcy Conference’s Code Review Project, Final Report (1994) [hereinafter NBC].

367. Pub. L. No. 103-394, 108 Stat. 4106 (1994) (codified at various parts of 11 U.S.C.).

368. See generally Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 Am. Bankr. L.J. 487, 498–99, 502–05 (1995) [hereinafter Mabey & Zisser].

369. *Id.* at 502–03.

370. See generally *id.*

371. *Id.* at 477–78 (citing Mabey & Gavrin, *supra* note 70, at 749–50).

372. See *id.* at 502–03.

373. See *id.*

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Mabey and Zisser prefer the NBC proposed amendment because it would make clear that future claims are statutorily recognized claims.<sup>374</sup> Under both the NBC and the NBRC definitions future claimants would have a right to share in the distribution of the property of the estate, the right to vote for or against the plan, and the rights to protection under the best interests of the creditor test and the absolute priority rule.<sup>375</sup> Further, future claimants would be subject to due process considerations and protections, and their claims also would be subject to discharge—thereby relieving the debtor of future liability.<sup>376</sup>

When considering the value of the NBC proposed amendments, Mabey and Zisser state that future claimants must be treated fairly with respect to present claimants and that a limited funds value would be maximized by including in the plan as many future claims (those arising from prepetition conduct although not yet manifested) as possible. This approach limits the possibility that futures will assert claims later—so-called “overhang[ing]” liabilities.<sup>377</sup>

Judge Jones finds the NBRC proposals a departure from precedent by “crafting a bankruptcy definition of a claim that is untethered to state law.”<sup>378</sup> The proposal thus introduces additional uncertainty about claims. Unlike class action jurisprudence, the definition contains “[n]o requirement of commonality of legal or factual issues, typicality, or predominance of common issues exists in this definition.”<sup>379</sup> The only advantage over class action approaches is that “the Commission proposal would arguably create enough of a controversy to overcome justiciability concerns” that have accompanied future claims issues.<sup>380</sup>

Professor Kathryn Heidt thinks that the NBC proposed amendments do not go far enough. Her critique would also apply to the NBRC proposal. While approving of the bankruptcy court as a forum for resolving future claims, Heidt argues that the Bankruptcy Code should be amended “to make clear that obligations arising from culpable

374. *See id.* at 504–05.

375. Whether future claimants should be considered part of the present class of claimants or a separate class remains open to debate. Traditionally, futures were treated as a separate class from present claimants (*e.g.*, the Manville Amendments specify that future participants possess demands but not claims). This was not the case, however, in *Robins*. *See id.* at 496–97 (“In *A.H. Robins*, on the other hand, future claims were accorded the same treatment as present claims”).

376. *See id.* at 503–04.

377. *See id.*

378. Jones, *supra* note 365, at 1707.

379. *Id.* at 1708.

380. *Id.* at 1709.

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actions which are not yet manifested, and perhaps have not yet even occurred, are ‘claims’ that ‘arise’ at the time the debtor commits the act on which liability is based.”<sup>381</sup> In effect, this would codify the conduct test for determining when a claim arises.

Heidt believes that Mabey and Zisser’s definition of what constitutes a “future claim” is unclear about whether that term would include persons who at the time of the filing had not yet come into contact with the product (e.g., the future claimants in *Piper* who had no pre-bankruptcy relationship with the debtor or its product).<sup>382</sup> Heidt argues that if these persons are not included then both principles of fairness and maximizing a fund for claimants by eliminating future demands on the debtor outside the fund—principles upon which Mabey and Zisser rely—will be violated.<sup>383</sup>

The NBC Report states that “the difficulty underlying . . . bankruptcy cases is the expectation of future claims based upon injury which arises out of this debtor’s earlier conduct, but has not yet manifested itself.”<sup>384</sup> This indicates that those who have not yet come into contact with the product would not be covered by the NBC amended definition of “claim.”

While agreeing with Mabey and Zisser that the approach in the NBC proposed amendments is far superior to the Manville Amendments, Heidt expressed concern that the NBC’s definition of future claimant would exclude *Piper*-like claimants who had not yet come into contact with the product at the time of reorganization but are later injured.<sup>385</sup> Further, Heidt disagrees with the NBC proposal that the plan proponent may decide whether future claims should be in or out. “Future claims” should be clearly defined, and future claimants should be free to participate in the bankruptcy—it should not be left up to a plan proponent to decide whether future claims are in or out.<sup>386</sup>

Heidt suggests that the best manner in which to go about resolving the problem is to focus first on bankruptcy principles.<sup>387</sup> The first principle is that of treating similar creditors similarly (“equality is equity”), and the second is the principle of a fresh financial start for the debtor.<sup>388</sup> Under the first principle, future claimants injured by the same act,

381. Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 Am. Bankr. L.J. 515 (1995).

382. *See id.* at 518.

383. *See id.* at 518–19.

384. NBRC Report, at D, Introduction, at P1, *cited in id.* at 518.

385. *See* Heidt, *supra* note 381, at 518.

386. *See id.* at 519.

387. *See id.* at 520.

388. *See id.*

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defect, or omission as present claimants should be included in the bankruptcy process. Presents and futures, she contends, are similarly situated and should be treated similarly. To leave out futures not only treats them differently but devalues the going concern value of the business by exposing it to future lawsuits. Heidt believes that the *Piper* distinction of contact between the debtor and creditor unduly detracts from this policy of treating similarly situated creditors similarly.<sup>389</sup> It should be noted, however, that at least one commentator does not view present and future claimants as similarly situated.<sup>390</sup> Under the second principle, excluding future claimants exposes the going concern to liability. This exposure plainly violates the congressional policy of giving a reorganized business a fresh financial start.<sup>391</sup>

Heidt does not necessarily find fault with the present definition of a “claim” in the Bankruptcy Code. She asserts that the real problem is not with whether or not there is a “claim” (she argues that futures are included in the definition) but when a claim “arose.”<sup>392</sup> Heidt believes the Bankruptcy Code ought to specify that claims “arise” “when the debtor did the acts on which the obligation is based, usually when it manufactured the product.”<sup>393</sup>

The NBRC test is really a conduct test with added tests to limit its application to mass torts claims in which claimants are knowable and the value of claims is capable of estimation. Its proposed definition of claim requires that the conduct that ultimately gives rise

389. *See id.* at 521.

390. *See* Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 Am. Bankr. L.J. 329 (1996). Davis sees an important difference in one who is presently living with an injury and aware of that injury as opposed to one who has not yet manifested the injury and is not aware of the potential injury. Further, Davis argues that treating present and future claims as equal would violate principles of maximizing the estate for distribution. *See id.* at 332. Davis relies on *Manville* as an example to demonstrate that often the creation of a fund may be unworkable—he further notes that many companies are simply too small to deal with the costs of paying a representative to investigate potential future claims. Davis points out that future claims are rarely a serious difficulty for a reorganizing business. *See id.*

However, Davis also argues that future claims should not simply be disregarded. Treating future claims as unequal to present claims does not mean that they have to be treated unfairly. “Fair treatment of future claims requires that they be protected from the diversion to present claimants of funds or value that could meaningfully be distributed to future claimants.” *See id.* at 367. Davis believes that there are protections for future claimants inherent in the cramdown process (e.g., market forces and legal representatives). *See id.* at 368–69.

391. *See* Heidt, *supra* note 381, at 521–22.

392. *Id.* at 522.

393. *Id.*

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to the injury have occurred before the bankruptcy petition is filed. The NBRC proposal does not require a pre-petition relationship as such if there are mass claims involving identifiable claimants. Requiring that the claimants be identifiable seems designed to serve as a substitute for requiring a prior relationship between claimant and debtor.

However, the NBRC definition limits a bankruptcy court's ability to channel liabilities away from a reorganized entity that are "so unforeseeable or speculative that they are not reasonably capable of approximation."<sup>394</sup> The NBRC further points out that it has purposely not required a showing of insolvency so as to encourage the settlement of mass torts liability through the bankruptcy process. The requirement that future claimants be identifiable should ameliorate the due process concerns raised by a pure conduct test. The requirement that the liability be estimable is intended to act to filter out debtors dealing with highly speculative liabilities.<sup>395</sup>

e. Estimating claims

Once future claims have been defined, it becomes essential in a mass tort case to estimate the size and number of all present and future claims, and the code provides authority to do so.<sup>396</sup> This figure will determine how large a trust will need to be to pay such claims fully or to provide a pro rata share. Estimations of classes of claims also allow reorganization proponents to provide fairly and equitably for creditors in different classes (e.g., by providing for the same pro rata share to be given personal injury creditors and trade creditors).

Estimation of claims is not to be confused with liquidation—liquidation requires a conclusive finding of a specific sum while estimation is a device used to keep the case moving forward. Estimation's goals are to "provide greater certainty of recovery and resolution of contingent and unliquidated claims during the bankruptcy process."<sup>397</sup> A bankruptcy court is prohibited from estimating "contingent or unliquidated personal injury tort or wrongful death claims against the estate *for purposes of distribution* in a case under title 11."<sup>398</sup> A jury trial may be requested to determine the actual amount of a claim for

394. NBRC Report, *supra* note 364, at 327.

395. *Id.* at 327–28.

396. 11 U.S.C. § 502(c) provides:

"There shall be estimated for purposes of allowance under this section— (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or (2) any right to payment arising from a right to an equitable remedy for breach of performance."

397. Harvey R. Miller et al., *Formulation and Confirmation of Chapter 11 Plans Under the Bankruptcy Code*, Chapter 11 Business Reorganizations 173, 285 (1988), *referring to In re Baldwin-United Corp.*, 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985).

398. 28 U.S.C. § 157(b)(2)(B) (1994) (emphasis added).

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distribution purposes.<sup>399</sup> Courts have estimated potential personal injury liability in the mass torts context.<sup>400</sup>

The estimation process may be particularly useful if future claimants are included in the bankruptcy process.<sup>401</sup> We will look at a mass torts estimation to examine further how the process works.

f. Estimation of claims in the *A.H. Robins* reorganization case

The *A.H. Robins* case was one instance in which an estimation process played a central role. Richard Sobol, an attorney, has written a book called *Bending the Law* that is devoted exclusively to the *Robins* reorganization case and is the primary source for this discussion.

Robins, the equity committee, Aetna, and the Dalkon Shield claimants' committee all employed processes of (1) identifying the women in the sample deemed to be entitled to compensation at historic levels; (2) determining the values of their claims, generally by reference to databases containing information taken from resolved cases; and (3) projecting these values to the universe of eligible claims.<sup>402</sup> Sobol points out some serious methodological concerns with regard to how these accepted methodologies were implemented.

Sobol's main critique is that the experts made non-scientific assumptions about precisely how many women would file claims and about the criteria to be used in the evaluating a claim.<sup>403</sup> Sobol notes:

A serious shortcoming with the methodology concerned the identification of the claims in the sample to which historic value would be accorded. Ideally, in statistical sampling the pertinent information is determined concerning the sample and the assumption is made that the same factual pattern will be replicated in the universe. If 25 percent of the homes in a statistically valid sample are tuned to the "Cosby Show," it is assumed that 25 percent of all the homes in the universe from which the sample was drawn are tuned to the "Cosby Show." The comparable methodology for estimating the

399. See 11 U.S.C. § 1141(a), cited in Miller, *supra* note 397, at 294.

400. See *A.H. Robins v. Piccinin*, 788 F.2d 994, 1012–13 (4th Cir. 1986).

401. See Houser, *supra* note 355, at 115 ("The claims estimation process is particularly well-suited to future claims, which by their very nature could delay the administration of a bankruptcy case."). Houser also finds that the estimation process will be of more value if it can be used to set a limit on the amount to be distributed to future claimants than if it used solely to decide whether a proposed plan is feasible. *Id.*

402. Sobol, *supra* note 356, at 181. Added to the estimation was the cost of nuisance payments for claimants that were excluded, future claimant costs, costs to nonuser claims, and administration costs. See *id.*

403. See *id.*

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value of the universe of Dalkon Shield claims would be actually to liquidate the claims in a sample, using the procedures that would be used to liquidate claims under the plan of reorganization, and to project the liquidated value of the sample to the universe.

That was not done. Rather, the parties' experts made assumptions concerning the number of women in the sample who would present their claims for payment, and concerning the criteria by which the claims that were presented would be evaluated and paid. The differences among the estimates depended almost entirely on the differences in these assumptions. The witnesses had no expertise relative to these matters, and no evidence or even opinion was offered in support of the assumptions that were made. The witnesses simply made the assumptions that would support the result favored by their employer.<sup>404</sup>

As an example, Sobol points to a witness who assumed that every member of the sample who did not return a questionnaire and health records would not file a claim for damages. This number was nearly 50%. Another expert assumed that every woman in the sample would participate in the trust. Sobol asserts that there are many reasons that more women would participate in the claims resolution process than would participate in the estimation questionnaire process. For example, the questionnaire asked numerous questions about a woman's sexual history. Further, the sample procedure discounted responses if they were deficient in any way. Finally, participating in the sample did not lead to financial compensation while participating in the claims resolution process would.<sup>405</sup>

Plaintiffs' attorneys attempted to introduce several victims' testimony in order to give the judge a sample of "the actual impact on women's lives." District Judge Robert R. Merhige, Jr. ruled that such evidence was irrelevant to the estimation process because it related only to one individual's claim.<sup>406</sup> Ultimately Judge Merhige only allowed counsel from the official claimants' committee to participate in the estimation proceeding.<sup>407</sup>

The parties testimony resulted in estimates ranging from \$1.215 billion (Robins) to \$2.5 billion (Aetna) to \$7.167 billion (claimants' committee).<sup>408</sup> After the parties' experts testified, Judge Merhige encouraged the parties to agree on an estimation of the claims. After settlement negotiations bogged down, Judge Merhige, reportedly "[f]rustrated and angry," announced his estimate of the claims to be \$2.475 billion. He did not offer reasons for this figure, but its proximity to Robins' insurer's estimate suggests a rationale. After

404. *Id.* at 181.

405. *See id.* at 182.

406. While plaintiffs' counsel actually called one of these witnesses at trial arguing the testimony was applicable to every claim, their efforts were once again rebuffed by Judge Merhige. *See id.* at 179–80.

407. *See id.* at 179.

408. *See id.* at 183–96, esp. Table 13.1.

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the judge rebuffed efforts to get an explanation of the above figure, the court of appeals affirmed his estimate and rejected claimants' argument that they were entitled to an explanation of the figure.<sup>409</sup>

g. NBRC claims estimation proposal

The NBRC has also proposed an amendment to the Bankruptcy Code that specifically recognizes a bankruptcy court's authority to estimate mass future claims for purposes of allowance, voting, and distribution.<sup>410</sup> The NBRC deliberately avoided proscribing any particular method of estimation in order to maintain flexibility in the process. Courts would retain discretion in articulating the purposes for which they estimate future claims.<sup>411</sup>

This recommendation would not interfere with the right to a jury trial for personal injury or wrongful death claims, which the Seventh Amendment and the Bankruptcy Code preserves. The estimate would be used only to decide how large the trust must be to compensate those making claims against it. The reorganization plan will generally specify the manner in which jury awards become obligations of a claimants' trust.

Judge Jones finds it an "extraordinary proposition . . . that a bankruptcy court—hardly a forum that routinely decides injury cases—could fix and liquidate perhaps thousands of tort or contract claims without conducting a single jury trial."<sup>412</sup> On the other hand if there is to be an estimation process, she would mandate its use in every case so that it "would perform the same role as a class action fairness hearing on settlement."<sup>413</sup>

h. Channeling injunctions

The NBRC also recommended that section 524 of the Bankruptcy Code authorize a bankruptcy court to issue a channeling injunction, which "steers claimants toward a trust or pool of assets to compensate claimants as it simultaneously steers those claimants away from the reorganized entity."<sup>414</sup> The NBRC notes that channeling claims reinforces the effect of discharge in that the debtor does not have to deal with individual creditors. The NBRC further notes that it has not explicitly set out a precise form for channeling injunctions because a court should be free to fashion a channeling injunction that best fits the situation at hand. For example, alternative ways of assuring adequate funding of a trust or of distributing excess funds can be explored under the broad authority the NBRC

409. See *In re A.H. Robins Co.*, 880 F.2d 694, 697 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

410. NBRC Report, *supra* note 364, at 341–44.

411. *Id.* at 343.

412. Jones, *supra* note 365, at 1714.

413. *Id.* at 1715.

414. NBRC Report, *supra* note 364, at 345.

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proposes.<sup>415</sup> Judge Jones warns that the NBRC channeling injunction, “by definition, would prevent future claimants from suing not only the debtor, but whatever third parties to the debtor’s liability the court thought it equitable to protect.”<sup>416</sup>

i. Due process and future claims

In discussing class actions, Professor Richard Marcus addresses problems related to notice of future claimants.<sup>417</sup> Marcus argues that while class actions have involved serious efforts to notify class members, there must be a more serious effort to notify those who have been exposed to a dangerous product but have not yet manifested injury. In his words:

Unless claimants with unmanifested claims are absolutely protected against having to decide now whether to exclude themselves from a class action, the ultimate question for mass tort class actions is whether they can adequately identify and inform absent class members of their rights. Given the underlying *Erie* issues and the nature of these claims, intense scrutiny of both the efforts and their results is warranted. Given the immense amounts at stake in the current settlements, even the multi-million dollar efforts mounted by their proponents may not suffice. Moreover, where there are requirements (such as those in *Silicone Gel*) that claimants take affirmative action by registering to protect their rights, the attention to notice should be even more exacting. There are certainly indications that even the million-dollar notice efforts in the recent cases may be found inadequate.<sup>418</sup>

Such concerns might be even greater in the bankruptcy context where the statutory framework grants more specific rights to claimants, including the right to vote on a proposed plan and to invoke the absolute priority rule and the best interests of creditors rule.<sup>419</sup> Approaching due process issues from their bankruptcy experiences, Bankruptcy Judge Russell Eisenberg and attorney Frances Gecker suggest using the class action standard to evaluate the fairness of notice in the bankruptcy context because of the similarities between limited fund class actions and bankruptcies with regard to due process concerns.<sup>420</sup>

415. *See id.* at 347.

416. Jones, *supra* note 365, at 1717.

417. *See* Marcus, *supra* note 70, at 894–95.

418. *Id.* at 894–95.

419. *See* discussion *supra* notes 348–349. The Business Bankruptcy Committee of the ABA expressed concern that the NBRC proposals invite analysis of “difficult and complex issues,” especially “the due process rights of holders of mass future claims.” Brunstad et al., *supra* note 365, at 1451.

420. *See* Russell A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 *Bankr. Dev. J.* 47 (1993).

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Obviously, both limited funds and bankruptcies deal with classes or groups of individuals, and in bankruptcy individuals tend to act “in homogeneous groups, establish official and unofficial committees, and take many actions as a group of people.”<sup>421</sup> Judge Eisenberg and Ms. Gecker point out that Fed. R. Bank. P. 7023 incorporates Rule 23 which states, “[i]n any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>422</sup> Rule 23(c) is designed to alert parties of pending class actions and to give parties in interest an opportunity to decide whether or not to participate.<sup>423</sup> Judge Eisenberg and Ms. Gecker assert that this standard should be used in bankruptcy matters. Failure to provide notice to future asbestos claimants, for example, has been held to invalidate a proposed discharge of their claims.<sup>424</sup> A party in bankruptcy who is on notice and does nothing should lose his or her rights just as a party in a limited fund class action would.<sup>425</sup> If there are known but not identifiable future claimants, a representative should be appointed to act on their behalf; notice by publication will not suffice in such circumstances.<sup>426</sup>

To provide due process for future claimants, the NBRC proposal calls for appointment of a representative for future claimants. According to Judge Jones, the future claims representative would have “extraordinary exclusive power . . . to file and compromise class claims,” would operate “without the supervision or control of real clients,” and possess only “inherently weak” bargaining powers.<sup>427</sup> The NBRC proposal stipulates that the future claims representative not hold any interest adverse to the class,<sup>428</sup> but Judge Jones questions whether this would satisfy the adequacy of representation standard in Rule 23(a)(4) which the Supreme Court applied in *Amchem*.<sup>429</sup>

In summary, constitutional due process applies with full force in bankruptcy cases and proceedings. The importance of the interests of future claimants and the need for prompt action on those interests demands special efforts to provide actual notice or fiduciary representation.

421. *Id.* at 96.

422. Fed. R. Civ. P. 23(c).

423. *See* Eisenberg & Gecker, *supra* note 420, at 97.

424. *See id.* at 105–06, citing *Waterman Steamship Corp. v. Aguiar*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992).

425. *See id.*

426. *See id.* at 107.

427. Jones, *supra* note 365, at 1713.

428. NBRC Report, *supra* note 364, at 332.

429. Jones, *supra* note 365, at 1713.

j. Bankruptcy and limited fund class actions compared

When balancing the relative strengths and weaknesses of resolving mass torts through the bankruptcy process or through class actions, the most obvious strength of the bankruptcy court is its jurisdictional reach. Mabey and Zisser point out that in a Rule 23 class action the court “(i) lacks personal jurisdiction over unwilling plaintiffs, (ii) is arguably unable to enjoin proceedings pending in other courts, and (iii) does not now have removal jurisdiction from state to federal courts absent complete diversity.”<sup>430</sup> A bankruptcy court does not have to deal with any of these obstacles. All personal injury and wrongful death tort actions must be removed to the district court (in which the bankruptcy case is pending), and the bankruptcy court has personal nationwide jurisdiction over every creditor of the debtor.<sup>431</sup> Further, Mabey and Zisser comment, the bankruptcy court has the power to enjoin all actions that may impact the estate.<sup>432</sup> Finally, Mabey and Zisser point out that the bankruptcy courts’ treatment of future claims emanates from the Bankruptcy Clause of the Constitution and the Bankruptcy Code itself.<sup>433</sup>

John Coffee has argued that the Chapter 11 reorganization process has both substantive and procedural advantages over class actions in reaching a fair resolution for tort creditors.<sup>434</sup> As noted above, bankruptcy reorganization cases follow the absolute priority rule. Bankruptcy principles also follow a norm of temporal equality, the equitable principle that requires all claimants or interests in the same class be treated equally even if their claims did not mature at the same time.<sup>435</sup>

Coffee goes on to point out that class actions settlements violate these two principles.<sup>436</sup> A Rule 23(b) (1) (B) limited fund class action is essentially a bankruptcy in thin disguise. In a bankruptcy, tort creditors would receive full payment before stockholders would receive any compensation (except to the extent they agree to a different treatment). However, in the limited fund class action that settles, which it is very likely to do given the

430. Mabey & Zisser, *supra* note 368, at 489 (footnotes omitted).

431. *See* Mabey & Zisser, *supra* note 368, at 489–90. Cases are to be tried in the district court in which the bankruptcy case is pending or in the district court in the district in which the claim arose. For a discussion of the possible reach of bankruptcy jurisdiction to codefendants of the debtor, see Note, *Why Bankruptcy “Related to” Jurisdiction Should Not Reach Mass Tort Nondebtor Codefendants*, 73 N.Y.U. L. Rev. 1627 (1998).

432. *Id.* at 489 n.7.

433. *Id.* at 490. Mabey and Zisser state, “Thus, in applying procedural due process balancing tests, because the governmental interest is greater, the bankruptcy court’s treatment of future claims is more likely to pass constitutional muster than is similar treatment by a class action court.” *Id.* at 490–91 (footnotes omitted).

434. *See* Coffee, *supra* note 69, at 1458.

435. *See id.*

436. *See id.* at 1459.

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attorney incentives, tort claimants often get a percentage of the value of their claims while stock value soars because of the release from the liability.<sup>437</sup> Further, mass torts settlements often violate temporal equality. Future claimants suffer at the hands of present claimants if more present claimants come forward than expected and deplete the trust fund.<sup>438</sup>

All is not necessarily fair in all mass torts bankruptcies either. Thomas Smith comments that mass torts bankruptcies suffer keenly from distributional problems.<sup>439</sup> While Smith recognizes that the bankruptcy process does recognize principles such as absolute priority and temporal equality, he notes that “[s]trong forces militate against equal treatment of present and future claimants.”<sup>440</sup> Smith examines three factors affecting allocation decisions.<sup>441</sup> The first category he calls psychological factors which he capsulizes in the phrase “vividness effect.”<sup>442</sup> Present claimants have psychological advantages over futures because they have visible and often urgent needs for compensation to pay medical debts or personal expenses after being incapacitated. On the other hand, futures are “statistical probabilities.”<sup>443</sup> In Smith’s view, it is inherently difficult as a representative of future claimants to persuade a judge to forgo compensating present plaintiffs in favor of unknown future claimants.

Second, Smith points out that there is some evidence that judges overvalue reorganized firms and tend to feel that any reorganization gives debtors adequate compensation.<sup>444</sup> Overvaluing reorganization may lead to a result that encourages judges to see

437. *See id.*

438. *See id.* at 1459–60.

439. Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 *Yale L.J.* 367, 371 (1994).

440. *Id.* at 372.

441. *See id.* at 383–91.

442. *Id.* at 383.

443. *Id.*

444. *Id.* at 384, citing J. Ronald Trost, *Corporate Bankruptcy Reorganizations: For the Benefit of Creditors or Stockholders?*, 21 *UCLA L. Rev.* 540, 544–46 (1973) (discussed below); Walter J. Blum, *The Law and Language of Corporate Reorganization*, 17 *U Chi. L. Rev.* 565, 577–78 (1950) (discussing the differences between reorganization value and market value).

Trost states that the most basic question in the valuation of a corporation is how much the reorganized corporation is likely to earn. First, one must estimate average annual future earnings. Second, one must estimate the length of life the reorganized business will have. Finally, one must decide the appropriate rate of return on earnings. Trost goes on to state that “[s]ome courts and commentators are more candid than others about the difficulties inherent in the valuation problem.” Particularly, the choice of capitalization rate is difficult to estimate with any certainty. “By a slight change of the capitalization rate, an insolvent company in which shareholders are denied participation becomes a solvent company in which shareholders are entitled to some kind of interest.” *See Trost* at 546.

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treatment of futures in a rosy light. Whether future claimants are being treated fairly or not, the judge may just want to get rid of the problem to push the plan through the confirmation hearing. Further, juries in a mass tort case are only deciding the value of the present value claims. Bankruptcy requires that a conscious decision be made to deprive present claimants of certain compensation in favor of the probability that future claimants might benefit.<sup>445</sup> Smith also points out that attorneys representing present claimants in a Chapter 11 case often benefit more financially from a plan than the representative of future claimants. Representatives of futures are typically paid from the estate itself, and a judge eager to push a plan through is more likely to appoint a representative that the judge believes may be more accommodating to a plan that does not treat futures fairly.<sup>446</sup>

Finally, Smith points out that strategic behavior in bankruptcy clearly advantages present claimants over future claimants. The only safeguard for future claimants is the court itself whose role, Smith believes, “is less to ensure that future claimants receive the maximum possible or even a fair share, than it is to ensure that the parties reach some agreement.”<sup>447</sup> Smith points out the advantages to equity in delaying the bankruptcy’s completion and the pressure this creates for present claimants who often need a quick resolution. Present claimants may choose to participate in a compromise with equity holders that disadvantages future claimants.<sup>448</sup>

Smith’s solution to what he sees as structural disadvantages for future claimants is to create a new structure—a “capital markets approach” to the estimation of liability to future claimants and the distribution of value to all claimants. Under such an approach, claimants would be paid in shares of a trust fund or bonds issued by a solvent company. Market forces would establish the value of the shares or bonds, creating financial incentives for the accurate assessment of future liability.<sup>449</sup> Evaluation of Smith’s proposals, which call for a total restructuring of Chapter 11,<sup>450</sup> is beyond the scope of this review.

445. See Smith, *supra* note 439, at 384.

446. See *id.* at 384.

447. *Id.* at 385.

448. See *id.* John Coffee has suggested that many of these problems of lack of fairness with regard to future claimants may be resolved by (1) requiring courts to find that future claimants interests will be fairly protected in a class action as a part of the superiority requirement, (2) certifying limited fund class actions for purposes of liability only, and (3) giving future claimants the deferred right to opt-out in a class action (e.g., even after a settlement has been approved). See Coffee, *supra* note 69, at 1433.

449. Smith, *supra* note 439, at 394–433.

450. See *id.* at 429–31, 439. For a succinct summary of the vibrant and extensive literature supporting and criticizing the current Chapter 11 reorganization approach, see *id.* at 430 n.188. For a creative proposal to improve protection for future claimants through a system of pro rata distribution of funds to compensate mass tort claimants, see Note, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 Yale L.J. 2545 (1998).

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Along the same lines as Smith and contrary to Coffee and Mabey and Zisser, Judge Jones is skeptical of the advantages asserted for bankruptcy courts vis-à-vis class actions. The absolute priority rule, voting rights, and protections against cram downs, she asserts, are “overrated as applied to the unique status of a class of mass future claims.” Because “most plans are ultimately consensual, a mass future claims class, like other senior creditor classes, will eventually compromise its interests with those of equity holders.”<sup>451</sup> Overall Judge Jones raise a rhetorical, but key question: “whether the mass future claims proposals have anything to do with bankruptcy, or whether they are a contrivance to shoehorn mass torts litigation into a coercive, collective settlement that preserves management control and shareholder equity.”<sup>452</sup>

We have no intention of attempting to resolve the debate about the relative advantages and disadvantages of bankruptcy and limited fund class actions. The Supreme Court may clarify some of the due process issues for us in the near future. Suffice it to say at this point that bankruptcy and class actions each face challenges in dealing with due process and the fair and equitable treatment of future claimants.

k. Delays and emergency medical procedures

Finally, a major criticism of the bankruptcy process arises out of the long delays experienced in the *Manville*<sup>453</sup> and *Robins*<sup>454</sup> reorganization cases. One consequence of such delays is that tort victims without insurance or other resources may not be able to obtain emergency medical procedures. For example, in *Robins*, some of the infertility caused by the Dalkon Shield could have been reversed surgically if action had been taken before the women reached the age of forty.<sup>455</sup> Claimants’ counsel put together a plan to fund emergency surgery that achieved the consent of all but the shareholders’ committee. Judge Merhige’s order implementing the plan was reversed by the court of appeals.<sup>456</sup>

451. Jones, *supra* note 365, at 1719–20.

452. *Id.* at 1722.

453. See, e.g., Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 Cardozo L. Rev. 583, 627 (1996) (“It is a shame that it took fourteen years for these lessons to be learned.”).

454. In *Robins*, the Chapter 11 petition was filed in August 1985. The claimants’ trust received full funding in December 1989. See Vairo, *Georgine*, *supra* note 310, at 155. Administration of the trust “is likely to effectively complete its mission by the end of 1998.” *Id.*

455. See Sobol, *supra* note 356, at 129–30.

456. See Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987). For commentary of how the order was developed and critiques of the ruling in *Mabey*, see Sobol, *supra* note 356, at 129–35; Jason A. Rosenthal, *Courts of Inequity: The Bankruptcy Laws’ Failure To Adequately Protect the Dalkon Shield Victims*, 45 Fla. L. Rev. 223, 226–32 (1993).

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In ordinary litigation a court can schedule a civil lawsuit for trial promptly or otherwise take action under its equitable powers to address such emergencies. The bankruptcy process currently does not provide an express mechanism for tort victims to be immediately compensated for emergency medical procedures. Rosenthal argues that tort creditors may suffer irreparable harm while waiting for plan confirmation.<sup>457</sup> He points out that there are some general powers that bankruptcy courts might invoke to protect tort victims,<sup>458</sup> but finds these tools to be inherently “weak.” Rosenthal argues that Congress should amend the Bankruptcy Code to explicitly grant the court the ability to require entities seeking reorganization under Chapter 11 to make preconfirmation payments for the express purpose of paying tort victims emergency medical expenses.<sup>459</sup> Sobol calls for a similar amendment.<sup>460</sup>

#### *6. Summary and conclusions*

The disparate approaches discussed in this section are similar in that they all depend on existing law and procedural rules, although some, such as statistical sampling, require an evolutionary extension of current laws and rules. Another common feature of all of the above approaches is that they all have major deficiencies that inhibit a comprehensive resolution of a single mass tort.

Some options, such as opt-out settlement class actions and Chapter 11 reorganization cases, depend on cooperation or consent of the parties in interest for effective use. Of course, there are involuntary remedies in bankruptcy cases and in limited fund class actions, but for the most part these remedies are not invoked unless the parties in interest have exhausted all opportunities to resolve these matters through negotiations. Judicial consideration of mandatory remedies seems unlikely in the absence of defendants’ agreement with a critical mass of plaintiffs and their attorneys.

Even the sweeping remedies involved in the aggregation of risk-based claims and in the use of statistical sampling thus far have found some of their most successful uses in designing settlements that are advantageous to all sides in the litigation. At the least, acquiescence and cooperation enhance the success of those remedies. Resistance, as *Cimino*

457. See Rosenthal, *supra* note 456, at 226–27.

458. These tools include a bankruptcy court using its equitable powers under section 105 of the bankruptcy code to “respond flexibly to the extraordinary problems which may arise in a bankruptcy case,” using the common-law doctrine of necessity, or using section 363 of the code to permit preconfirmation payments as justified by a “business purpose.” *Id.* at 232.

459. See *id.* at 248.

460. Sobol, *supra* note 356, at 338.

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illustrates so clearly, can convert a potentially cost-cutting innovation into a source of drawn-out appeals and additional transaction costs.

On the whole, case-management approaches to mass torts have severe limits. The most comprehensive approaches discussed above involve extensions, even bending, of existing law. As we have seen, sometimes those innovations cannot survive appellate review. Accordingly, comprehensive remedies to mass torts problems depend on legislative action. Whether focusing on a single mass tort like asbestos or tobacco or attempting to create procedures or establish agencies that can adapt to the wide-ranging variations in mass torts, many commentators and others believe that only Congress can pull together the many threads needed to weave a fabric that can support a comprehensive resolution of mass torts. We address some of those proposals in the next section.

#### ***B. Legislative proposals***

##### *1. Introduction*

To address the full range of problems identified in Part I, legislative proposals need to have a broad sweep. There appears to be no shortage of proposals to address mass torts problems, some much less comprehensive than others. The breadth of the proposals seems directly related to the controversy they spawn. In this section we present and discuss some of the major proposals and critiques of them. The scope of this review does not include legislative proposals to create administrative structures to compensate mass torts victims.<sup>461</sup>

We begin by addressing the few proposals that have attempted a comprehensive approach: Professor Cooper's, the American Law Institute's (ALI) and the American Bar Association's (ABA). We first present, without comment, all of the major elements of these three comprehensive proposals and identify their common features. We then discuss some published critiques and apparent limits of the proposals. Finally, we examine proposals that focus on single elements, such as federalization of mass torts substantive law, choice of law alternatives, punitive damages proposals, and other miscellaneous approaches. Because of their close relationship with current bankruptcy approaches, bankruptcy proposals requiring legislation were discussed in Part II.A.5.

461. See, e.g., Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 Cardozo L. Rev. 1891 (1992); Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967 (1992).

2. Professor Cooper's "bold approach"

As with our discussion of mass torts problems, it seems useful to begin examining legislative proposals by looking at what an all-encompassing proposal looks like. Professor Edward Cooper has done so in a crisp, footnote-free conception of a "bold approach" to the issues.<sup>462</sup> This seems like a good place to start.

Cooper posits a deceptively simple set of goals: "to achieve a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a 'mass tort.'"<sup>463</sup> It is worth noting that these goals and Cooper's proposal address most, but not all, of the idealized criteria identified by Judges Weinstein and Schwarzer in the first part of this review.<sup>464</sup> Missing criteria, like setting priorities for severely disabled claimants and addressing punitive damages, could be incorporated into Cooper's approach.

To achieve the goals he specifies, Cooper calls for the following changes in the current framework of jurisdictional, procedural, and substantive laws and rules:

1. empowering a single court to control all litigation events, select cases for mass torts treatment, and enjoin litigation in other courts;
2. assigning sufficient judges to handle all claims and to afford appellate review;
3. defining by statute the elements of mass torts claims and administrative processes to determine those claims (in other words, creating a complete compensation system without individual jury trial rights);
4. creating nationwide personal jurisdiction for the entire mass tort;
5. providing for joinder of all who might be liable for a claim or who might have claims for indemnification;
6. establishing a procedure to identify a single source of applicable law, whether federal law or a state's law (to be selected by a mass torts panel of judges);
7. controlling the selection of counsel, but without controlling who the adversaries will be;
8. sending notice "as good as can be managed" to claimholders who can be identified, or appointing representatives for those who do not receive notice;
9. allowing time and procedural opportunities for claims to mature and achieve any benefits from evolving scientific study;
10. addressing aggregate settlement issues like representation of disparate groups, participation by claimants, impartial judicial review, and facilitating information and support for objectors.

462. Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz L. Rev. 923, 946–51 (1998).

463. *Id.* at 947.

464. See discussion *supra* notes 18–19.

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Most proposals are not as comprehensive as Cooper's. Accordingly, they may need to be supplemented in one or more central areas of concern. For example, the ALI and ABA proposals summarized below do not deal directly with questions of notice to future claimants, representation of future claimants, or selection of counsel.

#### *3. American Law Institute Complex Litigation Project*

In May 1993, the American Law Institute approved a set of proposals emanating from its Complex Litigation Project. The project spanned seven years of deliberation and drafting, and concentrated on consolidation, choice of law, and transfer of multiform, multiparty cases among and between federal and state systems. Professor Arthur Miller and Dean Mary Kay Kane were the reporters.

The project deliberately eschewed addressing matters of substantive law, case-management procedures and related rule-making issues, proposals to limit diversity jurisdiction, and the right to trial by jury.<sup>465</sup> On the other hand, as its title implies, the scope of the project extends well beyond the mass torts field to quite different forms of complex litigation, such as antitrust or patent actions, that arise under federal law and might involve few individual cases.

The main elements of the ALI project consist of:

1. creating a statutory Complex Litigation Panel that would replace the existing multidistrict litigation procedure;<sup>466</sup>
2. setting standards for the panel to apply in deciding whether or not to consolidate cases within the federal system. When cases have been filed in two or more districts, the panel could consolidate them if they involve common questions of fact. The primary standard would be that transfer and consolidation "will promote the just, efficient, and fair conduct" of the litigation. Factors to be considered relate to whether transfer or consolidation will result in reducing costs, duplicative litigation, the likelihood of inconsistent adjudications, and burdens on the judiciary. The panel would be directed to take into account factors like the number of parties, the geographic dispersion of the cases, and the stages of the litigation.<sup>467</sup>
3. granting broad discretionary power in the transferee court to organize the litigation, identify issues for common treatment, certify classes for the entire litigation.

465. American Law Institute, *supra* note 66, at 3–6.

466. *Id.* at 78.

467. *Id.* at 36–38.

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tion or particular issues, “prepare a preliminary plan for the disposition of the litigation,” sever issues for remand or for trial, and transfer damages issues for consolidated trial either before or after the liability trial;<sup>468</sup>

4. providing for discretionary judicial review by the Complex Litigation Panel of a transferee court’s decisions about whether to transfer parts of the litigation and providing for discretionary interlocutory review of liability decisions, in the court of appeals of the circuit in which the transferee court is located;<sup>469</sup>
5. giving the transferee court personal jurisdiction over parties, including later joined parties, to the full extent permitted by the Constitution and permitting nationwide and extraterritorial service of subpoenas when authorized by the transferee court;<sup>470</sup>
6. authorizing the Complex Litigation Panel to transfer and consolidate actions in a state court under limited conditions, such as when the litigation is centered in a single state—the state court would have many of the powers of a federal transferee court, but appellate review of substantive law matters would be in the state’s appellate courts;<sup>471</sup>
7. expanding removal jurisdiction to allow the Complex Litigation Panel to remove state court actions that “arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, and share a common question of fact with that action,” and specifying seven factors for the panel to consider in deciding about removal;<sup>472</sup>
8. conferring discretionary supplemental jurisdiction on a transferee court for claims that arise out of the same transactions or occurrences or that involve indemnification related to such transactions or occurrences;<sup>473</sup>

468. *Id.* at 106–07. In the comments, the reporters discuss a variety of approaches to damages, including special master or magistrate judge allocation of individual damages, lump sum assessments based on illegal profits, or using test cases and encouraging the parties to settle. All options remain subject to jury trial rights. *Id.* at 126–27.

469. *Id.* at 129–30.

470. *Id.* at 147.

471. *Id.* at 177–78.

472. *Id.* at 220–21.

473. *Id.* at 256–57.

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9. authorizing the transferee court to “enjoin transactionally related proceedings . . . pending in any state or federal court” that might interfere with the consolidated action;<sup>474</sup>
10. formulating a federal standard for choosing the state law or laws applicable to mass torts, establishing explicit rules for choosing among the laws of states with interests in the transactions because that state is where the injury occurred, where the conduct causing the injury occurred, or where plaintiffs and defendants habitually reside or do business. If the choice of a single state’s law would be inappropriate, the transferee court is authorized to divide the actions into “subgroups of claims, issues, or parties to foster consolidated treatment.”<sup>475</sup>
11. formulating, in a fashion similar to item 10, choice of law standards in cases involving punitive damages, to determine a single law to apply;<sup>476</sup> and
12. providing that the transferee court set forth its choice of applicable law in its disposition plan and allowing the transferee court to certify the choice of law issue for immediate appeal.<sup>477</sup>

**4. American Bar Association Commission on Mass Torts**

In 1989, the American Bar Association Commission on Mass Torts reported its findings and recommendations. The Commission consisted of twelve members, including federal and state judges, experienced plaintiffs’ and defendants’ attorneys, the general counsel for a pharmaceutical company, the general counsel for a large insurance carrier, and a law professor.

As noted in Part I, above, the Commission defines “mass tort litigation” to include a set of “at least 100 civil tort actions arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of \$50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property.”<sup>478</sup> The Commission calls for federal legislation to establish a federal judicial panel to identify mass torts litigation that fits the above definition and to direct that “some or all individual actions . . . be consolidated before a federal court empowered to resolve all issues including liability and damages.”<sup>479</sup>

Federal original and removal jurisdiction would be created for all cases in a mass tort litigation without regard to diversity of citizenship and federal courts would be empow-

474. *Id.* at 263.

475. *Id.* at 321–22.

476. *Id.* at 405–07.

477. *Id.* at 425–26.

478. ABA Commission Report, *supra* note 20, at 26.

479. *Id.*

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ered to select applicable state law “by choice of law standards developed by the federal courts in light of reason and experience.”<sup>480</sup> Punitive damages claims against the same defendant arising from “the same or substantially similar conduct” should be consolidated before one court that would award a single judgment to be allocated among plaintiffs and public purposes. Standards for awarding punitive damages would be restricted in various ways, both procedurally and substantively.<sup>481</sup>

Legislation would also provide that, in appropriate cases, a court could convene a panel of two or more impartial experts and invite findings that would be submitted to the trier of fact; depositions of these court experts could be used at trial.<sup>482</sup> Courts would also be permitted to use alternative dispute resolution techniques that did not impair or deny the right to trial by jury.<sup>483</sup> A court would be empowered to enforce a settlement that bars “additional claims of those who have not sued or those who may not yet be able to sue.”<sup>484</sup>

Bench and bar are encouraged to develop guidelines to determine reasonable fees and expenses in mass torts litigation. Courts handling mass torts litigation would be empowered to regulate attorneys’ fees and expenses according to such published guidelines.<sup>485</sup>

The House of Delegates of the ABA did not approve the Commission’s report. It was withdrawn without a vote after a “barrage of last-minute criticism.” At the same meeting, delegates opposed proposed federal multiparty, multiform legislation, apparently because delegates saw it as intruding on state law sovereignty.<sup>486</sup> Despite its fate within the ABA, the main proposal as well as the dissenting proposal, discussed below, warrant attention because they represent thoughtful efforts to craft comprehensive measures to deal with various types of mass torts litigation.

#### *5. Rheingold dissent and proposal*

Commissioner Paul Rheingold, an experienced plaintiffs’ mass torts lawyer, dissented vigorously from the ABA Commission report and presented the outlines of his own pro-

480. *Id.* at 40.

481. *Id.* at 46.

482. *Id.* at 58–59.

483. *Id.* at 59.

484. *Id.*

485. *Id.* at 62–63.

486. See Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 *Rev. Litig.* 325, 353 (1991), citing *ABA Backs Abortion Rights, Right to Die, and Job Protection*, 58 *U.S.L.W.* 2474, 2477 (Feb. 20, 1990).

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posal to address mass torts. Rheingold starts with the observation that only “a few very rare types of litigation [asbestos, Agent Orange, and Dalkon Shield] . . . need . . . a radical revision of the laws. . .”<sup>487</sup> He asserts that the Commission’s remedy is “both too weak for true mass torts and unnecessarily intrusive for routine mass torts.”<sup>488</sup> In the true mass torts, there have been more than 200,000 claims whereas in the other sets of litigation, such as Bendectin and DES, there have generally been around 2,000 cases.<sup>489</sup> The same remedies do not fit both types of litigation, and the ABA proposal is the product of a “compromise” that “fits no known example of litigation to date.”<sup>490</sup>

To deal with the true mass tort, Rheingold proposes a definition that would require thousands of cases to have been filed in federal and state courts across the country with a foreseeable expectation that thousands more will be filed plus a risk that there will not be sufficient assets, including insurance and net worth, to satisfy present and future claims.<sup>491</sup> In those instances, he proposes:

1. assigning all cases to one federal judge, using a federal selection panel as recommended in the main ABA proposal;
2. assigning cases for all purposes;
3. declaring the consolidation to be “a mandatory, no opt-out suit;”<sup>492</sup>
4. appointing a representative of the future class (as in Manville and Dalkon Shield bankruptcies);
5. including all possible defendants and insurers;
6. conducting comprehensive, one-time discovery;
7. when causation is controverted, giving the judge “extraordinary powers to call in the scientists and review the literature in order to determine the degree of certainty on causation” and the power to “supplant the fact-finders with his own findings;”<sup>493</sup>

487. ABA Commission Report, *supra* note 20, at 1e.

488. *Id.*

489. Our estimates of the number of claims in mass tort litigations confirm Rheingold’s. Thomas E. Willging, Individual Characteristics of Mass Tort Case Congregations: A Report to the Mass Torts Working Group Table 1 (Federal Judicial Center 1999). We estimated that three mass torts (asbestos, Dalkon Shield, and silicone gel breast implants) had more than 100,000 claims. We estimated a much smaller number than Rheingold for Agent Orange claims, but between 600,000 and 2.4 million individuals were exposed to those chemical agents. Other mass torts tended to have claims in the 100 to 20,000 claim range. *Id.*

490. ABA Commission Report, *supra* note 20, at 7e.

491. *Id.*

492. *Id.* at 8e.

493. *Id.* at 9e.

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8. giving the judge the power to award proportionate damages, calibrated to “the percentage of chance that he or she was injured by the exposure;”<sup>494</sup>
9. authorizing the judge to select applicable law in the form of “one rule per issue,” which might be the “best” or the “average” or “consensus” law;<sup>495</sup>
10. freely allowing and expediting interlocutory appeals;
11. deciding punitive damages in a single trial, after evidence has had time to evolve, and distributing any award to claimants after compensatory damages are fully funded;
12. granting the judge full power to divide the issues for trial and to use separate juries for different issues
13. allowing “mass techniques” to deal with the “most monumental task” of allocating individual damages, e.g., by trying representative cases, using ADR techniques, and developing schedules based on jury awards;
14. creating funds for future claimants, as in the *Manville* and *Dalkon Shield* cases; and
15. creating a fund for compensatory damages to presently injured claimants, either in the form of medical monitoring, payment for enhanced risk of future injury, or a reserve against which damages would be paid to claimant who develop further diseases.

In a number of aspects—particularly in dealing with the problem of future claimants and in dealing with joinder of other parties who might be liable—Rheingold’s proposal is more comprehensive than the main ABA report. Rheingold also differs in calling for aggregative techniques to assign individual damages rather than relying on individual jury trials.

#### 6. Comprehensive plans compared

In referring to comprehensive plans, we include the Cooper, American Law Institute, American Bar Association, and Rheingold plans.<sup>496</sup> All four comprehensive plans provide for a single court or panel to make initial decisions as to what cases should be included in the mass torts process. Because all four proposals define thresholds based on numbers of

494. *Id.*

495. *Id.* at 10e.

496. Professor Rowe has reviewed and compared three of these proposals, but the ALI proposal reviewed was an earlier draft that has been amended considerably. See Rowe, *supra* note 486, at 325. The ALI proposal is discussed extensively in Symposium, *American Law Institute Complex Litigation Project*, 54 La. L. Rev. 833 (1994).

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cases filed, under any of them immature litigations could be treated as mass torts. Each plan provides a different approach to defining mass torts. The ABA has a broad definition, setting objective standards that many litigations could satisfy. Rheingold sets a narrower threshold, limiting entree to the handful of massive cases like asbestos and Dalkon Shield. The ALI would set broad general standards for a specialized panel to apply to all potentially complex litigation.

Each proposal envisions some system of specialized tribunals to handle the cases. The ALI delegates power to a single transferee judge, and the ABA looks toward a single court. Cooper and Rheingold address more directly the need to assign sufficient judges to handle the pretrial, trial, and appeals of claims.

All four proposals envision nationwide personal jurisdiction. All but the ABA proposal contain provisions for joinder of related defendants and insurers.

Only Cooper calls for a single federal statutory law to apply to claims that qualify. Other proposals express a need to attempt to find a single applicable law by recommending changes in the choice of law rules. The ALI proposal would establish federal standards and a rather complex hierarchy of objective rules for determining which state's laws should apply. The ABA proposal would authorize federal courts to develop and apply federal common law choice-of-law rules. Rheingold's variations would direct a court to choose one rule of law per issue, leaving considerable room for disagreement as to what that rule should be.

Only the Cooper proposal seems to grapple with questions relating to future claims, including appointment of counsel and a future claims representative and giving notice to future claimants. Rheingold provides for the court to create a fund to compensate future claimants. The ABA would allow handling future claims in a settlement and issuing a bar order against later assertion of such claims against a defendant directly.

Regarding settlement, only the Cooper proposal addresses procedural aspects of judicial review of settlements, including participation by claimants and objectors in the review process. The ALI and ABA proposals expressly provide for enforcing aggregate settlement by authorizing injunctions against related litigation in other courts.

On punitive damages, Cooper does not address the issues directly, but presumably his call for federal substantive law would include federal statutory standards for awarding punitive damages. Again, the ALI proposal looks primarily to setting choice of law standards and having a single law govern. The ABA proposal would establish federal standards for punitive damages that are more restrictive than the laws of many states and limit punitive awards to a single judgment. Rheingold advocates a similar approach with the single award to be distributed only after compensatory awards have been paid.

7. *Critiques of the comprehensive proposals*

As a practical matter, the most telling critique of the ABA proposal is that it was not able to achieve an endorsement by the ABA's own House of Delegates. Despite the many compromises—juxtaposed against Paul Rheingold's uncompromising dissent—the commission's proposals were withdrawn and have not been reintroduced. Critiques appear to have been aimed at the federalization of mass torts and the “intrusion on state sovereignty” embodied in proposals that would permit consolidation of mass torts cases in federal courts.<sup>497</sup> Although the critiques apparently focused on legislation introduced in Congress, the targeted bill—though it addressed only single incident mass torts—had features similar to the ABA Commission proposal.

Academic critiques of the ABA Commission proposals paralleled and perhaps gave voice to the concerns raised by the ABA delegates. Professors Robert Sedler and Aaron Twerski argued that the commission's quest for litigation efficiency “cannot be achieved in our federal system . . . without doing serious violence to long-standing principles of state sovereignty and progressive trends in choice of law.”<sup>498</sup> While acknowledging that Congress has the power under the commerce clause to adopt federal rules governing mass torts,<sup>499</sup> they maintain that the proposals would sacrifice state sovereignty over mass torts law in exchange for removing so-called inefficiencies and inconsistencies. Those inconsistencies exist, in their view, “because different states, in the exercise of their traditional sovereignty, have adopted different substantive rules in the products liability area.”<sup>500</sup> Proponents of consolidation “should bear a heavy burden of showing that these ‘inefficiencies’ are so serious and place such a severe strain on judicial resources as to justify removing these cases from the state courts and consolidating them in a single federal action.”<sup>501</sup>

In a broad critique of an earlier, but not materially different, draft of the ALI proposal, Professor Richard Epstein attacks the core of the proposal, raising issues about whether

497. *Supra* note 486.

498. Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 Marq. L. Rev. 76, 76–77 (1989). The authors indicate that the article was supported in part by a grant from Lawyers for Civil Justice, which is a defense-oriented interest group.

499. *See id.* at 82–87. Indeed, one of the authors supports federal products liability legislation that imposes federal solutions “specifically targeted to resolve certain problems.” *Id.* at 86 (citing Twerski, *A Moderate and Restrained Federal Product Liability Bill, Targeting the Crisis Areas for Resolution*, 18 U. Mich. J.L. Ref. 575 (1985)). In this proposed federal legislation, selected elements of tort law would be federalized, but state law would govern all other issues. The mix of federal and state law elements would not advance the search for a single products liability standard in mass tort contexts.

500. Sedler & Twerski, *supra* note 498, at 96–97.

501. *Id.* at 95. In a later article, Professor Sedler voiced similar criticisms of the ALI proposals. *See* section II.B.8.

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the proposals would increase fairness, efficiency, or consistency.<sup>502</sup> He asserts that the ALI proposal overstates savings through efficiency and understates the cost of administering a complex consolidation.<sup>503</sup> The search for consistency ignores the real differences among cases and individuals as well as the differences related to our longstanding commitment to state experimentation and federalism.<sup>504</sup> Mostly, though, Epstein focuses on the perceived unfairness of taking away control of cases from individual litigants and amassing claims to the point that defendants become risk-averse.<sup>505</sup>

Professor Mullenix has labeled the ALI proposals an “unfinished symphony.”<sup>506</sup> She critiqued the proposal related to federal jurisdiction for mass torts because it does not directly grant federal jurisdiction to mass torts claims, but does so only indirectly through the removal process.<sup>507</sup> She contends that the proposal “fails to address whether a state-based case must also initially satisfy traditional federal subject matter jurisdictional requirements before the case may be removed.”<sup>508</sup> Much of Mullenix’s critique of the ALI proposal centers on the choice-of-law questions.

#### 8. Choice-of-law issues

At the core of the comprehensive proposals is the quest for a single source of applicable law. Unless one adopts the federal substantive law approach, which Professor Cooper posits as the “neatest solution,” the burden of finding a single legal standard rests on choice-of-law rules. The issue emerges from the tension between the desire to have a single law and the stark differences among state laws. Having a single law promotes consistent results in cases that arise out of a defendant’s single course of conduct in designing and distributing a mass product. Yet, various states have adopted dramatically different and often conflicting products liability laws.<sup>509</sup> For example, five states do not recognize a cause of action for strict products liability.<sup>510</sup> Other states apply a diverse set of rules to govern jury determinations of whether a product is defective or unreasonably dangerous,

502. Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & Com. 1 (1990).

503. *Id.* at 14–20.

504. *See id.* at 20–23.

505. *Id.* at 5–14.

506. Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 La. L. Rev. 977 (1994).

507. *Id.* at 981–82.

508. *Id.* at 983.

509. *See generally* Zabel & Eyres, *supra* note 50.

510. *See id.* at 436.

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including different rules relating to admissibility of evidence, burden of proof, and underlying tests of defectiveness or unreasonable danger. Most, if not all, states have different jury instructions.<sup>511</sup>

Choosing a single law in litigation dispersed among all or most of the states could easily result in imposing liability that the state courts or legislature have chosen not to impose, or avoiding liability that the state has chosen to impose. Professor Larry Kramer argues that choice-of-law issues are not procedural, but substantive. In his words, choice of law is “as substantive as it gets.”<sup>512</sup> “Choice of law defines the parties’ rights. States differ about what those rights should be. . . . It follows that there is nothing ‘unfair’ if victims of the same mass tort are compensated differently.”<sup>513</sup> Other means of consolidating can be found, Kramer asserts, without altering the parties’ substantive rights.

Professors Sedler and Twerski argue that constitutional barriers forbid the choice of a single law as the basis for resolving consolidated cases in which the state whose law is chosen does not have a direct policy interest in the dispute or “sufficient factual contacts with the underlying transaction.”<sup>514</sup> Case law narrows the constitutional limits within which a court can adopt a single state’s law.<sup>515</sup> To comply with those limits, “[a]s a practical matter, in the vast majority of cases, the court will be forced to choose either the totally discredited ‘law of the place of the wrong’ rule or an equally rigid rule of ‘law of the place of conduct.’”<sup>516</sup>

In mass torts settings, the only jurisdiction with an interest that could be recognized as applicable to a group of plaintiffs from multiple states will be the law of the place of conduct, generally the home state of the manufacturer.<sup>517</sup> The effect will be to disadvantage plaintiffs from states with more favorable rules, or, possibly, to advantage plaintiffs from states with less favorable rules. A long-term effect might be for manufacturers of mass products to locate in states with products liability rules favorable to them.

More specifically, Professor Sedler maintains that the ALI proposals are not likely to lead to the application of a single state’s law in dispersed mass torts cases involving multiple defendants. Even in cases involving a single defendant, ALI’s proposed rules of thumb

511. *See id.* at 436–47.

512. Kramer, *supra* note 152, at 569.

513. *Id.* at 579.

514. Sedler & Twerski, *supra* note 498, at 100.

515. *Id.* at 99–100, citing *Philips Petroleum v. Shutts*, 472 U.S. 797 (1985), and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

516. *Id.* at 99.

517. *See* Robert A. Sedler, *The Complex Litigation Project’s Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 *La. L. Rev.* 1085, 1100–02 (1994).

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(“tie-breakers”) would not yield a single applicable law because all plaintiffs and defendants are not likely to reside in the same state. Nor is it likely that all plaintiffs will reside in the same state, that all injuries will take place in the same state, or that possible state laws will not be in conflict.<sup>518</sup>

In the mass torts scenario, the ALI rules are likely to point to the law of the place where the conduct leading to the injuries occurred. Typically, the only constitutional possibility is the law of the place of manufacture (assuming that there is a single place of manufacture or other relevant conduct that can be identified). Most plaintiffs will lose the benefit of the law of their home state or of the place of injury.<sup>519</sup> Other commentators analyze the ALI choice-of-law proposal in similar terms.<sup>520</sup>

Sedler concludes that “the transferee court should be required to apply the conflicts law of the state from which the case has been transferred.”<sup>521</sup> He cites the current MDL practice in support of his position.

Professor Mullenix engages in a similar choice-of-law analysis and also concludes that the ALI proposal is unlikely to lead to a satisfactory application of the law of a single jurisdiction. Her recommendation, however, is at the opposite end of the state-federal spectrum.

Professor Mullenix asserts that “the intricate interrelationship of state tort law enmeshed in mass tort cases beckons for comprehensive treatment.”<sup>522</sup> That comprehensive

518. *See id.* at 1104–05.

519. *See id.* at 1107–08.

520. *See, e.g.,* Fred I. Williams, *The Complex Litigation Project’s Choice of Law Rules for Mass Torts and How to Escape Them*, 1995 B.Y.U. L. Rev. 1081 (mechanical uniformity in the ALI rules has the potential for causing unfair results but the escape hatch of allowing for subgroups of claims with similar state laws may ameliorate potential unfairness); Epstein, *supra* note 502, at 23–29. Professor Epstein points out the difficulty in apply a conduct test because “each individual’s conduct could take place in multiple jurisdictions” and because “there is no self-defining and self-identifying conduct that caused the injury.” *Id.* at 26–27. Thus, courts would have to conduct a trial to determine the conduct that caused the injury before deciding the choice of law issue. Similar analyses would be required to determine the place of injury. *Id.* at 27.

521. Sedler, *supra* note 517, at 1110.

522. Mullenix, *supra* note 506, at 989. Professor Mullenix has elaborated her view on the need for substantive mass tort law revisions in several articles. Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039, 1077–79 (1986) [hereinafter Mullenix, *Class Resolution*] (calling for authorization for federal courts to create a federal common law for mass torts or for enactment of federal statutory provisions on mass tort liability and damages). *See also* Pamela M. Madas, Note, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 Seton Hall L. Rev. 540, 562 (1997) (Enactment of a federal choice of law rule is a “back door” method for creating federal mass tort law; the better approach might be to create federal mass tort law by statute).

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treatment would entail enacting federal substantive mass torts law or at least authorizing the development of federal common law. Her critique of the ALI choice-of-law proposals leads inexorably to this conclusion. In her view, the principles embodied in the ALI choice-of-law schema would not lead to the choice of any single law that could be applied to dispersed mass torts because the conduct, place of injury, and state law interests are spread across multiple state borders.<sup>523</sup>

The ALI reporters recognize this problem and call for subgroups of claims, issues, or parties, or for remanding cases to the transferor courts for individual treatment under the laws normally applicable in those courts.<sup>524</sup> Clearly, the ALI proposal does not resolve the choice-of-law problems for cases like asbestos, DES, and silicone gel breast implants. Professor Mullenix's point seems well taken. The only possible source of a single law would seem to be federal substantive law.

In sum, the most detailed choice-of-law proposals seem likely to fail to find a single applicable law for dispersed mass torts. Commentators—and the ALI reporters—seem to agree on that much. Proposed remedies differ immensely: to create and consolidate subgroups of case with similar laws or to enact a system of federal statutory or common law rules governing mass torts.<sup>525</sup> Choosing among these polar opposite proposals depends on the values one places on state sovereignty in the mass torts field as compared to the values one places on efficiency and consistency of results.

#### 9. Other legislative proposals

##### a. Federal substantive law

As Professor Cooper has noted, changing federal substantive law provides the “nearest solution” to the need for a single applicable law. Professor Mullenix has advocated consistently, in a number of contexts, for adoption of federal legislation to govern mass torts.<sup>526</sup>

523. See Linda S. Mullenix, *Federalizing Choice of Law for Mass Tort Litigation*, 70 Tex. L. Rev. 1623, 1640–45 (1992).

524. See *id.* at 1644–45.

525. Discussing various proposals for federal changes in substantive products liability or other tort laws will be limited to the proposals addressed in the next section. Epstein observes that “there are plenty of areas in which the development of a uniform federal rule would be quite welcome,” citing the issue of the effect of compliance with federal standards. Epstein, *supra* note 502, at 31–32. For an example of a call for federal substantive law to govern mass torts, including adoption of federal products liability statutes and federal products standards, see Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 444–45 (1986).

526. Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DePaul L. Rev. 755 (1995) [hereinafter Mullenix, *Federalization*]; see also Mullenix, *Class Resolution*, *supra* note 522, at 1089–90; Mullenix, *Unfinished Symphony*, *supra* note 506, at 999–1000.

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Her core rationale is that the parties have chosen to bring most of their mass torts to federal courts, there are defects in all of the federal procedural tools for addressing mass torts, and federalization of the substantive law governing mass torts is the only practical way to address the problems comprehensively.<sup>527</sup>

In the course of her analysis, Professor Mullenix addresses what she considers to be strong counterarguments against federalization, especially those presented by Professor Mark Weber.<sup>528</sup> In the course of presenting Weber's rationale for favoring state adjudication of mass torts, Mullenix observes that he frequently calls for federal legislation to enhance the ability of the states to handle mass torts, including creating uniform choice of law rules, nationwide service of process, and approving proposed interstate compacts.<sup>529</sup> This selective federalization mirrors current legislative efforts to federalize selected aspects of products liability standards while leaving other aspects to the states. This approach is discussed in the next section. For handling mass torts litigation, such approaches seem to aggravate a preexisting problem.

Mullenix and Cooper do not set forth specific proposals for federal substantive law. Either federal products liability statutes or federal authorization for courts to develop federal common law would be needed. Other commentators have called for federal statutes to deal with specific aspects of mass torts liability, including altering the standards for proving general causation and punitive damages, which we discuss below.

#### **b. Federal substantive law: products liability reform**

Generally, the substance of the law to be applied by the federal judiciary would not be a matter of concern to a judicial policy-making body like the Mass Torts Working Group. In the mass torts area, however, concerns may be different. The case for a single federal law governing mass torts has been made in discussing the almost-intractable morass that applying state choice-of-law rules poses for the judiciary. In this section and the next, we outline two current proposals that could provide the content of federal law, one that would federalize products liability law and one that would alter the causation component of mass torts liability.

We address the first approach because there has been a persistent effort for more almost two decades to federalize products liability law in ways that have not been attentive to resolving mass torts problems. The judiciary's interest may be in not missing an op-

527. See Mullenix, *Federalization*, *supra* note 526, at 786–91.

528. See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 *Hastings Const. L.Q.* 215 (1994).

529. See Mullenix, *Federalization*, *supra* note 526, at 778–79.

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portunity to create a single federal law and improve the ability of courts to manage mass torts litigation—or at least avoid the possibility of making mass torts case management even more complex.

We address the second approach in the next section. Despite its substantive content, we discuss it because its premise is that by changing the incentives for testing the safety of products, substantive law can prevent mass torts and can simplify standards of proof for those mass torts that pass through the safety-testing net. Clearly the federal judiciary has a policy interest in substantive laws that promise such a direct impact on the federal civil caseload.

In March 1996, Congress passed the Common Sense Product Liability Legal Reform Act of 1996, which President Clinton vetoed.<sup>530</sup> In 1998, a modified form of the bill that was reportedly acceptable to the President failed to survive a motion to limit debate and amendments.<sup>531</sup> Given that proposals to enact federal products liability legislation have been presented regularly since 1979, continuing activity can be expected.<sup>532</sup>

For our purposes, the most important fact about recent efforts to enact federal products liability legislation is that they have *not* attempted to create a single federal law that would govern all elements of products liability causes of action. Proponents of federal legislation “do not advocate a complete federal ‘takeover’ of product liability law.”<sup>533</sup> Instead, they focus on “a few core areas”<sup>534</sup> such as the liability of wholesale and retail product sellers,<sup>535</sup> creating defenses when a claimant’s use of drugs or alcohol or gross misuse of a product was the principal cause of an accident,<sup>536</sup> establishing a preemptive two-year statute of limitation that would run from the time the claimant discovered or should have discovered the cause of injury,<sup>537</sup> establishing a non-preemptive fifteen year statute of repose (with an exception for latent injuries),<sup>538</sup> and establishing evidentiary and liability standards, bifurcation procedures, proportionality limits, and monetary caps on punitive damages liability.<sup>539</sup>

530. See Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy*, 64 *Tenn. L. Rev.* 595, 600–01 (1997).

531. See Philip Buchan, *Products Liability Bill Killed in Senate*, *Trial*, Sept. 1998, at 11.

532. See Schwartz & Behrens, *supra* note 530, at 599–601.

533. *Id.* at 604.

534. *Id.*

535. *Id.* at 607–08.

536. *Id.* at 609–10.

537. *Id.* at 610–11.

538. *Id.* at 611–12.

539. *Id.* at 613–19.

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We have not found a published analysis of the likely impact of the proposed federal products liability litigation on mass torts. My own impressions follow. Aggregation and choice of law seem to be the two main areas that are implicated. To a limited extent, aggregation would be simplified under the proposed legislation because some of the targeted issues would become common issues in a proposed class action or MDL proceeding. For example, uniform federal statutes of limitations and uniform standards for punitive damages would simplify aggregated management of some dispersed mass torts. On the other hand, areas that were omitted or not preempted, such as standards of dangerousness and statutes of repose, would continue to be resolved under various laws in various states. The federal statute of repose would add another law and further complicate the choice of law determination. Along similar lines, choice of law problems might be somewhat simplified in regard to statute of limitations and punitive damages issues, but in all other areas the quest for a single applicable law would remain muddled.

Federal product liability reform efforts may present an opportunity to clarify national products liability standards. Reforming standards nationally would fit the rationale of proponents of reform who argue that uniform standards are needed because 70% of products manufactured in a given state are sold elsewhere, because products liability insurance rates are set on a national level, and because competitors operate under uniform products liability laws.<sup>540</sup>

c. Federal substantive law: wrongful creation of risk

Professors Margaret Berger and Wendy Wagner each propose changing the standards for defining causation in mass torts settings. They start from the premise that current tort rules do not serve the public well because they discourage long-term research on the safety of products.

Professor Wagner reports that in “its comprehensive 1984 study, which still remains largely up-to-date, the NRC [National Research Council of the National Academy of Sciences] found that for approximately eighty percent of the estimated 48,523 unregulated chemicals in commerce, no toxicity information existed.”<sup>541</sup> A RAND study found that the organization of the corporate design and production processes often leads to failure to research products. In the words of the RAND researchers, “in developing the design for new or modified products, safety is everybody’s business—and, therefore, may turn out in practice to be nobody’s business.”<sup>542</sup>

540. *See id.* at 601–04.

541. Wagner, *supra* note 27, at 782 (citing Steering Comm. on Identification of Toxic and Potentially Toxic Chemicals for Consideration by the Nat’l Toxicology Program, National Research Council, Toxicology Testing: Strategies to Determine Needs and Priorities 12 at figure 2, 84 at table 7, 94 at table 10, 117 at table 20 (1984)).

542. Eads & Reuter, *supra* note 60, at 57.

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Professor Berger reviewed published case studies of Agent Orange, asbestos, Bendectin, breast implants, the Dalkon Shield, thalidomide, tobacco, and other substances and concluded that “a common thread runs through all these accounts. All report that the corporation in question did not test its product adequately initially, failed to impart information when potential problems emerged, and did not undertake further research in response to adverse information.”<sup>543</sup>

Under tort law, the manufacturer who has not conducted safety testing or other research commands a formidable advantage. Plaintiff has the burden of showing that it was more probable than not that a particular product or substance caused plaintiff’s injuries. “In mass tort cases, the importance of the science cannot be overemphasized. Without in vitro [tests on single cells], in vivo [tests on animals] and epidemiological findings, and experts prepared to present them, the plaintiff has no case.”<sup>544</sup>

Legal rules not only offer manufacturers “practical immunity for remaining ignorant about the latent hazards of their products and byproducts, [but] the courts provide, at best, unreliable rewards [in the form of a “state-of-the-art” defense recognized in some jurisdictions] for manufacturers who institute comprehensive safety testing programs.”<sup>545</sup> Empirical evidence from case studies of Bendectin and benzene shows that “a single positive or inconclusive epidemiology study appeared to lead to plaintiffs’ verdicts and increased filings.”<sup>546</sup>

Professor Wagner proposes changes in the tort law that would reverse the incentive structure in two ways: by creating a cause of action against a manufacturer for negligent failure to test a product’s safety and by creating a defense for the manufacturer who has tested a product before marketing it.

The new cause of action would work this way: “The plaintiff thus establishes a prima facie case with proof of the following: (1) inadequate minimal testing of a product, (2) normal or foreseeable exposure to the product, and (3) serious harm that might be causally linked to exposure to the product . . . The defendant then bears the burden of rebutting this presumption of causation.”<sup>547</sup> The manufacturer could use post-marketing testing to meet this burden.

543. Berger, *supra* note 27, at 2135.

544. Wagner, *supra* note 27, at 793 (citing Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 *Hastings L.J.* 301, 331 (1992)).

545. *Id.* at 794.

546. *Id.* at 817–18.

547. *Id.* at 834–36.

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The second prong of the proposed reform is designed to reward testing. “Successful completion of a battery of tests sufficient to fully assess the health hazards a chemical poses would provide the manufacturer with a state-of-the-art defense.”<sup>548</sup> A rationale for that prong is that “corporations that do their best in light of the uncertainties that abound in a technological society on the verge of the twenty-first century deserve to be relieved of liability.”<sup>549</sup>

In short, the Wagner-Berger proposals would penalize manufacturers who fail to test products that might cause injuries and would reward manufacturers who conduct minimal safety testing. Their proposals seem to warrant serious consideration as measures that might prevent the proliferation of mass torts litigation.

Professor David Bernstein, a critic of how the tort system handles scientific issues, agrees that the “absence of a remedy for behavior that puts thousands of people at risk is particularly troubling . . . because the current tort regime, in requiring proof of causation, not only fails to provide sufficient incentives for manufacturers to test the safety of their products, [it] may even discourage them from doing so.”<sup>550</sup> He concludes, however, that the Wagner-Berger proposal is “not an appropriate response to the problem of corporate misbehavior” because “a single state class-action verdict could easily bankrupt any defendant in a mass tort case, as the defendant would be potentially responsible for every claimed injury suffered by any plaintiff who was exposed to the relevant toxic substance.”<sup>551</sup>

Bernstein addresses the problem of lack of incentives to test products by proposing “federal legislation, akin to whistle-blower statutes and *qui tam* provisions, that would permit individuals to bring an action in a federal tribunal against a company that is negligently putting the health of the public at risk.”<sup>552</sup> Such a system would “give thousands of individuals with dispersed knowledge a financial incentive to monitor and challenge corporate misbehavior as it is occurring.”<sup>553</sup>

The Wagner-Berger and Bernstein proposals are fascinating in that analysts with very different perspectives on the civil justice system agree that it fails to address major public safety concerns. Whether one proposal or another—or even a third—takes hold, there

548. *Id.* at 838.

549. Berger, *supra* note 27, at 2148.

550. David E. Bernstein, *The Breast Implant Fiasco*, Calif. L. Rev. (forthcoming) at 63 (available on the Internet at [www.ssrn.com/papers/9807/98071302.pdf](http://www.ssrn.com/papers/9807/98071302.pdf)).

551. *Id.* at 64.

552. *Id.* at 66.

553. *Id.* at 67.

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may be common ground for concluding that the problem of safety research is at the core of mass torts problems.<sup>554</sup>

d. Federal substantive law: punitive damages

As we have seen, the proposed Common Sense Product Liability Legal Reform Act [“Federal Reform Act”] and its progeny included punitive damages provisions that would have altered the standards for punitive damage awards, impose caps, set proportionality limits, and required bifurcated proceedings for assessing punitive damages.<sup>555</sup> Specifically, the Act would have required that a defendant’s conduct exhibit “a conscious, flagrant indifference to the rights or safety of others,” raised the burden of proof to “clear and convincing evidence,” imposed a monetary cap of \$250,000 or twice the compensatory damages awarded, and permit either party to have a trial on punitive damages bifurcated from the trial on liability and compensatory damages.<sup>556</sup>

Recent empirical evidence on separating (“bifurcating”) punitive damages issues from decisions on liability and compensatory damages suggests that the effects may not be as straightforward as proponents expect. Using experimental social science methods, researchers found, not surprisingly, that “a bifurcated trial affords the defendant a better chance of prevailing on the issue of compensatory liability than a unitary trial does (a 60% probability of winning versus a 43% probability [in the simulated trial used in the experiment]).”<sup>557</sup> For those defendants who lose the liability issue and have to face a hearing on punitive damages, they are more likely to lose on punitive damages (90% versus 76%) and to face higher awards when they lose. Taking into account all possible outcomes (win/loss on liability, win/loss on punitive damages, and size of awards), researchers calculated that overall “a defendant’s expected loss is *greater* in a bifurcated trial (\$641,487 versus \$569,677).”<sup>558</sup> On the other hand, bifurcating trials improved jurors’ ability to identify the considerations appropriate for an award of punitive damages, but had no effect on comprehension of evidence or other instructions.<sup>559</sup> These data raise questions about whether the bifurcation aspect of proposed reforms is worth the candle.

554. See generally Nagareda, *supra* note 28 (analyzing the phenomenon of corporate misconduct that puts the public at risk but, through no vigilance of the perpetrator, fortunately does not cause serious harm).

555. See discussion *supra* notes 530–39.

556. Kimberly A. Pace, *Recalibrating the Scales of Justice Through Rational Punitive Damage Reform*, 46 Am. U. L. Rev. 1573, 1613–14 (1997).

557. Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wisc. L. Rev. 297, 329.

558. *Id.*

559. *Id.* at 330.

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The premises for federal punitive damages reform are that it is “necessary to safeguard against undeserved and excessive awards and to protect the defendant, the public, and the integrity of the judicial process.”<sup>560</sup> Empirical evidence, however, gathered in nine separate studies by entities such as the American Bar Foundation, RAND’s Institute for Civil Justice, the United States General Accounting Office, and a number of academic researchers cast doubt on the factual basis for the underlying rationale. A summary of those studies concludes: “The convergence of research findings is that overall [the] rate and level of punitive damages awards is low.”<sup>561</sup>

Rates of punitive damages awards are considerably lower in products liability cases than in contracts and business tort cases. A Department of Justice study found rates of 2% for products liability cases, 6% for toxic tort cases, 12% for all contract cases, and 21% for fraud cases; other studies uncovered similar results.<sup>562</sup> Amounts of punitive damages awards are closely correlated with severity of injury and amounts of compensatory damages awarded.<sup>563</sup> Indeed, proponents of the proposed federal reform cite one of the studies for the proposition that “awards in product liability punitive damages cases, after all appeals were exhausted, have almost always been within the two times compensatory [damages] limit proposed in the Conference Report.”<sup>564</sup> Researchers also found that there is “extensive judicial oversight over the remedy of punitive damages.”<sup>565</sup>

One empirical conclusion does, however, provide a basis for considering federal punitive damages legislation: “Every empirical study on trends of punitive damages finds substantial variation within and between jurisdictions.”<sup>566</sup> One study found that fifty of ninety-five asbestos punitive verdicts were assessed by southern juries and that southern juries accounted for more than 50% of all punitive awards.<sup>567</sup> The six states with the highest number of awards were, in descending order of magnitude, Texas, California, Florida, Illinois, Missouri, and Alabama.<sup>568</sup>

560. Pace, *supra* note 556, at 1615.

561. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 15, 20.

562. *Id.* at 24–28.

563. *Id.* at 31.

564. Schwartz & Behrens, *supra* note 530, at 618.

565. Rustad, *supra* note 561, at 40–44.

566. *Id.* at 33.

567. *Id.* at 34 (citing Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 25 (Lee Hays Romano ed., 1991)). To get an exact idea of how disproportionate those figures are, one would want to know the proportion of asbestos litigation civil litigation that takes place in southern courts.

568. *Id.*

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One area of uncertainty clouds the question of whether punitive damages reform is necessary. Proponents of punitive damages reform argue that despite the low incidence, punitive damages have a wide impact because concerns about the possibility of a huge award affect settlements. Empirical data on point are sketchy and better data have been very difficult to uncover.<sup>569</sup> One commentator, after reviewing existing studies, concludes that “[m]ass torts provide the clearest example of settlement leverage produced by punitive damages.”<sup>570</sup> This same author also concludes that the “rarity and predictability of punitive damages verdicts and the difficulty of collecting them post-trial suggest that the fears of the business community are exaggerated. Ironically, the leverage produced by a potential punitive damages award is increased by the belief that the remedy is out of control.”<sup>571</sup> Even if punitive damages are shown to cast a long shadow in mass torts cases, the same features of a case that might make punitive damages likely—reckless or otherwise outrageous misconduct by a defendant—might also drive high compensatory awards and settlements even if punitive damages were to be capped or reduced to a single judgment.

A key element of the Federal Reform Act is its cap on punitive damages. Proponents of the cap argue that it is necessary to make the punishment proportional to the harm.<sup>572</sup> Opponents stress that a cap may result in inadequate deterrence of wrongdoers “who have been found, by clear and convincing evidence, to have intentionally sacrificed public safety for corporate profits.”<sup>573</sup> Moreover, opponents assert that a cap tied to compensatory damages discriminates against women and minorities who are more likely than males or majorities to receive lower awards because their incomes are generally lower.<sup>574</sup> Such limits have no relation to factors such as the severity of injury inflicted by defendant’s conduct; a defendant may benefit from what has been called the “outrageous fortune” of unintentionally doing less harm than the conduct might have been expected to cause.<sup>575</sup>

One critic of economic caps on punitive damages calls instead for adopting the Model Punitive Damages Act [Model Act] provisions. The Model Act would direct juries to limit

569. See Herbert M. Kritzer & Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort To Bring It Into View*, 1998 Wisc. L. Rev. 157.

570. Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1997 Wisc. L. Rev. 169, 208.

571. *Id.*

572. See Schwartz & Behrens, *supra* note 530, at 617–18.

573. Pace, *supra* note 556, at 1638.

574. See *id.* at 1630–31.

575. See Nagareda, *supra* note 28, at 1121.

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their consideration of punitive damages to enumerated factors such as the nature and effects of defendant's conduct, profits, present and future financial condition, and any penalties, damages, or restitution paid arising from the same conduct.<sup>576</sup> The Model Act would also authorize courts to reduce awards that duplicate prior awards.<sup>577</sup>

Other proposed reforms address the possibility that courts will award multiple punitive damages for the same or similar conduct in a mass torts setting. Some contend that a single proceeding in the nature of a class action or interpleader could define a res and authorize an injunction against overlapping proceedings in state courts on the theory that such an injunction would be necessary to protect the court's jurisdiction.<sup>578</sup> Appellate cases in the mass torts context have expressly rejected that theory.<sup>579</sup>

Given these precedents, legislation would appear to be needed to accomplish any change in the practice of permitting multiple awards. Some states have enacted legislation to limit the number of punitive damages awards, but such statutes have been judged ineffective because states cannot control what courts in other states might do.<sup>580</sup>

Judge William Schwarzer, in testimony to Congress, emphasized that the availability of multiple punitive damage awards affects the settlement dynamics in all asbestos cases and that early awards of punitive damages diminish funds that might otherwise be available for later claimants.<sup>581</sup> He outlined four alternative statutory approaches that could be taken under the commerce power to address the problem: (1) establish federal stan-

576. See Pace, *supra* note 556, at 1632–34.

577. See *id.* at 1633.

578. See Bryan J. Schillinger, *Preventing Duplicative Mass Tort Litigation Through the Limited Resources Doctrine*, 14 Rev. Litig. 465, 476–81 (1995).

579. See Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 41–42 (1983) (citing *In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), and *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983)).

580. See Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 Vill. L. Rev. 433, 442–43 (1994). Along similar lines, a majority of the en banc U.S. Court of Appeals for the Third Circuit concluded that serious problems with multiple punitive damage awards in asbestos litigation were beyond the power of any single jurisdiction to cure. *Dunn v. Hovic*, 1 Fed. 3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 111 S. Ct. 650 (1993); see generally Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 Vill. L. Rev. 415 (1994) (discussing multiple punitive damages in relation to deterrence policies and addressing limitations on approaches for courts to control multiple awards).

581. Schwarzer, *Asbestos Testimony*, *supra* note 19, at 137–38, 140.

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dards for punitive damages, bar any state awards, provide for a single court proceeding to determine the single award, and permit intervention by plaintiffs with pending cases;<sup>582</sup> (2) a statutory amendment of Rule 23 to provide for a nationwide mandatory class action, to designate the court to hear the proceeding, and to specify either the federal substantive law or a federal choice of law rule to be applied;<sup>583</sup> (3) a variation of the federal interpleader statute in which one court would have jurisdiction to resolve all punitive damages claims in federal and state courts and to enjoin enforcement of any other punitive damage awards;<sup>584</sup> and (4) aggregating all federal cases under an amended multidistrict litigation statute, authorizing trials in the transferee court, and providing for removal of cases pending in state courts.<sup>585</sup> All of the options would require creating either a substantive federal law of punitive damages or a federal rule for choosing a single law.

e. Federal jurisdictional statutes

At least two commentators have noted that the ALI proposal does not include changes in federal subject matter jurisdiction to support consolidation of cases.<sup>586</sup> That appears to have been a conscious decision. The ABA and Cooper proposals, of course, include changes in federal subject matter jurisdiction that would allow all mass torts cases to be consolidated in a single federal court.

Before we examine specific jurisdictional proposals, we should consider the relationship between jurisdictional changes and other procedural and substantive rules. Jurisdictional changes, of course, do not and probably should not occur in a vacuum. In enacting the federal interpleader statute, for example, Congress also addressed companion issues to creating that joinder device. Those issues included establishing subject matter jurisdiction (changing federal question, diversity, supplemental, and removal jurisdiction are the existing options), appellate jurisdiction, venue, personal jurisdiction (providing for nationwide service of process), and authorizing injunctions against state proceedings.<sup>587</sup> Substance-specific matters relating to mass torts jurisprudence, such as standards for liability and punitive damages, would naturally arise,<sup>588</sup> as would issues relating to

582. *Id.* at 144–46.

583. *Id.* at 146–49.

584. *Id.* at 149–51.

585. *Id.* at 151–52.

586. See Mullenix, *Unfinished Symphony*, *supra* note 506, at 981–84; Epstein, *supra* note 502, at 33–49; Rowe, *supra* note 486, at 345–47.

587. Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. Rev. 186 (1996).

588. *Cf. id.* at 205–06.

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multidistrict litigation, choice of law, and relationships with current procedural rules (e.g., class actions) and current case-management practices (e.g., consolidation, extrapolation).<sup>589</sup> Detailed analysis of these relationships is beyond the scope of this review, but hopefully this brief summary will serve as a checklist of areas in which changes may be needed in legislation extending federal jurisdiction over mass torts. Without considering whether to include provisions relating to such issues, unintended consequences might result from attempts to alter subject matter jurisdiction.

More than a decade ago, Professor Thomas Rowe and Kenneth Sibley set forth a proposal to establish federal jurisdiction for mass torts and other multiparty, multiforum cases.<sup>590</sup> Rowe and Sibley focused their attention on “scattered” or dispersed litigation, that is “situations in which the multistate nature of the federal union prevents the states from responding adequately to the problem of scattered litigation.”<sup>591</sup> While one of their primary examples was the Hyatt Skywalk litigation, their proposal encompasses most mass torts litigation and seems especially applicable to the current fen/Phen/redux litigation now proceeding in state and federal courts.

Rowe and Sibley’s proposal would extend federal jurisdiction to multiparty, multiforum cases, using the mechanism of minimal diversity of citizenship once certain conditions were met. Their unique key to invoking this jurisdiction would be “whether any defendant has a residence in a state other than the one in which a substantial part of the acts or omissions giving rise to the action occurred.”<sup>592</sup> This unique factor distinguishes cases that might benefit from consolidation from all others.

Recognizing that changing federal jurisdiction would not, by itself, resolve problems with dispersed mass torts, Rowe and Sibley’s proposal includes features dealing with choice of law, removal jurisdiction, multidistrict transfers, personal jurisdiction, service of process, venue, and joinder. The proposed Multiparty, Multiforum Jurisdiction Act of 1990,<sup>593</sup>

589. See generally Mullenix, *Unfinished Symphony*, *supra* note 506.

590. See Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986).

591. *Id.* at 23. Rowe and Sibley underscore the limits of current jurisdictional devices. The complete diversity rule operates as a major barrier to multiparty cases, often limiting federal jurisdiction to single plaintiff, single defendant cases. See *id.* at 19–20. Requiring each class member to satisfy the jurisdictional amount in controversy also limits the availability of class actions to draw together dispersed cases. *Id.* at 20–21. Statutory interpleader has been “confined to the exigencies of the stakeholder situation, involving the threat of multiple and inconsistent liability, for which it was framed.” *Id.* at 22.

592. *Id.* at 26.

593. H.R. 3406, 101st Cong., 2d Sess. (1990). For a discussion of the bill, see Rowe, *supra* note 486, at 337–41.

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which was being debated at the time of the ALI proposals, would have created new federal subject matter jurisdiction, based on minimal diversity of citizenship, for a defined group of single-event accidents with multistate implications (at least twenty-five deaths or injuries in which damages exceeded \$50,000). The bill passed in the House of Representatives, but did not reach a vote in the Senate.<sup>594</sup>

The considerable efforts of supporters to marshal a consensus in support of that legislation are documented by Charles Geyh, who was then counsel to the subcommittee in which the bill originated.<sup>595</sup> Professor Geyh concluded that “proceeding by consensus and compromise may be pivotal to the success of mass-torts legislation in both the House and Senate, but achieving consensus and compromise in legislation passed by one body of Congress provides no guarantee that the other body will process the legislation.”<sup>596</sup>

Professor Mullenix argues that attempts to alter federal subject matter jurisdiction by using the minimal diversity approach or by expanding removal jurisdiction are of doubtful constitutional validity.<sup>597</sup> While she concludes that expanding diversity jurisdiction is constitutionally defensible, she predicts that those who pursue the diversity track “are heading for a choice-of-law disaster” and that only federalizing substantive law, which is “politically unacceptable,” is the only appropriate federal solution.<sup>598</sup>

f. Creating jurisdiction to issue a bill of peace

Historically, equity jurisdiction recognized an action by a defendant faced with a multiplicity of litigation about single events such as mine disasters, water rights issues, and noxious omissions.<sup>599</sup> A defendant could take the initiative in seeking a binding resolution of common issues, and, if certain conceptual hurdles were surmounted, the court could enjoin relitigation of those issues.<sup>600</sup>

594. See Rowe, *supra* note 486, at 329. An earlier version had a similar outcome. *Id.*

595. See generally Charles Gardner Geyh, *Complex Litigation Reform and the Legislative Process*, 10 Rev. Litig. 401 (1991).

596. *Id.* at 416.

597. See Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 Fordham L. Rev. 169, 196–211 (1990).

598. *Id.* at 224.

599. See Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 Ariz. L. Rev. 711, 712–13 (1997); see also Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687 (1997) (tracing the history of defendant-initiated class action litigation).

600. See Rowe, *supra* note 599, at 718.

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Professors Paul Carrington, Roger Cramton, and Jeffrey O’Connell have resurrected the concept of an equitable bill of peace and proposed the outline of a statute to implement their concept.<sup>601</sup> Their proposal centers on creating a mechanism that any party to multiple litigation can use to obtain a definitive ruling on a recurring scientific or technical issue. Venue would be in the United States Court of Appeals for the Federal Circuit, which could appoint a district judge to receive evidence. Apparently, a panel of the court of appeals would then determine the issue and be expected to explain the scientific or technical basis for its determination.<sup>602</sup> The court could appoint technical experts to assist it. Review would be by the Federal Circuit en banc or by certiorari to the Supreme Court, but not to reconsider the scientific or technical merits of a determination. The panel could enjoin relitigation of claims in any court.<sup>603</sup>

Because the proposal is new and creative, there is no direct commentary in the literature about it. The proposal’s approach, which is to bar relitigation of similar claims, uses issue preclusion as its core mechanism. Issue preclusion has been attempted in asbestos litigation with little or no success.<sup>604</sup> Professor Michael Green carefully studied the attempts to apply collateral estoppel to asbestos litigation and concluded that “collateral estoppel has little potential to make a significant contribution in resolving judicial administration difficulties engendered by asbestos litigation.”<sup>605</sup>

One of the reasons for this harsh judgment is that collateral estoppel—like the bill of peace—operates only on a single issue in mass torts litigation, typically whether a product has the general capacity to cause the type of injury alleged. If the answer is positive, as in asbestos litigation, only one of many issues is covered and its application to any individual plaintiff can be disputed. If the answer is negative, general causation may be a dispositive issue, but its application still might generate case-by-case litigation. For example, individuals with different injuries or different levels of exposure may argue for an opportunity to present their own scientific experts to testify as to what caused their specific injuries. Even if some attempts to relitigate are unsuccessful, the attempts themselves consume judicial and party resources.

601. Paul D. Carrington et al., *A Proceeding in the Nature of a Bill of Peace to Determine Scientific or Technical Issues Recurring in Civil Litigation* (1998) (unpublished manuscript on file with the Information Services Office of the Federal Judicial Center).

602. *See id.* at 8.

603. *See id.* at 7.

604. *See Trends, supra* note 49, at 101.

605. Michael Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 *Iowa L. Rev.* 141, 224 (1984); *see also* James F. Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 *Ariz. St. L.J.* 45, 52–53.

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Given its novelty in relation to mass torts litigation, experimental testing of the bill of peace approach may be needed. Practical questions remain, such as how to define the scientific issues, when to allow a decision to be reexamined, and whether the anticipated effects on future litigation will be achieved. Without more experience, it is difficult to predict whether or not this proposed device has the capacity to produce the peace its proponents seek.

g. Vaccine compensation-type program

Proposals to handle mass torts cases through administrative processes, as black lung cases are currently handled, are beyond the scope of this report. The National Vaccine Injury Compensation Program (NVICP), however, deserves attention because it is an administrative remedy that operates within the judiciary. The Federal Judicial Center recently published a description and evaluation of the operation of that program.<sup>606</sup>

Congress created the NVICP to address the risk that childhood vaccines might disappear from the market because of litigation arising from adverse reactions to vaccines.<sup>607</sup> Located in the United States Court of Federal Claims, an Article I court, the program uses special masters to hear claims for compensation. Awards issued by special masters can be rejected and claims pursued in federal or state courts, subject to several special statutory defenses.<sup>608</sup> Awards are financed by the proceeds of an excise tax on vaccine sales, while administrative costs are paid through federal appropriations.

Innovative case-management practices facilitate individual determinations by special masters. Such practices include “front-end loading,” a requirement that documentation supporting claims or defenses accompany the first pleadings; exchange of written experts early in the process; informal status conferences; bifurcation of causation and damages; telephonic hearings; hearings focused on expert testimony; and direct examination of expert witnesses by the special master.<sup>609</sup>

606. Molly Treadway Johnson et al., *Use of Expert Testimony, Specialized Decision Makers, and Case-Management Innovations in the National Vaccine Injury Compensation Program* (Federal Judicial Center 1998).

607. *See id.* at 7–8.

608. *See id.* at 9–10. Manufacturers are not liable for the unavoidable side effects of vaccines that were properly prepared and labeled with appropriate warnings. The statute also applies the learned intermediary defense and creates a presumption that warnings that comply with FDA standards are adequate. *See id.* at 10–11.

609. *See id.* at 25–39.

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A majority of attorneys found that the program was less expensive than traditional litigation, but that it takes at least as long.<sup>610</sup> While most attorneys were generally satisfied with the program, a substantial minority of petitioners' attorneys did not find the procedures to be fair,<sup>611</sup> and a number complained specifically about procedures for handling attorneys' fees.<sup>612</sup>

Special masters and government lawyers thought the program could be applied to other mass torts, such as asbestos, breast implants, and medical devices.<sup>613</sup> While it may be unlikely that this type of program would be adopted wholesale for mass torts, specific innovations show more promise. Front-end loading, early exchange of expert reports, and use of specialized decision makers are approaches that warrant consideration in mass torts litigation.

#### h. Amending class action rules

Several commentators have suggested modifying the class action rules in ways that appear to be so substantive that they are beyond the power of the Advisory Committee under the Rules Enabling Act. Professor David Shapiro borrows a term and concept from Professor Cooper and argues for legislation that would treat a class of mass torts claimants as an entity rather than an aggregation of individuals.<sup>614</sup>

Shapiro finds justification for such an approach in the collective aspects of mass torts litigation. For example, proof of exposure of any given individual to a toxic substance may be lacking, but proof of exposure of the class as a whole may present a better picture of the alleged wrongdoing.<sup>615</sup> Similarly, proof of individual causation may be lacking in a situation in which it is clear that exposure to a toxic substance raised the occurrence rate of a specific disease for the class as a whole.<sup>616</sup> These illustrations suggest that “a mass tort is, and should be treated as, substantively different from a one-on-one tort from the perspective of both major objectives of the tort system [compensation and deterrence], and that such treatment would (or at least should) be recognized as desirable by the members of the affected class.”<sup>617</sup> In other words, treatment of the class as an entity for purposes of

610. *See id.* at 46–47. The authors found that “[d]elays appear to be attributable to a backlog of pre-Act cases that is steadily being reduced.” *Id.* at 4.

611. *See id.* at 47–49.

612. *See id.* at 44–45.

613. *See id.* at 49–51.

614. Shapiro, *supra* note 133, at 913; *see also* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. Rev. 13, 26–32 (1996).

615. *See* Shapiro, *supra* note 133, at 930–31.

616. *See id.* at 931.

617. *Id.* at 932–33.

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the litigation produces substantive gains not attainable through individual litigation; the collective approach is more than the sum of the individual cases.

These substantive gains are superimposed on procedural gains in terms of prompt and less costly resolution of multiple claims, to the benefit of all parties and the courts. Moreover, viewing the class as an entity would modify the need for notice to each individual before the entity's claims are adjudicated; small claims certainly would need less notice than currently required. Most importantly, it would require modifying current rights of individuals to opt out of a class entity<sup>618</sup>—and perhaps changing the incentives for claimants and their attorneys to do so.<sup>619</sup>

Professor John Coffee posits some specific limits that might be imposed legislatively on attorneys representing opt-out claimants. One proposal is to limit attorneys fees in opt-out situations to the amount by which the opt-out award exceeds the class settlement.<sup>620</sup> Another method would be to “tax some portion of the defendants’ costs to a plaintiffs’ attorney who failed to exceed the class action recovery.”<sup>621</sup>

To implement his proposals, Shapiro advocates legislative action that would focus on the adequacy of representation of the class, with precise standards of accountability and specific prohibition of defined conflicts of interest. He also advocates “[d]eveloping explicit techniques to explore both the fairness of settlements in overall terms and in terms of distributions to be made among class members.”<sup>622</sup> Arguably, some of his concepts could be enacted as procedural rules under the Rules Enabling Act.

618. Another commentator approaches opt-out rights from a totally different perspective and arrives at conclusions similar to Shapiro's. Michael Perino uses game theory concepts to analyze the effects of opt-out provisions on the class action mechanism. He concludes that “recognition of opt-out rights in cases where it is feasible for litigants to exercise them [cases that can support individual litigation] can . . . destroy the effectiveness of the class mechanism. . . . Individual autonomy may thus be fundamentally incompatible with obtaining global resolution in mass tort and other kinds of class actions.” Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-out Rights in Mass Tort Class Actions*, 46 *Emory L. J.* 85 (1997). Discussion of Perino's specific proposals to address this dilemma is beyond the scope of this report.

619. See Shapiro, *supra* note 133, at 937–38, 957–58. Shapiro suggests a modification of opt-out rights by limiting attorneys' fees for parties who opt out and requiring that opt-out parties contribute to common costs of the litigation (citing David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 *Ind. L. J.* 561, 594 (1987)).

620. Coffee, *supra* note 69, at 1452.

621. *Id.* at 1452–53.

622. Shapiro, *supra* note 133, at 959.

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Professor Coffee also proposes reforms relating to settlement class actions. He would require that the court select counsel to negotiate for the class, perhaps requiring selection of a broad-based representative steering committee of counsel that would have to ratify a proposed settlement.<sup>623</sup> In later testimony, Professor Coffee proposed that additional democratic controls be imposed on class counsel, such as selection by a steering committee composed of class members or having class members vote on whether or not to ratify a negotiated settlement.<sup>624</sup> The latter suggestion seems particularly relevant to dealing with opt-out rights in mass torts litigation, as a compromise between full autonomy and unbridled collectivization.

Coffee also proposes that courts refuse to certify a “futures only” class and refuse to certify a settlement class when a litigation class could not be certified.<sup>625</sup> Alternatively, future claims could be handled by permitting delayed opting out, only after injuries have become manifest. Claimants would be allowed the option of accepting a scheduled amount for their injuries or pursuing a claim in the tort system. Defendants would thus have incentives to provide reasonable schedules.<sup>626</sup> Again, some of these proposals might be addressed through rule changes under the Rules Enabling Act.

Finally, Professor Mullenix has proposed that Congress adopt legislation that would create a presumption that class actions are the superior method of dealing with mass torts cases. She defines “mass tort” as “a single act or series of closely related acts for which a defendant may be liable in common-law tort to a minimum of one thousand claimants for injuries either to the person or to property.”<sup>627</sup> Her proposal also includes class action provisions relating to notice, opting-in, and opting-out.<sup>628</sup> Those proposals are relevant to possible rule revisions, which is the subject of the next part of this report.

### ***C. Rule-making proposals***

#### *1. Class actions*

##### a. Settlement classes and Rules Enabling Act limits

Stimulated by the Advisory Committee on Civil Rules’s proposals to amend Rule 23, the class action rule, there has been notable discussion in the legal literature concerning class

623. Coffee, *supra* note 69, at 1454–55.

624. *Class Action Lawsuits: Examining Victim Compensation and Attorneys’ Fees*: Hearings before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 105th Cong. 43 (1997) (statement of Professor John C. Coffee, Jr.).

625. Coffee, *supra* note 69, at 1455–56.

626. *Id.* at 1448–52.

627. Mullenix, *Class Resolution*, *supra* note 522, at 1091.

628. *Id.* at 1093–94.

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action proposals, and commentators have generated alternative proposals. We discussed some of those proposals as legislative matters, in Part II.B.9.h (Amending class action rules), because the proponents maintained that they exceeded the judiciary's rule-making authority. Before we discuss rule-making proposals, let us examine what commentators say about the authority of judicial branch committees to alter the class action rules.

Congress enacted the Rules Enabling Act (REA) and amended it in 1988 to cede a limited rule-making power to the judicial branch.<sup>629</sup> The statutory limitation is that a rule of procedure “shall not abridge, enlarge or modify any substantive right.”<sup>630</sup> Over the years, the Supreme Court has interpreted the “substantive right” language to apply only to rights that are clearly substantive. If a right affected by a rule is arguably procedural, the Court has found the rule to be constitutional.<sup>631</sup> Indeed, “the Court has never applied the REA to invalidate a Federal Rule.”<sup>632</sup>

In *Amchem Products, Inc. v. Windsor*,<sup>633</sup> the Court referred to the REA and its “substantive right” language in discussing the application of Rule 23 to the settlement class action involved in that case.<sup>634</sup> As we discussed extensively above in Part II.A.1.c. (Aggregation—settlement classes after *Amchem*), the Court ruled that the fact of settlement has relevance in determining whether certifying a class would pose insurmountable management problems under Rule 23 (b) (3) (D).<sup>635</sup> Because *Amchem* involved interpreting Rule 23 in the face of an REA challenge, the ruling implies—but certainly does not clearly hold—that drafting a rule permitting settlement classes would have passed REA muster.

A Harvard Law Review note argues that the right at issue in *Amchem* was a substantive right. The argument is that

when a settlement, and not the pre-existing legal claims, creates the basis for treating a class of individuals as a single juridical group, binding absent class members alters their substantive right not to be so bound in a manner not encompassed by the existing exception for class actions.<sup>636</sup>

629. See 28 U.S.C. § 2072 (1998). For a discussion of the background and legislative history of the Rules Enabling Act, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

630. 28 U.S.C. § 2072 (b) (1998).

631. See Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 Harv. L. Rev. 2294, 2295–99 (1998) [hereinafter Harvard Note].

632. *Id.* at 2294.

633. 117 S. Ct. 2231 (1997).

634. *Id.* at 2244.

635. *Id.* at 2248.

636. Harvard Note, *supra* note 631, at 2310.

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Because the “existing exception for class actions” is found in Rule 23, the argument has some circularity, especially given the Court’s *Amchem* ruling that Rule 23 permits settlement to be taken into account in assessing manageability. To be consistent with its prior REA cases, the Court’s ruling in *Amchem* may have meant that any impairment of substantive rights to litigate was seen as incidental.<sup>637</sup> Stated conservatively, the Court’s ruling means that it did not reject the “arguably procedural” test that preceded the 1988 amendments to the REA; otherwise, “it is likely that any rule-created distinction between the certification standard for litigation classes and settlement classes would not satisfy the REA.”<sup>638</sup>

Other commentators read the judiciary’s authority under the REA much more restrictively. Writing without the benefit of the *Amchem* decision, Professor Paul Carrington and Derek Apanovitch assert that the Advisory Committee on Civil Rules’ proposal to recognize settlement classes in a new Rule 23(b)(4) clearly exceeds the judiciary’s authority under Article III of the United States Constitution and the REA.<sup>639</sup> The authors argue that the proposed rule “has nothing to do with the Article III mission of deciding cases or controversies, but is instead a means of promoting and endorsing putative private dispositions by lending them the imprimatur of the court, thus garbing contracts in the dress of judgments.”<sup>640</sup> Carrington and Apanovitch detail their views of “at least ten substantive consequences confronted by the architects of global peace in mass torts.”<sup>641</sup> They recommend that the rules committee direct its settlement class proposal to Congress rather than the Court, closing with the chilling comment that “If it is tempted to disregard this advice, the analogy to the French aristocracy’s doom is worthy of the Committee’s attention.”<sup>642</sup>

637. *See id.*

638. *Id.* at 2311. After explicating a plausible argument that *Amchem* supports an expansive view of Congress’s delegation of rule-making authority of the courts, the note calls for the Court or Congress to “provide much needed clarity on this murky issue.” *Id.*

639. Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 *Ariz. L. Rev.* 461 (1997).

640. *Id.* at 463.

641. *Id.* at 464. Those consequences range from the rights of state governments to enact and enforce their own tort laws and standards and conflicts of law rules, *id.* at 464–65, to the effects of recognizing a settlement class on attorney-client relationships, *id.* at 466–68, to the relative value of individual settlement amounts, *id.* at 469–71, and the right of an individual to control a legal claim, *id.* at 472.

642. *Id.* at 495, citing Stephen P. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 *U. Mich. J.L. Reform* 425, 432 (1986).

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Professor Linda Mullenix articulates an opposing viewpoint on the application of Article III and the REA to settlement classes under either existing Rule 23 or the Advisory Committee's proposed Rule 23(b)(4). She asserts that the rule and its proposed cousin pass muster under both constitutional and REA standards.<sup>643</sup> In her view, the proposed (b)(4) class is no more than “a *descriptive functional category*” like other components of Rule 23.<sup>644</sup> She notes that the collection of arguments about the impact on state substantive law prove too much in that they would also invalidate rules expressly empowering courts to deal with settlements, such as Rules 23(e) and 16(c)(19).<sup>645</sup> She addresses directly the ten substantive effects posed by Carrington and Apanovitch as well as a few that they did not raise.<sup>646</sup> While we leave it to the reader to assess the merits of these arguments, as we noted above, the Court's ruling in *Amchem* implies that the current rule passes REA muster and that it permits settlement classes under limited circumstances.

b. Settlement class proposals

Aside from REA considerations, commentators have expressed opinions for and against Advisory Committee proposals to authorize settlement classes. Considerable opposition to the Committee's proposal came from the academic community in the form of a letter signed by 129 law professors.<sup>647</sup> This group objected specifically to Rule 23(b)(4) because “it contains no limiting principles, standards or other guidelines . . . to help trial judges decide when a settlement is desirable and what form the class should take” and because “it raises serious constitutional and statutory questions that have not been adequately addressed by the Advisory Committee.”<sup>648</sup> The group also expressed concern that the proposed rule “lends official approval to an extremely controversial practice, one plagued by serious agency problems and risks of collusion.”<sup>649</sup> A number of the signers also expressed their opposition to settlement classes in a 1995 Cornell Law Review symposium with the punchy title *Mass Tortes: Serving Up Just Desserts*.<sup>650</sup>

643. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 *Ariz. L. Rev.* 615 (1997).

644. *Id.* at 626 (emphasis in original).

645. *Id.* at 627.

646. *Id.* at 624–35.

647. Letter from Steering Committee to Oppose Proposed Rule 23 to Honorable Alicemarie H. Stotler, May 28, 1996 in Administrative Office of the United States Courts, 2 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at 1 (1997).

648. *Id.*

649. *Id.*

650. See, e.g., Cramton, *supra* note 153; Susan P. Koniak, *supra* note 170.

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In one of the few post-*Amchem* articles to date, attorneys John Aldock and Richard Wyner, counsel for the Center for Claims Resolution in *Amchem*, think a rule change is unnecessary. In their estimation, the class certification issues that were fatal to the *Amchem* settlement likely can be resolved by using more narrowly-defined classes or subclasses and by appointing separate counsel and named representatives for each of those classes or subclasses.<sup>651</sup> They also conclude that other criticisms directed at mass torts settlement class actions in *Amchem*—such as the alleged lack of a case or controversy and the difficulty of providing notice to future claimants—should not prove to be an insurmountable obstacle to such settlements.<sup>652</sup>

Lest we begin to think *Amchem* settled the issue, Professor Eric Green, also in a post-*Amchem* article, laments that the Court “apparently sounded the death knell for nationwide mass torts class actions (whether settled or litigated) under the current version of Rule 23.”<sup>653</sup> To remedy that situation, Green, an alternative dispute resolution (ADR) practitioner, urges the Advisory Committee to adopt the proposed Rule 23(b)(4). In his view, the

ultimate effect of the proposed amendment would be to clarify uncertainty about the legitimacy of settlement classes, increase fairness and efficiency in class action litigation, reduce transaction costs, increase compensation to deserving plaintiffs, decrease ruinous exposures and bankruptcy to defendants, and provide a reasonable and fair tool in appropriate cases for federal courts to reduce the enormous drain on resources caused by multiple harms—including mass products liability litigation (notwithstanding *Amchem Products*).<sup>654</sup>

Professor Judith Resnik provides a third post-*Amchem* opinion. In her judgment, the ruling shows that “settlement has a strong appeal: none of the justices in *Amchem* wanted to disown its function,” but “the quality of settlements is always a worry.”<sup>655</sup> She concludes with the observation that the remedy lies with the judicial branch because “solutions have not yet come from Congress.”<sup>656</sup> The Advisory Committee then has “an impor-

651. See Aldock & Wyner, *supra* note 144, at 941.

652. See *id.* at 917–20.

653. Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. Rev. 1773, 1775 (1997).

654. *Id.* at 1798–99.

655. Judith Resnik, *Postscript: The Import of Amchem Products, Inc. v. Windsor*, 30 U.C. Davis L. Rev. 881, 885 (1997).

656. *Id.* at 886.

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tant occasion in which to offer structure, to face the diversity of interests and individuals within an aggregate, and to insist on judicial oversight of interests of absentees, even at the expense of some settlements.”<sup>657</sup>

Before *Amchem*, a number of academic commentators supported the idea of permitting settlement class actions under some circumstances, suggesting alternatives to the Advisory Committee’s (b) (4) proposal. For example, Professor Judith Resnik and Professor John Coffee collaborated on a proposal that would establish standards for informing the class about a proposed settlement and detailing aspects of certification, notice, hearing, and settlement approval.<sup>658</sup>

The Resnik-Coffee proposal differentiates among class certification according to the stage of the litigation, with different provisions for settlement and for pretrial litigation, reserving full certification for trial. At whatever stages settlement is proposed, class action rules must address a series of common issues, such as “the extent of the information provided participants in a settlement about the remedy to be provided, whether claimants within a class are treated equally or distinguished by criteria that are appropriate, the relationship between compensation to claimants and to attorneys, the cost of administering the remedy and how it is financed, the degree to which opting out is either legally or practically feasible, and the timing of the processes of informing the class and permitting opt outs.”<sup>659</sup> Resnik and Coffee’s specific suggestions seem designed to provide information to class members and structure for the judge in reviewing certification or settlement proposals.

Judge William Schwarzer also proposes a rule designed to provide structure to a district judge’s review of a proposed class settlement. Judge Schwarzer observed that “[i]n the mass tort settlement context, . . . the class action is becoming a creature that resembles a cross between an equity receivership and a bill of peace.”<sup>660</sup> To counter the amorphous growth of the settlement class, Judge Schwarzer proposed specifying in Rule 23(e) a set of issues for a district judge to address when evaluating the procedural and substantive fair-

657. *Id.* at 887.

658. See Resnik, *Litigating and Settling*, *supra* note 189, at 865–71.

659. *Id.* at 848.

660. Schwarzer, *supra* note 29, at 841. See also discussion at notes 180–84.

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ness of proposed settlements. Those issues are detailed in the note.<sup>661</sup> In Judge Schwarzer's view, guidelines should not be prescriptive but should give discretion that would lead the court to give the settlement the consideration necessary to bring to light any serious defect and ensure that it is truly fair and equitable.<sup>662</sup> Some of Judith Resnik's suggestions echo Judge Schwarzer proposal,<sup>663</sup> and ALI-ABA commentators Charles Schwartz and Lewis Sutherland endorse wholesale adoption of the Schwarzer proposal.<sup>664</sup>

c. Class action trial structure proposals

Several class action trial structure proposals warrant attention because of their innovative approaches. Professor John Coffee attacks the joint problems of the need for individual damage determinations and the dilemma of providing fair treatment to future claimants in mass torts aggregations.<sup>665</sup> In applying the prerequisites to class certification, a court would be required to develop standards responsive to the particular needs of mass torts. For example, separate representation for future claimants would be expressly required,<sup>666</sup> and creating an adequately funded reserve for payment of future claims would

661. The issues are: (1) whether the prerequisites set forth in subdivisions (a) and (b) have been met; (2) whether the class definition is appropriate and fair, taking into account among other things whether it is consistent with the purpose for which the class is certified, whether it may be overinclusive or underinclusive, and whether division into subclasses may be necessary or advisable; (3) whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants; (4) whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them; (5) whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants; (6) whether opt-out rights are adequate to fairly protect interests of class members; (7) whether the provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed; (8) whether the settlement will have significant effects on parties in other actions pending in state or federal courts; (9) whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement; (10) whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and (11) whether the claims process under the settlement is likely to be fair and equitable in its operation. *Id.* at 843–44.

662. *See id.* at 842–43.

663. *See Resnik, Litigating and Settling, supra* note 189, at 858, n. 86,

664. Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, SA88 ALI-ABA 119 (1996).

665. Coffee, *supra* note 69, at 1433–42.

666. *See id.* at 1436.

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be part of the “superiority” requirement.<sup>667</sup> Within that framework, Coffee proposes a trial structure in which “the class action would resolve only the issues of liability and generic causation.”<sup>668</sup> Future claims could not be settled and would have to be resolved individually, either by trial or another agreed method, such as an arbitration panel.<sup>669</sup> Coffee presents his plan as “a compromise [that] makes political sense,”<sup>670</sup> an attempt to accommodate the sometimes disparate interests of plaintiffs, defendants, and courts.

Another approach to the trial structure of mass torts claims addresses present claims only. This model relies on statistical sampling, extrapolation of damages from a sample of cases in each injury category, and administrative distribution of the fund to individual class members. If this sounds familiar, the proposal was used in the *Cimino* and *Hilao* cases and found by one court of appeals to be unconstitutional as applied and by another court of appeals to be constitutionally adequate in the face of a limited challenge.<sup>671</sup> Professor Samuel Issacharoff, a member of Judge Parker’s team of consultants in *Cimino*, presented the case for allowing a court to “determine a formula for the pro rata share of damages among plaintiffs, relying on a damages matrix that assesses such factors as age, length of exposure, disease pathology, and actuarial projections of lost income.”<sup>672</sup> While the details of his proposal seem substantive and beyond the Advisory Committee’s authority under the REA, formulation of required elements of a trial structure may be within that authority.

d. Adequacy of class representation

Two suggestions for proposed changes in the adequacy of representation standard in Rule 23 are worth discussing. Professor David Shapiro starts with the proposition that “the constitutional propriety of class action treatment, and the binding effect of a judgment on the members of the class, turns on the issue of adequate representation.”<sup>673</sup> He recommends that this point “become the heart of a recrafted rule.”<sup>674</sup> Specifically, Shapiro calls for

667. *See id.* at 1437.

668. *Id.* at 1440.

669. *See id.* at 1440–41.

670. *Id.* at 1442.

671. *See* discussion *infra* notes 199–229.

672. Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 *Rev. Litig.* 463, 467 (1991).

673. Shapiro, *supra* note 133, at 958–59.

674. *Id.* at 959.

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- “Focusing on the adequacy of counsel (rather than worrying about the named representative);
- “Recognizing that adequacy requires consideration not only of counsel’s experience and ability but also of the potential existence of conflicts either within the represented group or between that group and outsiders also represented by the same counsel;
- “Making sure that counsel remains responsible to the class as a whole by establishing channels of communication with a sufficiently representative group of class members and by allowing that group to be heard at critical stages of the process in order to be sure that the class is not being manipulated either by counsel or by the adversary; [and]
- “Developing explicit techniques to explore both the fairness of settlements in overall terms and in terms of distributions to be made among class members, as well as techniques to insure against disproportionate counsel fees.”<sup>675</sup>

Professor Coffee has developed an explicit suggestion for addressing the conflict of interest problem. He would suggest that rule makers “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.”<sup>676</sup> Another alternative would be to disqualify an attorney only if the inventory settlement provided more favorable terms than the proposed class settlement, but that would put a court in the position of choosing between enforcing the ban and approving a settlement.<sup>677</sup> The prophylactic rule would prevent the dilemma from arising. A more direct way of achieving the same result might be to bar a settlement that provides less favorable terms for the class than provided by a previous inventory settlement, but that approach appears to be primarily, if not totally, substantive and outside the rule-making authority.

#### ***2. Ethics of mass torts lawyering and judging***

The issue of drafting ethical rules for lawyers on subjects of special federal interest has been raised by the Standing Committee on Rules of Practice. Though at the borderline of the historic subject matter of the Advisory Committees, drafting rules to govern lawyers representing plaintiffs and defendants in mass torts contexts might be considered in the context of a general reexamination of federal ethics rules. As with most of the issues discussed in this report, we have neither the time nor the space to give this topic the

<sup>675</sup>. *Id.*

<sup>676</sup>. Coffee, *supra* note 69, at 1445.

<sup>677</sup>. *See id.* at 1444–45.

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attention it deserves. Mentioning a few of the major works on the subject, however, may serve to call attention to the needs and opportunities for mass torts rule making.

Professor Carrie Menkel-Meadow summarizes her analysis of the state of the art of ethics and mass torts in what she calls “a simple argument: *The current ethical rules on conflicts of interests, limitation of practice, and ethics in negotiation and litigation . . . were not drafted with the special issues of mass tort class action settlements in mind, and do not, in my view, provide adequate guidance for how those issues should be resolved.*”<sup>678</sup> Her conclusion: “*Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for ‘aggregate’ justice.*”<sup>679</sup> Menkel-Meadow describes clearly the varied interests involved in mass torts litigation, the conflicts of interests, collusion, and restrictions on practice that arise in mass torts litigation, and documents her case for new ethical rules. Along similar lines, Judith Resnik calls for new procedural and ethical rules that would “specify the respective roles of lawyers and clients and the roles of different lawyers—those on the inside, sitting at the table, and those who never appear in court.”<sup>680</sup> Such rules need to “go hand in hand” with fee award allocations.<sup>681</sup>

Looking at one specific ethical issue, aggregate settlements, Paul Rheingold, an experienced mass torts plaintiffs’ attorney, observes that “any lawyer who handles mass tort litigation is faced constantly with offers by a defendant to settle an inventory of cases at one time” and that “there is no ready solution” to the problems posed by such offers.<sup>682</sup> Law professors Charles Silver and Lynn Baker analyze in depth the current rule on aggregate settlements, Model Rule of Professional Conduct 1.8 (g), and conclude that “there are identifiable reasons for thinking that alternative disclosure and consent rules may work better for clients in some mass tort cases and that the option of using them should be available.”<sup>683</sup> Both the practitioners’ and the academics’ views converge in identifying the tension created by the attempt to apply to mass torts a rule designed for a single case or a small number of cases.

678. Menkel-Meadow, *supra* note 184, at 1172 (emphasis in original).

679. *Id.*

680. Resnik, *Procedural Innovations*, *supra* note 305, at 1644–45.

681. *Id.* at 1645. *See generally*, Resnik et al., *supra* note 64.

682. Rheingold, *supra* note 222, at 395.

683. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733, 736 (1997).

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Finally, in a magnum opus that helped define the field of ethics and mass torts, Judge Jack Weinstein presents a sweeping portrayal of the major ethical dilemmas that confront lawyers and judges in the mass torts field.<sup>684</sup> Judge Weinstein, however, does not see ethical rules as a panacea, or even a palliative, for those problems. In his view, “[t]oo rigid an adherence to formal ethical-legal rules constitutes a violation of the basic rule of ethics itself, requiring a practicable regime in which the needs of the public, the parties, and the law are in reasonable balance.”<sup>685</sup>

The above comments are presented as a starting point for considering the ethical issues for lawyers raised by the demands of mass torts litigation. Because of its interstate nature and the unique demands that such litigation imposes on federal courts, the time may be right for federal rule-making bodies to exercise leadership in this area.

### *3. Conclusion*

After starting with an examination of whether mass torts present problems for the legal system and finding a nonunanimous consensus that they do, we discussed a host of problems identified by a wide variety of commentators. The breadth of proposals to address those problems—spanning a full spectrum of case-management, legislative, and rule-making innovations—suggests there is a broad consensus that mass torts problems warrant prompt action. That consensus shows signs of fragility, and outright rupture, when specific proposals are considered. Molding that fragile consensus into meaningful action is the challenge that faces the Mass Torts Working Group and any successor group that may be appointed.

684. Weinstein, *Ethical Dilemmas*, *supra* note 30; *but cf.* Linda S. Mullenix, *Mass Tort As Public Law Litigation: Paradigm Misplaced*, 88 Nw. U. L. Rev. 579 (1994); *see also* Weinstein, *Individual Justice*, *supra* note 18.

685. Weinstein, *Ethical Dilemmas*, *supra* note 30, at 492.