

## I. Introduction

Mass toxic torts litigation is a phenomenon that, since its serious emergence in the United States in the 1980s, has both characterized popular conceptions of class action practice and flavored the broader debate over national tort reform. Demonstrative litigation such as In re Agent Orange Product Liability Litigation<sup>1</sup> and In re Three Mile Island Litigation<sup>2</sup> are flagship toxic exposure cases involving class action proceedings on behalf of thousands of individuals claiming damages for chronic exposure to a variety of harmful substances released into the environment.

This paper advances the proposition that mass toxic tort litigation has been the predominant driver of class action rule reform in the United States. Through three distinct phases of proposals to reform Rule 23 of the Federal Rules of Civil Procedure, the judicial and academic attitude to the certification of mass toxic torts has influenced the reform debate in radically different ways – initially by providing the catalyst for efforts to reform Rule 23; then as a dampener against significant reforms to Rule 23 in the wake of mass toxic tort “settlement-only” classes; and ultimately as an explanation for the comparatively modest reforms presently before Congress. The common theme throughout the three “Rounds” of reform is that the trends and developments in mass toxic tort litigation have determined the pace and substantive outcome of class action rule reform in the United States. The fact that Rule 23 remains standing in what is effectively its original 1966 format supports a central contention of this paper, namely, that any meaningful change to class action practice designed to accommodate the legal and ethical

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<sup>1</sup> In re Agent Orange Product Liability Litig., 745 F.2d 161 (2d Cir. 1984).

<sup>2</sup> In re Three Mile Island Litig., 87 F.R.D. 433 (M.D. Pa. 1980).

challenges posed by aggregate toxic exposure claims lies in the collective hands of Congress.

Part II of this paper provides a working definition of the mass toxic tort by examining the key characteristics of this species of litigation, including a discussion of the scientific difficulties associated with establishing causation in such litigation, and the procedural tensions arising out of the emergence of multiple-incident mass toxic torts.

Part III examines the early proliferation of mass toxic torts in the 1980s and the volume pressures that motivated litigants and ultimately the courts to bring such claims as class actions. The subsequent calls for class action rule reform comprised “Round One” of the three-part reform “contest” that pitched mass toxic torts against the present procedural mechanisms for bringing aggregates claims.

Part IV outlines the emergence of the future-claimants mass toxic tort class action, plunging the Advisory Committee into a headlong consideration of the ethical and legal implications of determining “futures” in the context of a settlement-only class action. Accordingly, “Round Two” of the continuing battle between mass toxic torts and Rule 23 was characterized by a concern that such claims should be curbed in light of their controversial application in toxic exposure cases, together with the unanticipated effects of rule reform on settled areas of practice outside the mass toxic tort context.

Part V considers the current proposals to reform Rule 23 which were submitted by the United States Supreme Court to Congress on March 27, 2003. Although the proposals are largely procedural as opposed to substantive in nature, they arguably present a host of

potential unintended consequences that, although ventilated before the Advisory Committee, have not deterred the adoption of the proposals by the Supreme Court.

Part VI analyses the current proposals and suggests that, in the context of the history of class action rule reform, “Round Three” is likely to result in a rejection of the amendments to Rule 23. The present amendments unmistakably present opportunities for unintended consequences effecting class action practice outside of the mass toxic tort context. More importantly - perhaps fatally to the success of the proposals - they do not squarely address the myriad of potential legal and ethical issues emerging from the mass toxic tort phenomenon. That is a task beyond the limited capacity of rule reform, and the time is ripe for Congressional intervention to deal with aspects of the mass toxic tort phenomenon. The present attempt to administratively deal with the resilient flows of asbestos litigation by embracing a national privately-financed trust may be a product of the lessons learned from three protracted rounds of class action rule reform, and the growing exigency of Congressional intervention.

## **II. The Modern Conception of a Mass Toxic Tort**

### **A. General Characteristics of Mass Toxic Torts**

While no uniform definition of a “massive toxic tort” has been developed beyond its colloquial denotation, the term is consistently understood to involve groups of hundreds, or even thousands, of individuals who have suffered harm as a result of toxic exposure.<sup>3</sup>

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<sup>3</sup> See James W. Elrod, *The Use of Federal Class Actions in Mass Toxic Pollution Torts*, 56 *Tenn. L. Rev.* 243 (1988) (“Toxic tort cases may be generally characterized as involving the breach of a legal duty resulting in the proximate causation of damages or personal injury by exposure to a toxic or poisonous substance. The definition quoted above is restricted to claims for personal injury. Although toxic (poisonous) torts should by definition involve ‘poisoning,’ the restrictive definition cited above should be

Mass toxic tort litigation encompasses a broad range of claims asserted by individuals exposed to toxic substances. Those substances are often chemicals (including man-made fibers such as asbestos), but can include radiation or even naturally occurring bacteria or similar pathogens.<sup>4</sup> The typical toxic tort claim involves hundreds or possibly thousands of individuals alleged to have been exposed on a chronic basis to low levels of a toxic substances. The sheer number of individual claims, together with a host of other factual and legal issues peculiar to the mass toxic tort, present extraordinary challenges to the courts, the litigants, and their lawyers.<sup>5</sup>

The central distinguishing characteristic of mass toxic tort cases is that they nearly always involve disease, as opposed to traumatic injury. Typical exposure circumstances involve low-level, chronic exposures, rather than acute, high-dosage situations. The injuries commonly claimed are complex diseases of uncertain etiology, often with long latency periods - such as cancer - although plaintiffs will often assert that more common conditions (such as allergies, fatigue, learning disabilities and various cardiac problems) are the product of their exposure. As Professor Fisher has helpfully noted, “genuine” mass toxic torts possess a range of common characteristics, although signature characteristics include: (1) geographically widespread exposure to potentially harmful agents, (2) a large or indeterminate number of plaintiffs, (3) exposure to toxic substances over long time periods, even generations, (4) circumstances of exposure often differ greatly between claimants, (5) scientific obstacles complicate asserted theories of

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expanded to include property damage. Toxic pollution torts often involve property or economic damage claims that are tied to the personal health risks of toxic contamination.”).

<sup>4</sup> Joseph C. Kearfott, et al, Case Management and Health Claims in Toxic Tort Litigation, SG084 ALI-ABA 127, 131.

<sup>5</sup> Id. (“As an example of the importance of these challenges, a study by the United States Department of Justice showed that plaintiffs’ counsel have found investing in toxic tort cases to have produced some of the richest returns among all types of civil litigation cases.”). Id. n.2.

causation, (6) frequently it is difficult or even impossible to link a particular defendant's conduct to a particular plaintiff's injuries or increase risk, (7) it may also be difficult to determine the number of potentially responsible defendants and their relative culpability, if any, (8) the large number of individual claims results in multiple litigations that stretch court resources and create significant transactional costs, including large awards of legal fees, and (9) such litigation threatens the financial ability of defendant companies - possibly even entire industries - to respond to traditional damage awards.<sup>6</sup>

To the extent that there exist prototypical examples of mass toxic tort litigation, perhaps the most demonstrative cases include In re Agent Orange Product Liability Litigation<sup>7</sup> and In re Three Mile Island Litigation.<sup>8</sup>

In re Agent Orange Product Liability Litigation was a class action lawsuit brought by Vietnam Veterans and their family members against seven chemical companies for injuries allegedly caused by exposure to Agent Orange and other herbicides in Vietnam. More than 200,000 veterans joined the class action claiming a large number of diseases

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<sup>6</sup> See the discussion of the court in *Ashley v. Abbott Laboratories*, 789 F. Supp. 552, 562 (1992).

<sup>7</sup> Clifford Fisher, *The Role of Causation in Science as Law and Proposed Changes in the Current Common Law Toxic Tort System*, 9 *Buff. Env't'l L.J.* 35, 155 ("The Agent Orange litigation was recognized as extraordinary both by the trial court and the Second Circuit, which stated: "This action is 'sui generis, and national in its proportions' involving an extraordinary consultation of facts, parties, and pleadings." One of the major factors on which the court based its decision to certify a class in the Agent Orange case was the fact that the primary defense in that litigation was the "government contract" defense. The defendants claimed that since the product was manufactured under contract to the government specifications, the private defendants were therefore relieved from liability. Even under these circumstances, the court noted that it was treating the case before it as an exception to the general rule that mass tort situations do not generally lend themselves to class action treatment.").

<sup>8</sup> *Id.* at 156 ("The Three Mile Island Litigation involved a single incident with an identifiable source of exposure of a known, measured dangerous substance to an identifiable and geographically limited group of people. Even with these certainties, the court that certified that class has indicated upon reconsideration that certification was really not appropriate.").

related to Agent Orange. On May 7, 1984, a settlement was reached in which the manufacturers of Agent Orange agreed to pay approximately \$180 million.<sup>9</sup>

In re Three Mile Island Litigation arose when, on March 28, 1979, Reactor 2 at the Three Mile Island nuclear power plant suffered a partial meltdown. Within weeks attorneys had filed a class action suit against Metropolitan Edison Company (a subsidiary of General Public Utilities) on behalf of all businesses and residents within 25 miles of the plant. Over 2,000 personal injury claims were filed, with plaintiffs claiming a variety of health injuries caused by gamma radiation exposure. The Pennsylvania district court quickly consolidated the claims into ten test cases. Over the next 15 years, the case went to the Supreme Court and back, and through various district and appeals courts.<sup>10</sup>

#### **B. The Signature Characteristic of Mass Toxic Torts: Causation**

Mass toxic tort cases give rise to characteristic evidentiary issues, including those surrounding evidence of scientific opinion, particularly in the context of the scientific and legal requirements of causation.<sup>11</sup> Even if the presence of disease is undisputed, proof of medical causation can be scientifically complicated in toxic exposure situations.<sup>12</sup> The courts have been reluctant to hold defendants liable until a statistically significant number of individuals have been injured or until science has been afforded the time (and

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<sup>9</sup> Deborah Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, 25 (2000).

<sup>10</sup> See excerpt from the official court summary of Judge Rambo's decision at <http://www.pbs.org/wgbh/pages/frontline/shows/reaction/readings/tmi.html> (last visited May 2, 2003).

<sup>11</sup> E. Donald Elliott, Introduction to Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L. J. 1355 (1985).

<sup>12</sup> See also Kearfott, *supra* note 4 at 163 ("Where actual disease is not present, plaintiffs have increasingly pursued ambitious theories of recovery based on exposure to toxic chemicals alone. Historically, three 'exposure alone' theories of recovery that have been particularly important are: fear of future illness; increased risk of future illness; and medical monitoring or surveillance. More recently, claims have also been based on what has been described as 'Multiple Chemical Sensitivity Syndrome'.")

resources) to complete sophisticated laboratory studies of the toxins.<sup>13</sup> As a result, a number of courts and tort scholars have suggested that as a matter of fairness and equity, the common law tort probability standard of “fifty percent plus” be relaxed when trying to prove causation in the mass toxic tort context.<sup>14</sup> Indeed, it has been persuasively argued that the basic “impossibility” of proving individual causation in mass toxic tort cases is what distinguishes them from classic mass tort lawsuits.<sup>15</sup>

The difficulty in proving causation in a mass toxic tort cases arises, primarily, because of the latency of the claimed diseases<sup>16</sup> and because the plaintiff may have been exposed to multiple toxins that could have caused that disease.<sup>17</sup> Population-based probability estimates do not speak to probability of causation in any one case, and the estimate of relative risk is an extrapolation of the studied population, not of an individual’s circumstances. In many instances of disease, such as cancer and other cell mutations, the condition itself provides no physical evidence of the causative origin, such that direct observation of individual victims provides little or no evidence of causation. Litigants are forced rely on epidemiological evidence - based on the study of populations, not individuals - and must seek to establish associations between alleged causes and effects

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<sup>13</sup> This reluctance has been at least in part encouraged by aggressive arguments from defense attorneys against class certification in the face of weak causation evidence, see Patrick Lysaught, 67 Def. Couns. J. 165, 166 (2000) (“One of the often-cited problems with mass tort litigation involving exposure to, or ingestion of, chemicals, implants or drugs is that the science has not caught up with the litigator. If no scientific and medical support exists for their claims, plaintiffs ought not be in court. ... However, ‘junk science’ claims continue to make it through the courthouse doors, and defendants and their counsel need to be ready.”).

<sup>14</sup> Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 99 U. ILL. L. REV. 269 (1991).

<sup>15</sup> Fisher, *supra* note 7 at 126 (“The basic impossibility of proving individual causation distinguishes classic common law toxic tort cases from ordinary personal injury lawsuits.”).

<sup>16</sup> Andrew R. Klein, *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. Davis L. Rev. 965, 981 (2002) (“However, it is difficult to prove in a toxic exposure case, both because of the latency problem and because the plaintiff may have been exposed to multiple toxins that could have caused her disease.”).

<sup>17</sup> *Id.*

by either comparing the incidence of exposure across sick and healthy populations or by comparing the disease across exposed and unexposed populations.<sup>18</sup> While these scientific correlations may lend weight to an inference of causation, in any individual case epidemiology will not amount to conclusive proof.<sup>19</sup>

### **C. Distinguishing Single- and Multiple-Incident Mass Toxic Torts**

A distinction may be drawn within mass toxic tort litigation between the “single-incident” case in which a group of individuals has been simultaneously exposed to the same or similar toxic material in a well-defined time period, and the “multiple-incident” case in which individuals within the group may have had different levels of exposure to a myriad of toxic substances over a longer, less well-defined period.

In the single-incident case, such as In re Three Mile Island Litigation, the number of persons injured is finite, and their identities are relatively easy to determine. Further, all claimants share common exposure (including almost identical characteristics of time, place and cause of injury). In contrast, multiple-incident cases, such as In re Agent Orange Product Liability Litigation, involve exposure over many years and a variety of circumstances, with the injury often occurring years after first exposure, further complicating issues of causation. While both single-and multiple- incident mass toxic tort actions strain the existing judicial mechanisms for claim resolution, the single-event type is usually easier to resolve through existing mechanisms of claim aggregation, such as

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<sup>18</sup> Fisher, *supra* note at 126 (“However, in an individual case, epidemiology cannot conclusively prove causation. It can only estimate certain probability that a randomly selected case of disease was one that would not have occurred without exposure or the increased risk of the exposed population.”).

<sup>19</sup> *Id.*

existing federal rules for bringing class action proceedings. Claims arising from multiple events present additional conceptual and procedural difficulties.<sup>20</sup>

#### **D. Procedural Tensions Presented by Multiple-Incident Mass Toxic Torts**

The case-by case adjudication of mass toxic torts through the courts is unquestionably inefficient and expensive.<sup>21</sup> A recent study concluded that the disposition of all currently pending asbestos cases for both personal injury and property damages, if treated in the traditional course of litigation, would require approximately 150 judge years.<sup>22</sup> Reliance on individual litigation, or even non-class aggregation, means enormous delay and court congestion.<sup>23</sup> It may jeopardize the prospect that resources will be available to compensate all victims, leaving those who come late to the queue with no remedy at all.<sup>24</sup>

It is certainly arguable that in the absence of any legislative solution to mass toxic tort problem, Congress has effectively forced the courts to adopt diverse, innovative, and often nontraditional judicial management techniques to reduce the burden of this species

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<sup>20</sup> See discussion in Norman M. Hobbie, et al, Multi-Plaintiff Toxic Tort Litigation, 215-JUN N.J. Law. 44, 45-46 (2002).

<sup>21</sup> A Rand Corporation study in 1983 of asbestos litigation found that over 60 percent of total costs were expended for administrative costs, primarily attorneys' fees. See Donald Elliott, Why Courts? Comment on Robinson, 14 J. LEG STUD. 799, 802 (1985). Further, a Rand Corporation study in 1992 indicated that, since the federal Superfund law was enacted in 1980 to help clean toxic waste sites, insurers have spent an average of almost 90 percent of their Superfund related outlays on legal fees and related costs, not on cleanup. See Edward Felsenthal, No Exit: Mass-Liability Suits Can Trap Minor Players That Prefer to Settle, WALL ST. J., Jan 4, 1993, at A1.

<sup>22</sup> State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 303-04 (W.Va. 1996) (citing Jack B. Weinstein, Individual Justice in Mass Tort Litigation 140 (1995).

<sup>23</sup> Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz. L. Rev. 923 (1998)

<sup>24</sup> As Professor Cooper has suggested with respect to the absence of class treatment: "It may fail utterly to achieve the distinctive treatment of each individual case according to its distinctive merits, as hundreds or even thousands of victims become nominal 'clients' of attorneys who settle their inventories of cases in large batches with no effective constraint on the terms or allocation of the settlements. The only remedies available are those awarded in traditional litigation based on unique events that affect no more than a few people. The transaction costs are staggering; it is common to observe that something like two-thirds of the money devoted to asbestos litigation goes to the costs of litigation, leaving barely one-third for victim compensation." Cooper, supra note 23 at 923.

of litigation that has typically threatened to paralyze active dockets.<sup>25</sup> In order to conserve the time and resources of the court, judges and academics have traditionally urged that related toxic tort claims be processed together in an aggregate fashion.<sup>26</sup> Unsurprisingly in this context, the “opt-out” class action mechanism, fashioned by Rule 23(b)(3) of the Federal Rules of Civil Procedure (and many state rule equivalents), has become the most frequently used vehicle for plaintiffs seeking to certify class actions in toxic tort litigation. The emergence of this trend towards mass toxic tort aggregation - together with the legal and ethical issues triggered by that approach - have created a history of calls for potential reforms of the Federal Rules of Civil Procedure. This paper outlines the current proposals for such reform in the context of a tradition of tension between mass toxic tort litigation and contemporary mechanisms for claim aggregation via Rule 23.

### **III. “Round One” Reforms: The Emergence of Mass Toxic Tort Litigation**

#### **Triggers Calls for Class Action Rule Reform**

##### **A. The Influx of Mass Toxic Tort Claims in the 1980s**

The 1980s saw the first serious wave of mass toxic tort suits as an identifiable species of litigation.<sup>27</sup> Consumers of drugs and medical devices, and others exposed to toxic substances, sued manufacturers for injuries allegedly associated with those products. Typically, these cases were brought against one manufacturer that produced a particular

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<sup>25</sup> See *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 821 (1999) (stating that asbestos litigation “defies customary judicial administration” and calls for national legislation).

<sup>26</sup> *Hobbie*, supra note 20 at 45 (“In order to conserve the time and resources of the court, most judges believe that related tort claims should be processed together.”)

<sup>27</sup> However, the prospect of large scale mass tort litigation was recognized even earlier - by the mid 1970s, calls were already being made to reform class action practice. See *Hensler*, supra note 9 at 25, who notes that the Advisory Committee “flirted with some of the proposals”, but then deliberately put the matter to one side.

device or a group of manufacturers that produced products containing a particular substance. Because these products were widely marketed, they had been used by thousands of people - or sometimes hundreds of thousands - many of whom came forward once litigation began, claiming injury to themselves or their relatives. In some instances, thousands of lawsuits alleging the same facts and legal violations were brought in a single jurisdiction, ordinarily where the exposure had taken place.<sup>28</sup>

When brought as individual claims, courts found it difficult to handle the rapid increase in their caseloads triggered by the proliferation of mass toxic tort claims (which were rarely accompanied by proportionate increases in judicial resources to manage such cases). Faced with this pressure of excessive volume, litigants - and thus courts - increasingly utilized the class action mechanism to avoid duplicative litigation.<sup>29</sup> Through the use of the class action in mass toxic tort litigation, courts had the ability to bring numerous parties into one courtroom, preside over one trial - on all, or some, of the common issues - and dispose of the matter in a way that was binding on all class members.

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<sup>28</sup> Id. at 25 (“For example, tens of thousands of asbestos lawsuits were filed during the 1970s and 1980s, many of them in a few jurisdictions where the workers who had been exposed to asbestos had labored. In other instances, the lawsuits were dispersed because consumers were spread across the country, and the companies that were sued were forced to respond to large numbers of claims in many different state and federal courts.”).

<sup>29</sup> Several perceived advantages to certifying a class action were instrumental in triggering an influx of mass toxic tort claims. First, class actions eliminated the need for hundreds or thousands of plaintiffs to repeat the presentation of evidence on similar issues, thereby increasing judicial efficiency and reducing costs. Second, class actions achieved global resolution of similar mass toxic tort claims within one proceeding. Third, class actions allowed for an even distribution of damages among class members, thereby alleviating some of the problems associated with the race to the courthouse doors. See Mandi L. Williams, *The History of Daubert and its Effect on Toxic Tort Class Action Certification*, 22 *Rev. Litig.* 181, 200.

## **B. Initial Reluctance to Certify Mass Toxic Tort Classes**

Despite the perceived potential of Rule 23 to deliver efficiencies in the administration of the emerging mass toxic tort phenomenon, class action treatment was initially rejected by the courts because such cases were thought to lack commonality on questions of damages (illnesses and injuries) and circumstances of exposure history.<sup>30</sup> This initial judicial reluctance to mass toxic tort certification was, at least in part, a product of the history of Rule 23. The Advisory Committee did not foresee the scale or range of litigation that was unleashed by the Rule 23(b)(3) opt-out damages class provision. Certainly, there was no expectation that the rule would be used in the context of dispersed mass toxic torts, a concept that the committee could not have been overtly familiar with. The Advisory Committee was, however, aware of mass accident cases, but chose to expressly exclude those types of claims from Rule 23 treatment:

“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”<sup>31</sup>

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<sup>30</sup> Lewis C. Sutherland, et al, Class Certification for Environmental and Toxic Tort Claims, SG084 ALI-ABA 1 (“Thus, the early view of the Advisory Committee was that for mass torts individual issues would overwhelm class-wide issues, and as a result the utility and efficiency of the class device would be lost.”).

<sup>31</sup> 39 F.R.D. 69, 103 (1966) and see Sutherland, supra note 30 at 3, noting that the Advisory Committee note is specifically addressed to class actions certified under Rule 23(b)(3) which requires a demonstration

In the mass toxic tort arena, Rule 23(b)(3) was certainly interpreted consistently with the Advisory Committee mandate.<sup>32</sup> The denial of class certification for mass toxic torts cases was typically based upon a finding that individual issues would predominate.<sup>33</sup> Many of the early mass toxic tort claims, particularly those involving environmental exposure, also included allegations of property damage and residential exposure. The time and the duration of the alleged exposure typically varied between class members. The defendants' conduct usually changed over time, so did the identity of the defendants. Thus, most courts concluded that a class action was not well-suited for mass toxic tort cases because no individual set of operative facts would establish liability and no single proximate cause applied equally to each putative class member. For these reasons, courts frequently exercise their discretion to decline class certification of mass toxic tort claims.

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that issues common to the class “predominate” over individual issues. The early view of the Advisory Committee was that for mass toxic torts individual issues would overwhelm class-wide issues, and as a result the utility and efficiency of the class device would be lost. Moreover, as at least one commentator has noted, one of the apparent purposes of the Rule 23 was to enable meritorious litigation (such as securities and civil rights actions) that would not otherwise occur due to the limited size of each individual claim. This enabling function is less critical to tort claims because “tort claimants do not need that extra boost because they already have access to legal services by way of contingency fee arrangements.”

<sup>32</sup> Initial attempts to certify mass tort classes under the newly revised Rule 23 - even before the deluge of mass toxic tort cases in the early 1980s - were rejected based on the concerns expressed in the Advisory Committee. See, for example, *Harrigan v. United States*, 63 F.R.D. 402 (E.D. Pa. 1974) (rejecting class certification for class consisting of all paralyzed veterans injured by negligent urological surgery at Veterans Administration hospitals). Similarly, even when a trial court certified a mass tort class, the appellate courts usually reversed. For example, in 1981, a California district court certified the first Dalkon Shield class action, but was later reversed by the Ninth Circuit. *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal.), modified, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 988 (1982) (vacating district court decision to certify a class of all women injured as a result of Dalkon Shield IUD). Similarly, also in 1981, a Missouri district court certified a class of all persons injured by the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, but this certification was later reversed by the Eighth Circuit. *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), rev'd, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

<sup>33</sup> Sutherland, *supra* note 30 at 9 (“In complex, mass toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy.”).

### C. The Agent Orange “Breakthrough”: First Phase of Mass Toxic Tort Certifications

By the mid-1980s, as the number of mass toxic tort cases mounted, trial and appellate courts had begun to reconsider the wisdom of the Advisory Committee’s admonition.<sup>34</sup> It was the In re Agent Orange Product Liability Litigation<sup>35</sup> case, brought by Vietnam veterans alleging injuries resulting from their exposure to dioxin, that proved to be the watershed event in the use of Rule 23 for mass toxic tort litigation. This case represented the first time that a court certified (and appeal court affirmed) a massive toxic exposure class - potentially millions of individuals - who alleged injuries of varying severity and types, incurred under similar but not identical circumstances.<sup>36</sup> The settlement of the veterans’ claims in 1984, for \$180 million, attracted widespread professional and academic attention.<sup>37</sup>

Similar significant decisions followed. In the 1988 decision of Sterling v. Velsicol Chemical Corp.,<sup>38</sup> the Sixth Circuit Court of Appeals approved the certification of a toxic tort class action in which plaintiffs alleged both property damages and personal injuries resulting from hazardous chemical releases associated with the defendant’s landfill. The Sixth Circuit affirmed the trial court’s class certification order because it found that the

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<sup>34</sup> Reference to AC Note above. Citation to follow.

<sup>35</sup> See Advisory Committee note, *supra* note 31.

<sup>36</sup> *In re “Agent Orange” Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying the class), *aff’d*, 818 F.2d 145 (2d Cir. 1987) (upholding the certification and rejecting other grounds for appeal). Defendants attempted to overturn Judge Weinstein’s certification immediately after he issued it, claiming abuse of discretion by the trial judge, but the appellate court rejected this request. *In re “Agent Orange,”* 725 F.2d 858 (2d Cir. 1984).

<sup>37</sup> See discussion in Hensler, *supra* note 9 at 25 and accompanying footnotes.

<sup>38</sup> 855 F.2d 1188 (6th Cir. 1988).

cause of the particular “disaster” in this case was a single course of conduct which was equally applicable to all of the plaintiffs. Each of the class members lived in the vicinity of the landfill and allegedly suffered damages from ingesting the same contaminated water.<sup>39</sup>

A few other courts have reached similar decisions regarding the certification of property damage claims.<sup>40</sup> The general posture of these decisions was an attempt by the judiciary to take advantage of perceived efficiencies associated with class treatment of aggregated claims. As for defendants, while they had hitherto generally opposed certification of a mass toxic tort class, as more such cases were filed against them, experimentation with class actions as a mechanism to create global settlements tentatively began.<sup>41</sup> Moreover, as plaintiff attorneys continued to file for class certification in asbestos and other toxic

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<sup>39</sup> The appeal court upheld certification of a toxic tort case using the following language: “... the problem of individualization of issues is often cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or single course of conduct. . . [When] the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.” *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988).

<sup>40</sup> *Olden v. LaFarge Corp.*, 203 F.R.D. 254 (E.D. Mich. 2001) (nuisance and negligence claims based on property contamination with cement kiln dust); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991). In *Cook v. Rockwell International Corp.*, the district court approved class certification of a plaintiff class alleging property damages arising from historical chemical and radiation contamination at the Rocky Flats Arsenal. The court stated as part of its predominance analysis under Rule 23(b)(3): “plaintiffs have demonstrated that this case presents many common issues of law and fact, including whether the operation of Rocky Flats constitutes an ultra hazardous activity; whether defendants exercised reasonable care to prevent the release of hazardous radioactive and nonradioactive materials from Rocky Flats; what materials were released, in what quantities; what caused the releases; what precautions to avoid emissions were taken; whether the geographic dispersion of the releases in the surrounding environment was reasonably foreseeable; and whether defendants engaged in intentional, reckless, willful, or wanton conduct.”

<sup>41</sup> The penultimate examples of this experimentation are the *Amchem Products, Inc. v. Windsor* 117 S. Ct. 2231 (1997) asbestos personal injury settlement class overturned by the Supreme Court in 1997, and the *In re Asbestos Litig. (“Ahearn”)* 134 F.3d 668 (5th Cir. Jan. 27, 1998); cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (June 22, 1998) asbestos personal injury settlement class overturned by the Supreme Court in 1999. As evidenced by these two enormous cases, in recent years there has been partial retrenchment from the expansive use of class actions in mass tort cases both in the litigation and in the settlement context.

tort cases<sup>42</sup> as well as other mass personal injury suits,<sup>43</sup> it appeared that the barrier to class certification presented by the 1966 Advisory Committee's caution was at last about to fall.<sup>44</sup> Trial courts began to demonstrate a greater willingness to experiment with class actions for mass toxic tort and environmental litigation,<sup>45</sup> and commentary at the time seemed to support the use of Rule 23 to facilitate the efficient disposition of mass toxic tort litigation. Professor Charles Alan Wright summarized his views in court in the following way:

“I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong ...”<sup>46</sup>

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<sup>42</sup> In 1990, a class of asbestos workers was certified in the Eastern District of Texas, *Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990), which had certified the first asbestos class action, *Jenkins v. Raymark Industries*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986), five years earlier.

<sup>43</sup> In 1988, a mass tort class action alleging property damages due to a Shell Oil company explosion was filed in state court in Louisiana. Removed to federal court, it was certified in 1991. *In re Shell Oil Refinery*, 136 F.R.D. 588 (E.D. La. 1991). The Fifth Circuit Court of Appeals upheld the certification. *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992).

<sup>44</sup> See, for example, Bruce Neilson, *Was the 1966 Advisory Committee Right? Suggested Revisions of Rule 23 to Allow for More Frequent Use of Class Actions in Mass Tort Litigation*, 25 *Harvard Journal on Legislation* 393 (1988).

<sup>45</sup> Sutherland, *supra* note 30 at 8 “During the last 20 years or so, trial courts - led initially by federal district courts and more recently by a few state courts - have demonstrated a greater willingness to experiment with class actions for toxic tort and environmental litigation.”

<sup>46</sup> Transcript of Oral Argument, *In re Asbestos Sch. Litig.*, 594 F. Supp. 178 (E.D. Pa. 1984), quoted in Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* 17.06, at 20 (3d ed. 1992). Somewhat similarly, Judge Weinstein offered the following observations about the Committee Note: “As authority for this warning against attempts to use class actions in torts, the note cites an article [I] wrote as a law professor. As a judge [I have] been forced to ignore this indiscretion when faced with the practicalities of mass tort litigation. In the earlier 1960s we did not fully understand the implications of mass tort demands

#### **D. Judicial Innovation Facilitates Mass Toxic Tort Certifications**

As mass toxic tort certifications continued to emerge, so did criticism of the ability of Rule 23 to properly accommodate them. Squeezing the mass toxic tort into existing procedural mechanism for the aggregation of claims created pressure on judges to demonstrate judicial innovation in their efforts to accommodate the burdens of thousands of mass toxic tort filings. Many judges saw class treatment in the mass toxic tort context as essential to avoid the “unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress.”<sup>47</sup> Indeed, Judge Williams wrote an article forecasting the possible demise of mass tort class actions, predicting that “until Congress addresses these questions by enacting comprehensive federal products liability law ... the inequities and shortcomings of the present system require that we judges work in an innovative fashion, adapting aspects of the current system to address these challenging problems.”<sup>48</sup>

Judge Williams’ forecast proved true. Asbestos litigation became the prime area in which federal judges used innovation to achieve essentially substantive goals.<sup>49</sup> In 1985, Judge Rubin urged the Fifth Circuit to adopt federal common law principles in asbestos cases to guard against the risk cited by Judge Williams - that repeated awards of damages would

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on our legal system.” Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. Ill. L. Rev. 269, 288.

<sup>47</sup> In 1981 Judge Spencer Williams highlighted the problem as he oversaw personal injury suits brought by users of the Dalkon Shield contraceptive device. He certified a nationwide mandatory class action for punitive damages and a statewide Rule 23(b)(3) opt-out class action for compensatory damages for California users of the Dalkon Shield. Although not a toxic exposure case, Judge Williams appreciated the prospect of burgeoning mass toxic tort litigation, and saw Rule 23 as the key to a “cure”. The national certification was rejected by the Ninth Circuit on appeal. See discussion in Richard L. Marcus, *Symposium Mass Torts: Benign Neglect Reconsidered*, 148 U. Pa. L. Rev. 2009, 2014 (2000).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2015 (“Judge Williams was right about judicial innovation; ... the courts have been ‘remarkably inventive’ in addressing the problems of mass tort litigation with existing procedural tools.”).

not only add no deterrent effect to the enormous compensatory liability borne by asbestos producers but would also create a risk that later plaintiffs would receive nothing.<sup>50</sup> Calls for judicial innovation to meet the pressures of mass toxic tort litigation continued, as did the practice of courts becoming “remarkably inventive” in addressing the problems of mass toxic tort litigation with existing procedural tools.<sup>51</sup> Such efforts were demonstrative of the pressures exerted by the steady flow of toxic tort litigation and the consequent judicial innovation aimed at identifying a solution. What emerges from this brief survey is a clear picture of federal mass tort litigation plagued by a number of pressure points – most prominently the complications caused by proof regarding causation in mass toxic tort cases together with the risk of ever-increasing bankruptcies flowing from the volume of such litigation.

#### **E. The Seeds of Rule Reform: the Advisory Committee Seeks to Address the Mass Toxic Tort Phenomenon**

Perhaps because of this judicial innovation, throughout the years of controversy over the 1966 revision of Rule 23, the Advisory Committee had declined to act. But late in 1990, the committee agreed to take up the question of whether Rule 23 needed revision, and, if so, what sorts of changes were in order.<sup>52</sup> Predictably, the impetus for revision was the report of a special judicial committee on asbestos litigation, appointed by Chief Justice

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<sup>50</sup> Jackson v. Johns-Manville Corp., 750 F.2d 1314 (5th Cir. 1985). The case was filed as a class action but was not certified as one.

<sup>51</sup> See discussion in Marcus, supra note 47 at 2015 (“These efforts relied not only on Rule 23, but also the power of the Panel on Multidistrict Litigation to combine federal cases under 1407, most prominently evidenced in the 1991 order transferring all asbestos personal injury actions to Philadelphia. In re Asbestos Prod. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).”).

<sup>52</sup> Most references cite 1991 as the beginning of the contemporary Rule 23 revision process. However, as Hensler notes, the minutes for the Advisory Committee’s meeting of November 30 and December 1, 1990, read, “It was agreed to take up Rule 23, to enlarge the opportunity for mass tort litigation, to provide for defendant class actions, perhaps to specify the fiduciary duties of the class representative, and to consider the ABA Litigation Section report.” Hensler, supra note 9 at 41, n.75.

Rehnquist to consider strategies for managing the rising tide of asbestos litigation in the federal courts.<sup>53</sup> After surveying the difficulties wrought by asbestos litigation and noting that “this litigation impasse cannot be broken except by aggregate or class proceedings,”<sup>54</sup> the Advisory Committee recommended that Congress create “a national system for resolving asbestos claims which at the very least permits consolidating all asbestos claims in a single forum.”<sup>55</sup> As a fallback in case this “ultimate solution” was not adopted, the Advisory Committee recommended that Congress expressly authorize class actions or collective trials in asbestos cases. Failing such measures, the Committee foresaw the bankruptcy of all or most available defendants.<sup>56</sup>

The volume of mass toxic tort litigation had forced the hand of the Advisory Committee. As a basis for its deliberations, the Advisory Committee turned to a report published in 1986 by the American Bar Association Litigation Section, which had recommended significant changes in the structure of Rule 23.<sup>57</sup> The report advanced the view that the requirements of the 1966 rule led to “unnecessarily time consuming and expensive” practices.<sup>58</sup> Believing that the tripartite structure of the rule, which required parties and

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<sup>53</sup> In 1991, the Judicial Conference’s Ad Hoc Committee on Asbestos Litigation concluded that there was a “litigation impasse [that] cannot be broken except by aggregate or class proceedings,” and urged Congress to act to resolve the problem. Judicial Conference of the U.S., Report of the Ad Hoc Committee on Asbestos Litigation 19 (1991) at 32-34. See also *Ahearn v. Fibreboard*, 162 F.R.D. 505, 509 (E.D. Tex. 1995) (“By 1990, the [asbestos litigation] situation had reached critical proportions”).

<sup>54</sup> Judicial Conference of the U.S., Report of the Ad Hoc Committee on Asbestos Litigation 19 (1991) at 32-34.

<sup>55</sup> *Id.* at 30.

<sup>56</sup> *Id.* at 27. The Report stated that: “The committee believes it to be inevitable that, unless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources for payment of these claims will be exhausted in a few years.”

<sup>57</sup> The ABA Litigation Section’s report was prepared in response to legislative revisions to Rule 23 originally proposed by the Carter administration in the late 1970s. See American Bar Association Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements (1986). Building on this proposal, in 1992, Judge Pointer (then chair of the committee) prepared a revision that did away with the three part (b)(1), (b)(2), and (b)(3) classification in Rule 23.

<sup>58</sup> *Id.* at 199.

lawyers to decide whether their proposed class was most appropriately labeled a (b)(1), (b)(2), or (b)(3) action, was a major source of problems in implementing it, the section proposed substituting a “unified standard governing all class actions.”<sup>59</sup> Taken up by the Advisory Committee, the ABA Litigation Section’s proposal became the basis for an effort to revise the rule, directed primarily at facilitating class certification of mass toxic torts. In place of the tripartite structure, the proposal set forth circumstances under which judges could certify class actions.<sup>60</sup> The new structure seemed likely not only to facilitate class certification of mass torts, but also to make certification more widely available for a range of other civil litigation.<sup>61</sup>

A year later, when the Advisory Committee resumed its discussion of Rule 23 revision, it appears that its members had become wary of changing established practices, particularly given what had up to that point been judicial preparedness to certify mass toxic tort claims in the face of an overwhelming volume of cases. The draft revision to Rule 23 was withdrawn on the Standing Committees’ advice that further consideration would be required “before such a sweeping proposal could be published for public comment.”<sup>62</sup> In its minutes, the Advisory Committee noted that “[a] very common reaction is that lawyers have learned to live with the present rule, and do not need to devote ten years to

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<sup>59</sup> Id.

<sup>60</sup> See Department Defense News, *Class Action Reform Gets a Shot in the Arm*, 69 Def. Couns. J. 263 (2002). The proposal also provided for opt-in classes at the court’s discretion, and stipulated that exclusion from the class could be conditioned upon a prohibition against institution or maintenance of a separate action. Notice was made more flexible such that “sampling notice” might be permitted depending on the circumstances.

<sup>61</sup> Hensler, *supra* note 9 at 26 (“Taken up by the Advisory Committee, the ABA Litigation Section’s proposal became the basis for an effort to revise the rule, directed primarily at facilitating class certification of mass torts.”).

<sup>62</sup> Department Defense News, *supra* note 60 at 265 (the Standing Committee also felt that “In the years since [the proposed 1992 revisions to Rule 23], we have engaged in that further consideration and can now appreciate how prescient and sophisticated that first effort was.”). Id.

educating themselves and judges in a new rule.”<sup>63</sup> The effect was that the courts were left to their improvisation, using existing procedural tools to manage the steady stream of mass toxic torts.

#### **IV. “Round Two” Reforms: The Emergence of the “Futures” Mass Toxic Tort Class Action Blocks Major Reform Attempts**

##### **A. The Emergence of “Futures” Class Actions**

As the Advisory Committee continued its deliberative process regarding the future of Rule 23, the mass toxic tort legal landscape evolved once again. In 1993, a new kind of Rule 23(b)(3) mass toxic tort class emerged - marked by the Amchem asbestos litigation<sup>64</sup> - comprising individuals who had been exposed to asbestos but who had not filed suit against any defendant. The Amchem class was certified at the time of settlement, rather than earlier in the litigation process, and the terms of the settlement meant that future asbestos claimants would be precluded from suing the defendants except under certain restrictive conditions. In return, plaintiffs would have access to compensation through administrative facilities. The structure of the settlement carved out of the class all “inventory” clients of plaintiffs’ attorney (for whom lawsuits had already been filed).

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<sup>63</sup> Hensler, *supra* note 9 at 26, citing Minutes of Oct. 21–23, 1993 meeting. With a new Chair, Judge Patrick Higginbotham, and several other new members, the committee decided that further deliberation was necessary before formally proposing revisions to the rule. The committee then began the protracted inquiry into class action practice in which it is still engaged. *Id.*

<sup>64</sup> Judge Robert Parker appointed a plaintiffs’ steering committee to organize the futures class in 1993, and approved the settlement in 1995. *Ahearn v. Fibreboard*, 162 F.R.D. 505 (E.D. Tex. 1995).

The “futures” class created difficulties in the mass toxic tort context. Future claimants comprised an “amorphous group” with varying levels of toxic exposure.<sup>65</sup> Class members would likely be unaware of their legal status, their “ignorance” stemming from the long latency periods of many toxic substances within the human body such that the victim’s first awareness of exposure often coincided with the onset of the disease.<sup>66</sup> This characteristic of toxic diseases created several problematic legal issues for future claimants, including whether such claimants could ever effectively participate in the judicial process.<sup>67</sup> In addition, even if future claimants affirmatively opted-out of a Rule 23(b)(3) class action, the opt-out plaintiffs then faced the difficult task of litigating independently without the necessary resources to successfully challenge the defendant company.

Although some viewed futures settlements as examples of judges and lawyers rising to the procedural challenges posed by mass torts, the cases were soon embroiled in controversy.<sup>68</sup> Critics charged that binding future claimants - who arguably were not even aware at the time of notice that they might some day have a legal claim - to the terms of the settlement would be a violation of due process. Ethicists argued that the plaintiff attorneys who negotiated the settlements had discounted the value of the claims of future

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<sup>65</sup> *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626-27 (3d Cir. 1996).

<sup>66</sup> *Id.* at 633 (noting that the onset of mesothelioma in asbestos-exposed victims, for example, may occur many years after even the most casual contact with the toxin).

<sup>67</sup> See Daniel M. Weddle, *Settlement Class Actions and “Mere Exposure” Future Claimants: Problems in Mass Toxic Tort Liability*, 47 *Drake L. Rev.* 113, (noting that “futures” class members have no manifest injury at the time the class action is filed, which creates a two-fold problem: the exposure-only member has no way of knowing whether he or she will ever need any of the benefits of a settlement plan or whether his or her particular injuries will be covered by such a settlement; additionally, the exposure-only member has no way of making an informed decision to opt-out of the class action because the settlement, barring coverage of all potential direct and indirect injuries, may or may not cover the types of injuries incurred in the future but latent at the time of the litigation.).

<sup>68</sup> See Hensler, *supra* note 9 at 26 (“Critics charged that binding future claimants – who arguably were not even aware at the time of notice that they might some day have a legal claim - to the terms of the settlement would be a violation of due process.”).

asbestos litigants in return for more generous payments to current asbestos litigants, whom these attorneys also represented. That the classes were certified at the time of settlement heightened concerns about possible collusion between the plaintiff attorneys and defendants, because it suggested to some that the defendants had agreed to the certifications only because they had been able to find plaintiff attorneys who were willing to negotiate attractive deals with them.<sup>69</sup>

## **B. The Advisory Committee's Response to the "Futures" Class**

In the growing shadow of the future claimant class action, from 1994 the Advisory Committee continued to debate Rule 23 revision.<sup>70</sup> Importantly, the mood of the Advisory Committee and those it invited to join in its deliberations had shifted away from an enthusiasm to facilitate mass tort class actions - hitherto by virtue of judicial innovation - toward an interest in curbing perceived "class action abuses" exemplified by questionable aspects of the futures class settlement.<sup>71</sup> In the context of this perception of abuse, not only did the earlier Advisory Committee proposal to substitute a unitary standard for the

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<sup>69</sup> See, for example, Susan Koniak, "Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*" 90 Cornell Law Review 1045 (1995). The conflicting views of legal ethicists who testified as experts in the *Georgine* case are summarized in Judge Reed's Memorandum Opinion, *Georgine v. Amchem Products*, No. 93-0215 (E.D. Pa. filed Aug. 16, 1994). These problems were accentuated in subsequent mass toxic tort settlements. The court in *Asbestos Litigation v. Ahearn* permitted a class action settlement with future claimants who had no possibility of opting out. As noted in Judge Smith's dissent, the settlement "force[d] asbestos victims to surrender their claims in exchange for a meager \$10 million of Fibreboard's \$225-250 million net worth." Without knowing the full extent of their asbestos-related injuries, the exposure-only group was forced to join the settlement-only class. *Asbestos Litig. v. Ahearn*, 90 F.3d 963 (5th Cir. 1996) vacated & remanded sub nom. *Ortiz v. Fibreboard Corp.*, 117 S. Ct. 2503 (1997). The case was subsequently heard on remand by the Fifth Circuit. *In re Asbestos Litig.*, 134 F.3d 668 (5th Cir. 1998) cert. granted sub nom. *Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

<sup>70</sup> The Advisory Committee invited leading practitioners to address its members (1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23, 266 (1997) (hereafter "Working Papers of the Advisory Committee").

<sup>71</sup> The minutes of the April 1994 meeting summarizes comments by one member as follows: "Subsequent history [after 1966] has been a story of expansion and excesses ... The fear that defendants would rig plaintiffs classes has not materialized. They have not had to. The 'take-a-dive' class has been arranged by plaintiff attorneys who settle out class claims for liberal fee recovery ... Abuses of Rule 23 are rising." *Id.* at 187, 189 per John Frank (a member of the 1966 Advisory Committee).

(b)(1), (b)(2), and (b)(3) categories looked less attractive, but indeed the desire to facilitate mass personal injury class actions was diminished if not temporarily extinguished. Although never incorporated in a formal proposal, consideration was briefly given to the possibility of an entirely separate rule to deal with mass toxic torts (incorporating a solution to the “futures” problem) but Rule Enabling Act concerns emerged and the proposal was deferred.<sup>72</sup> Some even questioned whether any revision to Rule 23 was appropriate at that time.<sup>73</sup> It is therefore not surprising that when reforms to Rule 23 were finally considered by the Advisory Committee in 1995, changes were advanced that would have significantly restricted the ability to successfully prosecute a mass toxic tort class action.

### **1. “Necessity” and “Probable Success”**

The changes included adding a requirement that certification of a Rule 23(b)(3) class be “necessary” (instead of only “superior”) for fair and efficient adjudication of the case - adding a requirement that in certifying Rule 23(b)(3) classes, judges consider both the “probable success” of the case if it went forward as a class action and the “significance” of this success.<sup>74</sup> A necessity standard for certification would certainly have been more

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<sup>72</sup> Id. at 206 (“A topic that recurred repeatedly throughout the day [was] whether problems of mass tort actions are so distinctive that a separate rule should be developed. One advantage might be to address the problem of ‘futures’ claimants that seem to be unique to this setting ... Doubts were raised in response. A specific mass torts rule may seem so laden with substantive overtones as to raise legitimate doubts about the wisdom of invoking regular rulemaking procedures.”).

<sup>73</sup> Id at 214 (“Whether Rule 23 changes are needed at all remains uncertain. The mass tort phenomenon seems to be driving the process. If that is so, it must be asked whether asbestos and breast implant litigation are an isolated phenomenon - and, perhaps, when more is known, may be quite different from each other ... is all of this discussion an attempt to design a system for asbestos? And isn’t that foolish, in part because too late?”).

<sup>74</sup> Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next*, 69 *Def. Couns. J.* 432, 433 (2002) (“Defendants expressed two major concerns - that even a preliminary consideration of the merits would inevitably lead to complete discovery on the merits before a certification

difficult to meet than the original superiority standard, and considering the likely success and significance of a proposed class action would require trial judges to determine, in a preliminary way, the merits of the underlying allegations. The proposal was rejected because of a major concern that even a preliminary consideration of “probable success” would inevitably lead to complete discovery on the merits before a certification decision could be made, and that a certification based on a prediction that the plaintiffs have a good chance of winning would exert irresistible pressure on defendant’s to settle.<sup>75</sup>

## **2. Maturity**

There was substantial - although far from unanimous - support for the view that a mass toxic tort class action should not be certified to resolve a claim that rests on uncertain or still-developing scientific evidence. It was urged that in mass toxic tort litigation there is frequently a race to file the first class claim, often hard on the heels of preliminary announcements of a new theory of injury or causation, or new evidence of exposure.<sup>76</sup>

Challenges to the “maturity” proposal took several directions, but a familiar fear arose that a proposal responding to problems with mass toxic tort litigation would likely disrupt settled areas of practice. It was argued, for example, that considerations of maturity were irrelevant to a securities law violation class action – such violations could be corrected by a single class action without awaiting the results of individual actions challenging the

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decision could be made, and that a certification based on a prediction that the plaintiffs have a good chance of winning would exert irresistible pressure to settle.”).

<sup>75</sup> Id.

<sup>76</sup> Cooper, *supra* note 23 at 955 (“The race is prompted by the desire to become class counsel, or at least a member of a steering committee. With little experience of the outcome of individual actions, there is a great pressure to settle and little guidance as to appropriate terms. Time and experience with individual litigation are needed. Only time will enable real science, developed by agencies independent of the litigation, to displace ‘junk science.’ This science will bolster the claims, sort out the good from the bad, or refute them all. Experience facilitates realistic settlement.”).

same violation.<sup>77</sup> In another familiar vein, it was noted that there is was no proposed definition of maturity - the lack of definition threatened to confuse established practice, particularly in cases other than mass toxic tort litigation, and might provide yet another excuse for the denial of class certification in otherwise appropriate circumstances.<sup>78</sup>

### **3. Concerns Over Class Action Volume**

Additional areas of controversy were identified. Primary was a concern was that too many larger personal injury claims were being aggregated in mass toxic tort class actions. To remedy this, the Advisory Committee proposed revising the list of matters pertinent to determining whether certification was appropriate to include factors with an obvious bearing on mass toxic tort claims: the practical ability of individual class members to pursue their claims without class certification and class members' interests in maintaining or defending separate actions.<sup>79</sup>

The public comments and testimony on the proposed factors demonstrate the difficulty of ensuring that modest changes do not run out of control. Ironically – given that the proposals were designed to curb mass tort volume - much of the criticism of the proposals emphasized their likely deleterious effect on such claims. The courts, it was argued, should not be expressly instructed to consider individual interests, because

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<sup>77</sup> Id. at 965.

<sup>78</sup> Id.

<sup>79</sup> Id at 952 (“One formulation would add four words: ‘the practical ability of individual class members to pursue their claims or otherwise obtain relief without class certification.’”).

claimants with large individual claims are also those for whom the opportunity to opt out is most meaningful.<sup>80</sup>

Taken as a whole, the comments in relation to the “necessity”, “maturity” and “volume” concerns raised above are an embodiment of the difficulties associated with drafting general provisions that will adapt Rule 23 to mass toxic litigation without also inviting unintended consequences in better-settled areas of class-action practice. Considering the divergent criticisms of the rule reform proposals, the Advisory Committee concluded that the changes should be rejected. The risk of unintended consequences outweighed the modest benefits that were sought and the proposals otherwise failed to meet squarely the major challenges proposed by the “futures” settlement class in cases such as Amchem.<sup>81</sup>

#### **4. “Settlement-Only” Classes**

Another change, proposed to respond to the identified uncertainty about the application of Rule 23 to the Amchem-style “settlement-only” class added a new certification category - (b)(4) - that explicitly mentioned settlement classes and provided authority for judges to certify such classes in response to the parties’ joint request.<sup>82</sup> Certification of settlement classes had become exceptionally controversial and the profession sought to settle the issue through rule revision, notwithstanding that “futures” settlements had been

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<sup>80</sup> The importance of large claimants was stressed from another perspective as well: exclusion of large claimants from the class definition makes it more difficult to achieve settlement - a phenomenon that may be attributed to the bargaining power of their claims, or that instead may be attributed to the defendant’s desire to achieve “global peace”. Other comments, focusing ostensibly on mass toxic torts and drawing from the asbestos (and heart-valve) experiences, urged that even if every class member is able to pursue individual litigation, class litigation can achieve remedies that are not available in individual actions – specifically such remedies as funding for research that would benefit the class. *Id.* at 933.

<sup>81</sup> Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

<sup>82</sup> See Cooper, *supra* note 23 at 934 (“The 1996 proposals included a very restrained 23(b)(4) provision that would allow certification of a (b)(3) class for settlement, even though the same class might not be certified for trial. This proposal provoked extensive and illuminating commentary.”).

fingered as a central source of toxic tort abuse. A comprehensive critique of asbestos futures settlement classes was spearheaded by Professor Susan Koniak,<sup>83</sup> but the debate was somewhat short-lived. In the year prior to the proposal, the United States Supreme Court had taken up the question of the legality of settlement-only classes and had not yet handed down its decision. It was apparent to the Advisory Committee that they could not act on the proposal before hearing from the court. Indeed, as a lack of consensus on the overwhelming majority of the 1996 proposals became apparent, the pending Supreme Court decision developed into a rationale for postponing action on the proposed revisions to Rule 23.<sup>84</sup> In October 1997, the Advisory Committee agreed to table Rule 23 revision.

## **5. 1996 Proposal Jettisoned by the Advisory Committee**

The Supreme Court's decision striking down the proposed Amchem settlement heightened perception of sharp controversy over the very purposes of Rule 23(b)(3) and dampened much of the Advisory Committee's momentum its long effort to reform the rule. Importantly, the issue that had triggered the long process of reviewing Rule 23(b)(3) - the need to find some means of handling mass toxic torts - remained unanswered. This was recognized by the Advisory Committee, which proposed that the Judicial Conference

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<sup>83</sup> Koniak, *supra* note 69. Settlement-only classes were opposed because they were believed to be highly susceptible to conflicts of interest between plaintiff attorneys and class members, and to collusion between defendants and plaintiff attorneys. See also comments by Howard Metzenbaum, Chair, Consumer Federation of America at 2 Working Papers of the Advisory Committee, *supra* note 70, at 91 ("There have been too many settlements made where the attorneys took far too much of the proceeds, and the aggrieved consumers received but a pittance . . . We urge the committee [to withdraw the settlement class provision and engage in] further study of how collusive settlement can be avoided and how the interests of absentee class members can be adequately represented.").

<sup>84</sup> See Hensler, *supra* note 9 at 36 ("After two days of meetings, the committee had approved only two revisions: a provision for interlocutory appeal, and a small change in the wording of Rule 23(c)(1) indicating that the judge may certify a class 'when practicable' (instead of 'as soon as practicable') in the course of litigation. The following month, the Standing Committee voted to recommend the interlocutory appeal provision to the Judicial Conference, but postponed the 'when practicable' recommendation.").

appoint a special committee to develop recommendations for improving the management of mass personal injury litigation.<sup>85</sup>

The Rule 23 debate had significantly changed since it was first waged in the 1980s - mass toxic tort class actions, in particularly those presenting a futures settlement problem, were now playing a role that would have been inconceivable during Round One, when the Advisory Committee's note warning against certification of such personal injury suits still held sway. Having shaped the application of Rule 23 for almost 30 years, mass toxic torts were now exerting their influence on proposals to change the substance of the rule. But Rule 23 had once again survived, notwithstanding a very rigorous second round of proposed amendments. Fears that amendments to Rule 23 to accommodate mass toxic tort litigation would ultimately implicate changes in general class action practice were acute, and indeed aggravated, by a perception that even the fairly robust changes before the Advisory Committee in 1996 would not address the core of the mass toxic tort problem. The emergence of futures settlements had only clarified the legal and ethical problems presented by mass toxic torts, and rule reform was now a blunt instrument with which to perform a delicate but important operation.

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<sup>85</sup> The special committee - a working group on mass torts - completed its work and issued its report and recommendations in early 1999. The working group and Advisory Committee recommended that the Chief Justice appoint a new Ad Hoc Committee on Mass Torts, charged with recommending legislation, rule revision, changes in case management and practice, and judicial education. In a preface to the Advisory Committee's and Working Group on Mass Torts' report to the Chief Justice and Judicial Conference, issued in February 1999, the Advisory Committee Chair Judge Paul Niemeyer wrote: "In August 1996, the Committee published proposed changes to Rule 23. The public hearings and comments persuaded the Committee that the proposals would not solve the most serious of the identified problems and might raise troubling collateral issues. It also became apparent that rulemaking might not be adequate to solve some of the more serious problems. During this same period, Congress ... began to conduct its own hearings. This activity increased to the point that the House was prepared to pass a bill to address some of the perceived problems before time ran out. Many believe that some final action may be taken by the current Congress." Administrative Office of the U.S. Courts, Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States (Feb. 15, 1999).

**V. “Round Three” Reforms: Current Proposals Diluted by Mass Toxic Tort Concerns**

**A. Empirical Foundations of the Current Proposals**

Despite the tabling of the 1996 amendments, the seeds of rule reform had been firmly planted into the class action landscape.<sup>86</sup> Several studies were commissioned to determine the merit of a variety of reforms to Rule 23 – most of them focusing in part or in whole on the range of problems presented by the now steady stream of mass toxic tort litigation.<sup>87</sup> Among them, a Rand study, in line with a great amount of less rigorously assembled empirical information, emphasized the importance of class counsel, including fee practices, and of judicial review of class action settlements. These were areas of concern dating back to the first appearance of toxic tort futures settlements in the early 1990s - concerns which had not been adequately addressed by the 1996 proposed amendments to Rule 23. The commissioned studies, together with a report of the ad hoc working group investigating mass torts generally, provided additional information about the operation of Rule 23 in the context of mass toxic torts and illuminated many of the

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<sup>86</sup> The Advisory Committee’s continuing deliberations not only had at their disposal the comments from the hearings on the proposed 1996 amendments, but also the benefit of the Rand Institute for Civil Justice’s case study of ten class actions, eventually published in 2000 as “Class Action Dilemmas: Pursuing Public Goals for Private Gain”. See Hensler, *supra* note 9.

<sup>87</sup> In addition to the Rand study, the Federal Judicial Center did a study of class actions in four high-activity courts and is carrying out another study presently. See the discussion of the materials before the Advisory Committee in Susan Ford Bedor, Proposed Changes to FRCP 23 – Class Action Rules Undergoing Change, 49-MAY Fed. Law. 49 (2002).

problems that had emerges over the preceding years, including new problems associated with multiple, overlapping class actions.<sup>88</sup>

Presently, after what is now more than 10 years of work, proposed amendments to Rule 23 have been submitted by the Supreme Court of the United States to Congress for consideration.<sup>89</sup> Absent Congressional intervention, the amendments to Rule 23 will take effect on December 1, 2003. The proposed changes do not address the criteria for granting or denying class certification but rather refine the process for managing a class action once it has been certified. The current proposals focus on four areas: the timing of the court's certification decision and related notice; increased judicial scrutiny and review of settlements; judicial appointment and evaluation of class counsel; and compensation to class counsel. Arguably, many of the current proposals reflect contemporary class action

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<sup>88</sup> Along with the currently proposed amendments to Rule 23 outlined below, the Advisory Committee released a companion report on unfinished business recommending that the Judicial Conference support legislation designed to minimize the number of "overlapping" class actions in state and federal courts. Such legislation emerged in the form of HR 2341, bipartisan legislation introduced on June 27, 2001 in the House of Representatives by Hon. Bob Goodlatte, R-Va. and others. The legislation amends Section 1332 ("Diversity of citizenship; amount in controversy; costs") of 28 U.S.C. in a number of important ways. For instance, the amended provision creates original jurisdiction in the district courts for any civil action in which the controversy exceeds \$2,000,000 (exclusive of interest and costs) and any member of a plaintiff class is a citizen of a different state than any defendant. Effectively, the legislation expands the jurisdiction of federal courts, allowing them to more easily hear large class action lawsuits in which plaintiffs and defendants are from different states. The attempt is to ensure that national class action lawsuits, involving plaintiffs from around the country, can be heard in federal courts. See description of the general operation of the legislation provided by the U.S. Chamber Institute, Litigation Fairness Campaign at <http://www.litigationfairness.org/act.html> (last visited May 5, 2003). On April 11, 2003, the Senate Judiciary Committee's voted embrace the legislation which, according the U.S. Chamber of Commerce is designed to "curb rampant venue shopping in state courts and abusive settlements in which class members receive coupons or something else of little value while their lawyers receive huge legal fees." See U.S. Chamber of Commerce, Newsletter, April 11, 2003 at [http://www.litigationfairness.org/pdf/041103\\_release.pdf](http://www.litigationfairness.org/pdf/041103_release.pdf) (last visited May 5, 2003).

<sup>89</sup> A copy of Chief Justice Rehnquist's letter to the Speaker of the House of Representatives can be found at <http://www.supremecourtus.gov/orders/courtorders/frcv03p.pdf> (last visited May 5, 2002), while a complete copy of the amendments and explanatory committee notes submitted to Congress can be found at the Federal Judiciary website at <http://www.uscourts.gov/rules/>. The proposed modifications include several recommended by the Advisory Committee to the proposed changes published in August 2001. After those proposals were published, the Advisory Committee received voluminous testimony and comments in support of or in opposition to the proposals. The rule changes submitted to the Judicial Conference and ultimately the Supreme Court and Congress now reflect the Advisory Committee's consideration of those comments.

practice; however, other proposals - such as those relating to settlement overview and a second opt-out opportunity - are relatively new to the class action arena.<sup>90</sup>

## **B. Timing of the Certification Decision**

The current language of Rule 23(c)(1)(A) states that a certification decision must be made “as soon as practicable” after the commencement of the action, thus requiring that a motion for certification to be brought with reasonable speed after the filing of the case. The Advisory Committee heard testimony that this requirement may create a tension between the need for a swift decision on certification and the practicalities of gathering the proof needed for the court to evaluate a class certification motion.<sup>91</sup> The proposals will amend that language to “at an early practicable time”.<sup>92</sup> The premise of the proposal is that it is proper to take the time needed to uncover the substance of the dispute, “but not to indulge discovery on the merits or decision on the merits”.<sup>93</sup> The proposed note suggests that time also may be needed for the parties to conduct discovery to support the certification decision and acknowledges that, as a part of its certification decision, the court is not required to evaluate the case on the merits. It goes on to say, however, that

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<sup>90</sup> See Bedor, *supra* note 87 at 50 (“The current proposed changes are broader in scope than the 1998 change, and they focus on four areas: the timing of the court’s certification decision and related notice; increased judicial scrutiny and review of settlements; judicial appointment and evaluation of class counsel; and compensation to class counsel. . . . Many of the proposals do reflect current practice; however, other proposals are relatively new to the class action procedure.”).

<sup>91</sup> Typically, this entails discovery regarding the Rule 23 class elements, such as the size or extent of the class, commonality of issues and facts among the class members, evaluation of the circumstances and adequacy of the class representatives, and the need for certification.

<sup>92</sup> Report of the Civil Rules Advisory Committee, May 20, 2002, 96 (Revised to account for action taken by Standing Committee at its June 10-11 meeting, hereafter, “AC Report”), a complete reprint of which appears at <http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf>. See also Bedor, *supra* note 87 at 50, noting that the proposed language is arguably consistent with current practice, which has shown that certification decisions are not always reached soon after the commencement of the action. The study conducted by the Federal Judicial Center showed many “seemingly tardy certification decisions.”

<sup>93</sup> AC Report, *supra* note 92 at 133 (“The premise of the proposal is that it is proper to take the time needed to uncover the substance of the dispute, ‘but not to indulge discovery on the merits or decision on the merits.’”).

discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.<sup>94</sup>

Arguably, the proposal presents a risk of unintended consequences. The change to “at an early practical time” may provide an opportunity for additional pre-certification discovery that may therefore delay the certification decision. Concerns were raised before the Advisory Committee that defendants would use the new language to convince courts to entertain intrusive discovery, making plaintiffs more desperate to settle the litigation. The danger is that discovery will be so extensive that the merits of the case are litigated prior to a certification decision.<sup>95</sup>

In mass toxic tort litigation, even though causation is predominantly at issue during the actual trial, the analysis begins much sooner, during the class action certification proceeding. Before the court can even consider whether a toxic substance injured the members of the class, it must first determine whether the plaintiffs have standing to sue, whether the class has questions of fact and law in common, and whether a joinder of their claims is practicable.<sup>96</sup> By softening the mandate for quick certification and acknowledging the possibility of more extensive discovery, the proposed delay invites litigants and judges to consider the merits of the class action. This, in turn, may permit

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<sup>94</sup> Id. at 98 (“In this sense it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.”).

<sup>95</sup> Id. at 135 per Mary Alexander, Esq., S-F Testimony pp 58 ff: For ATLA (“The change to at an early practical time ‘will provide an opportunity for extensive precertification discovery and litigation that could be used to delay crucial certification.’ Although the change seems modest, we are concerned that it will make the situation ‘even worse,’ that defendants will use the new language to convince courts to do further discovery and make plaintiffs more desperate to settle.”).

<sup>96</sup> In other words, although a plaintiff will not have to prove each causation requirement comprehensively to be certified as a class member, he must at least demonstrate that he is one of many who will be allowed to participate in a lawsuit against the defendant. In order to be considered a member of a toxic tort class action under Rule 23, each plaintiff has to first demonstrate that the toxic substance in question might have caused his particular injury.

opposing counsel greater opportunity to discredit the expert's testimony on behalf of the class in order to eliminate a representative from the class or rule out a class action altogether. Defendant's counsel may also benefit from greater opportunities to scrutinize the class expert's theory of exposure and to assert that other existing factors could have affected the distribution of the toxic substance within members of the class. Counsel may also have the opportunity to discredit the validity of laboratory experiments on animals for the purpose of proving the potential harm of toxic substances on humans, as well as the admissibility of and weight given to epidemiological studies.

The upshot of the proposals may be a greater level of scrutiny of the plaintiffs' scientific evidence of causation at the certification stage. That possibility is made more apparent by persistent suggestions that a Daubert-like inquiry into the admissibility of scientific evidence should be allowed at the class action certification stage.<sup>97</sup> Certainly, that may be a position that the Advisory Committee - and even a portion of the profession - may wish to tolerate, or even encourage. But it is nevertheless an unintended outcome, and one that deserves closer scrutiny in the context of the problems sought to be addressed by the proposed change to the requirements for certification timing.

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<sup>97</sup> Williams, *supra* note 29 at 201 ("A Daubert-like inquiry into the admissibility of scientific evidence is vital and should be allowed in class action certifications. Such an inquiry plays a substantial role in determining whether a class action will consist of twenty or two thousand class members. Daubert factors should be used by opposing counsel to challenge, and possibly discredit, any expert scientific evidence offered to prove that a plaintiff should be part of a class and that the class meets the requirements of Rule 23. Counsel should be able to examine a theory's reliability and relevancy, as well as point out its deficiencies, while addressing each of the four (or, in Texas, six) non-exclusive factors set forth by Daubert.").

### C. Increase judicial oversight of settlements

Judicial involvement in class action settlements – traditionally an area of significant controversy – has been the focus of additional scrutiny in the mass toxic tort context, particularly as potential defendants increasingly embrace the economic incentives associated with quick settlements and global peace. Proponents of increased judicial scrutiny over mass toxic tort settlements point to the unique legal and ethical problems presented by the compromise of hundreds and thousands of claims arising from alleged toxic exposure. The active, behind-the-scenes role of some judges in “encouraging” settlement – itself a source of considerable debate – was a characteristic of the Agent Orange litigation.<sup>98</sup> In cases such as the Amchem litigation, in which the proposed settlement is filed on the same day as the class action, the judge participates (at least publicly) only when formal motions are made to certify the class and approve class settlement. In this situation, current Rule 23(e) provides little guidance to assist the court with its review of the settlements.<sup>99</sup> As others have persuasively argued,<sup>100</sup> many of the current problems with settlement of mass torts are related to the generality of Rule 23.

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<sup>98</sup> See Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1986) at 259-60, 295-96 (discussing the powerful role of Judge Weinstein in the Agent Orange case).

<sup>99</sup> Rule 23(e) provides: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Rule 23(e) contains no settlement “standards”, while other provisions of Rule 23 provide only vague criteria – a “fair” and “reasonable” settlement negotiated by class counsel capable of providing “adequate representation” to the entire class, including any absent members.

<sup>100</sup> See Roger C. Crampton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 *Cornell L. Rev.* 811, 823 (“As Judge Schwarzer argues in his afterword, many current problems are related to the generality of these standards. Judicial scrutiny of class action settlements, unarguably influenced by judicial approbation of the docket-paring results of settlement, suffers from the absence of a prescribed procedure or detailed standards for considering fairness to absent claimants and adequacy of representation.”).

Under the proposed amendments, Rule 23(e) is completely rewritten to emphasize the court's responsibilities to review a proposed settlement.

## **1. Regulating Side Deals**

Rule 23 (e)(2) is entirely new. It directs the parties to identify any agreement made “in connection with a proposed settlement”.<sup>101</sup> The determination of whether an agreement is made “in connection” with a settlement is not defined, but the intention of the proposal is to notify judges of any side agreements that the attorneys for the parties have made that they may not wish to include in the settlement agreement itself. The Advisory Committee said that the provision would help the court determine whether a proposed settlement agreement was fair and adequate.<sup>102</sup>

This proposal is an obvious response to mass toxic tort futures settlements which - as was the case of Amchem - fail to include within the class individuals who had already filed suit. The proposal is also designed to permit the court to determine the existence of “take-out agreements”, which are increasingly a feature of mass toxic tort settlements, pursuant to which defendants seek an agreement with plaintiff's counsel not to represent individuals in subsequent related lawsuits against the defendant.<sup>103</sup>

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<sup>101</sup> Proposed Rule 23(e)(2) provides: “The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.” AC Report, supra note 92 at 254.

<sup>102</sup> Bedor, supra note 87 at 54 (“This requirement is aimed at making sure that the court is able to evaluate all aspects of the settlement, including separate agreements that may exist outside of the class settlement agreement. Obviously, the rule is concerned with making sure that a settlement reflects negotiations regarding the benefits to the class and that class interests have not been compromised by giving benefits to other individuals or cases at the expense of the class.”).

<sup>103</sup> See Kearfott, supra note 9 at 167 (“Another potential ethical constraint - for plaintiffs’ and defense counsel alike - arises in connection with the settlement of a plaintiff's claim, where a defendant seeks an arrangement with plaintiff's counsel under which he or she agrees not to represent individuals in subsequent related lawsuits against the defendant.”).

Despite the merit of the proposal, there are a number of potentially important areas not addressed by the suggested amendments. Many of these areas were discussed before the Advisory Committee and will not be extensively reproduced in this paper. The primary concerns are, first, that while side agreements are required to be identified, there is no requirement that the settling parties disclose material facts about the settlement negotiation, the settlement itself or the relationships among class counsel and the parties. The absence of such an additional requirement may contribute to the amendments failing to meet their intended purpose, that is, the identification of incentives to settle not obvious to the court at the time of class certification. Second, there are also no provisions dealing with the sanctions for failure to comply with the disclose requirements.<sup>104</sup> There is also a potential clarity problem with the words “in connection with the settlement”. If it is the intention of the amendments to “get on the table directly related undertakings”, clearer words may be required - in the mass toxic tort context, for example, a defendant may be engaged in simultaneous negotiations with named plaintiffs in private class actions, with federal regulators, and with state attorneys general. The proposals do not offer guidance as to whether all of these arrangements be disclosed.<sup>105</sup>

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<sup>104</sup> AC Report, supra note 92 at 179 per David J. Piell, Student, 01-CV-094 (“This is a welcome addition, but does not go far enough. What is the sanction for failure to disclose? Can the judgment be reopened? Can class members who opted out because the settlement was inadequate choose to come back in when an enhanced settlement results? Guidance should be provided, including a statement whether it is proper to deny any sanction if the failure to disclose resulted from a good-faith belief that the agreement was not ‘in connection with’ the settlement.”).

<sup>105</sup> See also comments before the Advisory Committee by Brian Wolfman, Esq., D.C. Hearing 120-122, 126-129 noting that there is also a compelling argument that side-agreement disclosure should be mandatory - based on the experience of those representing objectors in mass toxic tort settlements, there are often difficulties in determining which particular settlements within a settlement scheme may be masking relevant side agreements unless those agreements are disclosed by the parties. So it was only after the Amchem settlement was rejected that the settling parties disclosed that defendants had agreed to pay “what turned out to be millions of dollars of class counsel’s costs in litigating the fairness of the settlement, even in the event that the settlement was not approved.”

## 2. Second Opt-Out Opportunity

Rule 23(e)(3) also is entirely new and represents a significant innovation in class action practice. It authorizes a court to refuse to approve settlement of a Rule 23(b)(3) class action unless the settlement affords class members a second opportunity to request exclusion after a settlement is proposed, even though an initial opportunity to request exclusion has expired.<sup>106</sup> The purpose is to permit exclusion at a time when class members have clear information on the consequences of remaining in the class and a real incentive to think about the matter. There is also an “adequacy of representation” purpose – class members cannot be expected to monitor the work of class lawyers, and lawyers’ interests are not naturally aligned with class-member interests. Expanded opt-out rights may enhance members’ abilities to monitor their lawyers’ work.<sup>107</sup>

The time of the opt-out may be important for victims of toxic torts and, certainly, there may be merit in providing those exposed to toxic substances with a second opt-out at a time when the aggregate settlement terms are known – particularly where this is sometime after filing. However, the proposal will not address the circumstances of many toxic tort victims where the toxin-related injury may be latent for many years. The latent

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<sup>106</sup> Proposed Rule 23(e)(3) provides “In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.” AC Report, *supra* note 92 at 102.

<sup>107</sup> In addition, the prospect of opt outs may encourage the parties to negotiate a settlement more favorable to class members. Of course, there are alternative views on the due-process effects of the proposal, see for example, AC Report, *supra* note 92 at 193 per Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: “A second opt out ‘breeds laziness and free rider issues.’ It encourages class counsel to communicate even less with class members. The unintended effect will be even less interest by the litigants in the litigation. Class members who do not opt out at the first opportunity can protect their interests by objecting to the settlement.”

injury, should it arise, functions as a notice to the victim of his or her membership in the class, as well as an indication of the seriousness of disease. If the latency period is significant, it may well extend beyond any second-opt out opportunity afforded at the time settlement terms are known. Accordingly, even in the face of the proposed amendments, exposure-only claimants will not necessarily be permitted to exit the class at the time that they become aware of their injuries. Of course, while it might be possible to defer the second opt-out decision until a time when an individual class member knows what he or she will receive under the settlement, it would arguably destroy most mass-tort settlements if latent-injury class members were allowed to decide to opt-out, say, 21 years after settlement when their injury becomes manifest.<sup>108</sup>

There is some prospect that competing counsel will mount concerted campaigns to solicit exclusions, should a second opt-out opportunity be afforded, but it is difficult to predict how often that will happen or what the consequences might be.<sup>109</sup> Giving class members a second opportunity to opt out may also encourage objections and make it more difficult for defendants to gauge the likelihood of further litigation. However, the Advisory Committee heard these kinds of argument and nevertheless concluded that the second opt-out opportunity would provide judges with a way to obtain additional information before deciding whether the proposed settlement is fair, reasonable and adequate.

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<sup>108</sup> AC Report, supra note 92 at 189 (“Asbestos should not be used as an example for all cases. In many cases where ‘the biological clock ticks faster’ it will take two years, or four, to identify all ‘downstream claims’. Defendants can deal with this kind of ‘extended global peace.’ The back-end opt out can be worked out. In a large heterogeneous mass tort, the back-end opt out ‘can address the constitutional needs.’ But if the class is more cohesive, settlement without a back-end opt out may be appropriate. It would be a mistake to require a back-end opt out in all mass torts; if the disease affects a finite population and its progression is known, back-end opt out may not be needed.”)

<sup>109</sup> AC Report, supra note 92 at 193 per Walter J. Andrews, Esq., D.C. Hearing 284-286 (“The possibility of opt-outs makes settlement more difficult. Plaintiffs should not have a second opportunity to opt out: this allows them to litigate once, and then a second time if not satisfied with the class-action resolution. This will have a particularly adverse impact on insurers by ‘introduc[ing] an expensive level of volatility and unpredictability into the establishment of reserves’ for class actions.”).

### 3. Absence of Settlement Guidance

The amendments offer no direction about whether to certify a settlement class – an area of significant concern to the Advisory Committee since 1996. The notes as first published did contain several criteria to assist the court in evaluating a proposed settlement, but these caused significant concerns, including anticipated difficulties with interpretation.<sup>110</sup> Accordingly, as submitted to the Supreme Court and Congress, the proposed changes provide not even a suggestion of some of the more obvious questions that might be asked by a judge prior to settlement approval, including, for example: what similar cases settle for absent class treatment; whether a class member might recover more from individual litigation; what percentage of the class have opted-out of the settlement; and how much effort is required to participate in the settlement? Accordingly, while the proposed amendments to Rule 23(e) responds to some of the concerns expressed in Amchem,<sup>111</sup> they provide little guidance as to when it is appropriate for a court to certify a settlement-only class. This must be considered a major deficiency in the capacity of the amendment to deal with attempts to settle mass toxic tort litigation, particularly those involving exposure-only claimants.

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<sup>110</sup> Comments in response to the proposed criteria were critical and focused on the difficulty in achieving truly impartial court review of proposed class action settlements. See AC Report, *supra* note 92 at 174 per David J. Piell, Student, 01-CV-094 “The court will find it difficult to be impartial with respect to [the settlement class criteria] - for example, it has an interest in avoiding lengthy trial proceedings. The cost of trial is not an appropriate consideration where there will be fee shifting. The extent of participation in settlement negotiations by court or a court-appointed officer is also a problem: if the judge is involved, objective review is unlikely; even if it is a court-appointed officer, the judge is under pressure to accept the officer’s recommendation. Factor (G) calls for findings similar to those required by Ortiz to approve a limited-fund class — that is a lot of work for something that is only one factor.”)

<sup>111</sup> For example, the side-agreement provisions in proposed 23(e)(2), *supra* note 101.

#### **D. Judicial Appointment and Evaluation of Attorneys**

Rule 23(g) is entirely new. It confirms the court’s responsibility to appoint class counsel, separating this function from its present place as part of the Rule 23(a)(4) assurance that the class representative will represent class interests “fairly and adequately”.<sup>112</sup> The criteria for appointment have been drafted to ease the way for the appointment of good lawyers with little or no class action experience, and provision is made for the court to designate interim counsel (prior to certification) to act on behalf of a proposed class.<sup>113</sup> The new section requires the court to also consider the work that an applicant for class counsel has done in identifying and investigating potential claims in the specific class action. This requirement is intended to respond to long-standing criticism from plaintiffs attorneys that the same class counsel are appointed over and over again, creating a small and exclusive class counsel bar.

The proposal is also a reaction to problems similar to those identified by Judge Weinstein during the course of the Agent Orange Litigation: attorneys’ interests during settlement are likely to diverge from those of the class members.<sup>114</sup> Adequate representation, the Advisory Committee considered, required representation by lawyers the court designates

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<sup>112</sup> Proposed Rule 23(g)(1)(B) provides: “(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.”

<sup>113</sup> A provision expressly authorizing the court to allow a reasonable period for applications to represent the class was deleted in response to protests that it would encourage courts to stir up competition for appointment where competition is not useful. See AC Report, *supra* note 92 at 200.

<sup>114</sup> Genine C. Swanzey, *Using Class Actions to Litigate Mass Torts: Is There Justice for the Individual?*, 11 *Geo. J. Legal Ethics* 421, 427 (1998) (“Class counsel are responsible for choosing class representatives, framing the issues, supporting or abandoning certain claims, and making settlement decisions. Considering the time value of attorneys’ fees, the tendency of the attorney to submit such a settlement is not surprising. In fact, early settlement is likely to be in the best interest of the attorney, particularly when faced with the threat of bankruptcy. In recent years, attorneys have advanced money to finance class actions themselves.”).

after extended consideration of the composition of the class and the differing interests of various groups within it.

The proposal presents a number of potential problems in the context of counsel's relationship with the representative plaintiff. Although the court may clearly appoint lead counsel, the proposals are silent as to what the effect of that appointment is on the class representative. Traditionally, class representatives - even though they may be representing a class - have a right to pick their own lawyers. What is to happen if a judicial choice conflicts with the class representative's choice?<sup>115</sup> In that vein, does a judicial choice of class counsel conflict with any of the ethical rules governing lawyers that address the attorney-client relationship?

There other potential problems with the attorney appointment provisions. It is arguable, for example, that no attorney or firm will go to the trouble to develop a class action if there is a significant chance that the court will not appoint him or her as class counsel.<sup>116</sup>

Worthy cases involving possible injuries to the public may therefore will not be developed or filed. Concerns have also been raised that the court will be drawn into the business of "bidding" cases in seeking the appointment of class counsel. The court will presumably have to consider the merits of the case and other potential difficulties in the

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<sup>115</sup> See AC Report, *supra* note 92 at 203 per David Rubenstein, President, Virginia Project for Social Policy and Law, Inc., 01-CV-063 ("The class plaintiffs may even disapprove of the court's choice, and this would jeopardize the ability of the class action 'team' (lawyers and plaintiffs) to work best in combination for the protection of the class.").

<sup>116</sup> *Id.* at 207 per Association of Trial Lawyers of America, 01-CV-098 ("Overly aggressive competition for class counsel appointment can work to the detriment of the class. Lawyers may seek to 'poach' cases initially investigated, researched and filed by other attorneys. Something like that can occur under the present rules, but the proposals arguably encourage that practice. There is also a risk of collusion; the defendant may encourage more tractable lawyers to apply for the class counsel position. A third danger is favoritism; lawyers who frequently handle class actions could seek to develop relationships with judges which would position them to receive appointments for which they were not well-suited. Auctions, in particular, pose considerable risks.").

litigation, before any motion to certify is filed, based on “bids” submitted by some firms who have not been connected with the filing of the action. Notwithstanding these concerns, the Advisory Committee heard testimony that the present rule, which allows the court to decline to certify the class if it has doubts about counsel’s adequacy, is sufficient.<sup>117</sup>

### **E. Attorney Compensation**

Rule 23(h) confirms the court’s authority to award reasonable attorney fees “authorized by law or by agreement of the parties.”<sup>118</sup> The proposal provides the court with a framework for determining the final fee award and for monitoring the work of the class counsel throughout the litigation. A fundamental focus of the court under the new rule is to weigh the benefit actually achieved for class members against the class counsel’s fee request for fees.<sup>119</sup> The proposal does not attempt to establish any new basis for fee awards, nor does it take sides in the continuing struggle between “percentage” and “lodestar” methods for calculating fees. It does establish a regularized procedure that provides greater detail than the general attorney fee procedure of Civil Rule 54(d), and it requires separate findings of fact and conclusions of law under Civil Rule 52(a).

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<sup>117</sup> Id. at 203 per David Rubenstein, President, Virginia Project for Social Policy and Law, Inc., 01-CV-063 (“It is totally unworkable to have the court appoint counsel, for no attorney or firm will go to the trouble to develop a class action if there is a significant chance that the court will not appoint him or her class counsel.”)

<sup>118</sup> Rule 23(h) provides, in part: “In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties ...”.

<sup>119</sup> See Andrews Toxic Chemicals Litigation Reporter, 20 No.12 ANTCLR 11, August 22, 2002 (“In particular, the court should carefully scrutinize settlements involving non-monetary provisions for class members to ensure that the benefits are of actual value to the class, it stated in its report. The committee removed language from its report specifically referring to so-called “coupon settlements” in which class members may receive coupons for the purchase of goods or services. However, H.R. 2341, a bill passed by the U.S. House of Representatives and pending in the Senate, proposes to sharply restrict class action settlements in which “class members are awarded coupons or nominal cash settlements while plaintiff attorneys walk off with millions of dollars in legal fees.”).

This proposal is in part a response to study by the United States Department of Justice which showed that plaintiffs' counsel have found investing in toxic tort cases to produced some of the richest returns among all types of civil litigation cases.<sup>120</sup> Sensitivity to fee awards thus tends to be expressed directly by focusing on the amount of the award, or by focusing on the amount of the award in relation to the value recovered by the class.<sup>121</sup> Attorneys' fees have the potential to act as a driving force behind an attorney's ability to represent adequately class members, particularly in large toxic tort litigation. Indeed, in the Agent Orange case, Judge Weinstein considered the danger posed by fee-splitting agreements, explaining that attorneys who are promised a multiple of funds in advance may be tempted to settle a class action early so as to maximize his profits through early investment.<sup>122</sup>

The proposals are also a response to calls for contingency fees to be regulated and justified by the work attorneys provide for their clients.<sup>123</sup> Unfortunately, the note to the proposed new rule ignores the fact that the courts have spent years developing case law which allows courts to review and award fees within guidelines that have been carefully reviewed and developed to meet the number of situations that could arise. The note states

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<sup>120</sup> See Civil Jury Cases and Verdicts in Large Counties (Civil Justice Survey of State Courts, 1992), Special Report, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (July 1995, NCJ-154346).

<sup>121</sup> See Edward H. Cooper, Class Action Advice in the Form of Questions, 11 Duke Journal of Comparative and International Law 215, 245 ("Some part of the debate may be fueled by jealousy or resentment that even highly skilled, hard working, and public-spirited professionals should command handsome fees. Another part may derive from the belief that more of the money should go to the class.")

<sup>122</sup> On appeal, the United States Court of Appeals for the Second Circuit concluded that the risks of fee agreements on settlements were substantial grounds for invalidating the agreement as harmful to the interests of the class. The court explained that "fees that include a return on investment present the clear potential for a conflict of interest between class counsel and those whom they have undertaken to represent." In re Agent Orange Product Liability Litigation, 818 F.2d 216, 224 (2d Cir. 1987).

<sup>123</sup> See AC Report, supra note 92 at 225 per Victor Schwartz, D.C. Hg. pp. 76-63 & 01-CV-031 ("I favor the proposal to ensure that there's more scrutiny of attorney fees. There have been too many situations in which the class members got little or nothing and the attorneys got a great deal.").

that it is not the intention of the rule to “create new grounds for an award of attorneys fees.”<sup>124</sup> Thus, the lack of guidelines for a fee award contained in the rule would suggest that current case law would still govern the award. In this regard, therefore, the proposed change is relatively modest.

## **VI. Analysis: The Future of Rule 23**

Over the years of Rule 23 debate, the most frequent criticism of federal class action litigation has been that the current system was not designed to deal with mass toxic tort litigation and, as a result, the history of class action reform is effectively an analogy for mass toxic tort litigation reform.<sup>125</sup> For this reason alone, mass toxic torts have provided much of the motivation for the reforms agitated within the Advisory Committee and the judiciary since the mid 1980s. Yet despite this motivation, the first two rounds of class action rule reform did not, with one exception, manifest in any overhaul of class action practice or procedure.

Rule 23 survived “Round One” without amendment in large part because of the judicial innovation of district court judges to accommodate mass toxic tort claims. This innovation may have obviated the need to radically amend Rule 23 to accommodate concerns that the emerging mass toxic tort trend would exhaust the funds of existing defendants and aggravate the ever present “race to the courthouse”. Perhaps more to the

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<sup>124</sup> AC Report, *supra* note 92 at 117 (“This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties.”).

<sup>125</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1346 (1995) (“As a result [of the heavy burden placed on federal courts], ‘a consensus has now emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process.’” (quoting Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 *U. Ill. L. Rev.* 89, 89-90)).

point, an atmosphere of judicial enthusiasm had enveloped mass toxic tort litigation - based on the perceived litigation efficiency of class certification as opposed to multiple individual trials - that circumvented immediate rule amendment. This enthusiasm was bolstered by decisions, following the Agent Orange “breakthrough”, in which the traditional obstacle to mass toxic tort certification, namely a lack of common issues between class members, was innovatively managed by the courts.

As “Round Two” commenced, the atmosphere of enthusiasm surrounding mass toxic tort claims had dissolved and a new kind of battle emerged with the judiciary assuming a role of “gatekeeper” against dubious certifications and perceived class action “abuse” typified by future-claimant settlement-only class actions. But as the Advisory Committee considered proposals to toughen certification requirements for mass toxic torts, it became obvious that any amendments to Rule 23 could have consequences far beyond the perceived problems with mass toxic torts - possibly dampening the prosecution of legitimate class-based litigation in other substantive areas of law. Mass toxic torts were clearly different from securities, anti-trust, or even consumer class actions - presenting unique problems not foreshadowed in the development or evolution of either Rule 23 or class action practice generally. So it was that Rule 23 survived Round Two relatively unscathed only because of concerns that proposed amendments would have effects beyond those intended, together with fears that a proposal expressly permitting settlement-only class certification would aggravate perceived class action abuses exemplified by the attempted Amchem resolution.

Will “Round Three” finally result in significant changes to Rule 23 and, if so, what is it about the characteristics of the current proposals that distinguishes them from their

ancestors? Certainly, the current proposals are aimed at the procedures for conducting class actions, rather than the criteria for determining whether a class should be certified. To that extent, the proposals are far less ambitious than their forefathers and it might properly be suggested that any unintended consequences for species of litigation other than mass toxic torts will be minimal. Nevertheless, this paper has identified potential effects of the proposal that might pose difficulties for the prosecution of legitimate toxic and other mass torts, including, for example, increased pre-certification merits review; a lack of precision in the requirements governing the disclosure of side agreements; the unpredictable side-effects of second opt-out opportunities for non-mass toxic tort litigation and for settlement trends generally; and the potential chilling effects of the attorney appointment provisions for the prosecution of a variety of mass torts.

Equally, although perhaps paradoxically, the impact of the reforms on the class action abuses they were intended to correct – abuses which largely correlate to those emerging out of mass toxic tort litigation generally (and “futures” class certification and settlement specifically) - may be so modest that the proposals are otiose, if not damaging in light of the potential side-effects outlined above. The proposals are an apparent attempt to “codify” existing best practice (although the settlement provisions in particular may have salutary effects in engendering careful review within the present framework, and thus encourage worthy mass toxic tort settlements). The proposals do nothing to address in any significant way the problems created by settlement of “futures” - an aspect of the mass toxic tort phenomenon that arguably re-launched the Rule 23 reform train that ultimately characterized the second round of amendments.

At a more general level, the proposals fail to address mass toxic torts in any direct or substantive way. In particular, there are aspects areas of mass toxic tort litigation that may yet deserve additional attention and that have not received definitive answers from the Advisory Committee within the current proposals. One example is whether Rule 23 should incorporate a separate standard for settlement classes. This is a familiar topic which the Advisory Committee may wish to reconsider in light of case law as it develops under Amchem and perhaps may require further empirical work.

The unique issues raised by mass toxic torts arguably justify special provisions within Rule 23. The Advisory Committee has discussed on many occasions the prospect that litigants are trying to fit too many disparate forms of litigation into a single procedural “bottle” when there are sufficient needs of judicial economy to justify devising a separate mass tort, or mass toxic tort, rule.<sup>126</sup> Interestingly, after the Amchem decision, the debate before the Advisory Committee seems to be returning to the familiar question of whether mass toxic torts are even capable of certification under Rule 23(b)(3) for the very same reasons that fueled the clear admonition in the Advisory Committee Notes almost 40 years ago.<sup>127</sup>

The ultimate position appears to be that judicial innovation has been stretched to its conceivable extreme. Any further innovation risks contravening the requirement of

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<sup>126</sup> AC Report, supra note 92 at 239 (“The proposals fail to address mass torts ... There is a real problem with fitting mass torts into Rule 23. Perhaps they deserve a separate rule.”).

<sup>127</sup> See AC Report, supra note 92 at 240 per Washington Legal Foundation, 01-CV-082 “Mass torts are routinely being certified as Rule 23(b)(3) class actions, despite the clear admonition in the Advisory Committee Notes ... The Committee should take up the question of the appropriateness of class certification in cases in which issues surrounding liability and damages quite clearly vary considerably from class member to class member. Certification in such cases often renders them essentially untriable; class certification generally is sought as a means of imposing irresistible settlement pressure. The fact that federal courts are more than occasionally granting certification in such cases is an [sic] strong indication that Rule 23 needs to be amended to make clear that certification is virtually never appropriate in such cases.”).

heightened scrutiny now imposed on courts in arriving at certification decisions, particularly those involving settlement-only classes. Separate rules are attractive points of reform discussion, but this paper has outline a spectrum of unintended consequences that arise from amendments to existing rules, even those that are arguably modest. The consequences flowing from a new rule would be at least equally unpredictable, even if such a rule were confined mass toxic torts as separate species of litigation. Moreover, even if it is inevitable that different rules are needed to solve the legal and ethical problems presented by mass toxic torts, what might such a rule be? Recent academic discussion has turned to a reconsideration of the idea first circulated in 1991 incorporating a mass toxic tort rule that “does not involve a class” and which, among other aspects, collapses the Rule 23(b) class categories, permits opt-in classes and settlements, allows a court to restrict class members’ ability to opt-out from any type of class, and permits a judge to condition the right to opt-out on specified preclusion consequences.<sup>128</sup> Rule reforms of that kind may of course implicate the substantive rights of the litigants and immediately raise issues of potential violation of the Rules Enabling Act. Even so, the separate rule may be a proposal which now - 12 years after its initial formulation - is contemporarily suitable to address the mass toxic tort problem. It is, however, relevant that the Advisory Committee was notably concerned about the unintended consequences of “radical” rule reform of this nature in 1991, and indeed foreshadowed that it would take ten years to educate practitioners (and the judiciary) as to the operation of a separate mass (toxic) tort rule. Given all that has transpired in the three subsequent rounds of Rule 23 reform, ten years might now appear an ambitious estimate. In any event, the Supreme Court’s decision in Amchem makes it clear that the federal

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<sup>128</sup> See AC Report, supra note 92 at 241.

courts and the federal rulemaking procedure alone can no longer be relied upon as the sole vehicle of reform in the class action context.

The obvious alternative to rule reform is Congressional intervention. It is strongly arguable that Congress must now become involved in considering measures that enhance the administration of mass toxic tort claims. As the number of mass disasters increases, the mass tort phenomenon continues to present our justice system with ethical challenges that do not exist in the traditional tort scheme. Many commentators have urged Congress to create an administrative system to handle these mass claims adequately.<sup>129</sup> However, proponents of reform have hitherto largely discounted the possibility of congressional involvement, based on an assumption that Congress would not intervene in reform of the class action rule to make mass toxic tort claim resolution more efficient.<sup>130</sup> Two of the jurisprudential changes outlined in the paper, however, have arguably opened the way for Congressional intervention in ways that were not possible in the previous rounds of reform. First, as discussed, the Amchem opinion almost reads as a directive to Congress to the reform mass toxic tort landscape legislatively. Second, over the last 10 years,

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<sup>129</sup> George F. Sanderson III, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U.J. Legis. & Pub. Pol’y 315 (1999).

<sup>130</sup> See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The court stated: “The most direct and encompassing solution [to reforming mass tort litigation] would be legislative action. The Congress, after appropriate study and hearings, might authorize the kind of class action that would facilitate the global settlement sought here. Although we have not adjudicated the due process issues raised, we trust that Congress would deal with futures [sic] claims in a way that would maximize opt-out rights and minimize due process concerns that could undermine its work. On the other hand, congressional inhospitality to class actions and [Congress’s] recently expressed concern about the workload of the federal courts, might not bode well for such a prospect.”

Congress has shown a preparedness to take a more active role in legislating certain types of substantive class action litigation.<sup>131</sup>

Those factors may have freed the way for current negotiations regarding an Asbestos Accord – a national agreement designed to end all asbestos lawsuits and provide payments to people with asbestos-related ailments from a national privately-financed trust.<sup>132</sup> The Accord is reportedly being negotiated by potential defendant companies, unions, insurers and Democratic and Republican senators, and would be subject to approval by Congress and President Bush.<sup>133</sup> Although the details of the Accord are obviously difficult to predict, reports indicate that it would pay more than \$100 billion to hundreds of thousands of asbestos victims over next 30 years in an effort to curb the “flood of lawsuits that numbered 200,000 in last two years alone”.<sup>134</sup> If consummated, the Accord would likely represent the second-largest lawsuit settlement ever, exceeded only by the tobacco settlement of 1998.<sup>135</sup> No doubt the proponents of the trust will be firmly focused on the posture of the Senate, which has rejected asbestos bills in the past, but given that negotiations have involved representatives of the complete spectrum of interests implicated by repeated waves of asbestos litigation, the signs are at least encouraging.

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<sup>131</sup> See Sanderson, *supra* note 129 at 316 (“In reforming the class action litigation regime, however, Congress has restricted the availability of class certification in several substantive areas of the law without adequately addressing the concerns raised by the Amchem opinion regarding class action reform for mass tort litigation.”).

<sup>132</sup> Alex Berenson, Asbestos Accord Said to Be Near, *The New York Times*, April 24, 2003, Section A , Page 1 , Column 4, available at <http://query.nytimes.com/gst/abstract.html?res=FB0813F6345E0C778EDDAD0894DB404482> (last visited April 24, 2003).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The Accord will reportedly respond to the soaring costs of asbestos claims and companies that have sought Chapter 11 bankruptcy protection because of asbestos liability.

Of course, any administrative plan to deal generally with the influx of mass toxic tort litigation would be a significantly more ambitious step than contemplated even by the Asbestos Accord. But the preparedness of Congress to intervene legislatively in other areas of substantive practice (securities fraud being the best example), and the present attempts to meet concerns raised as far back as 1981 by Judge Williams (who noted the “unconscionable” effects of mass toxic tort litigation on those “not first in line at the courthouse door”<sup>136</sup>) are at least tentative grounds for the suggestion that a solution the present position might be possible in the absent of substantial rule reform.

## **VII. Conclusion**

Through three distinct phases of proposals to reform Rule 23 of the Federal Rules of Civil Procedure, mass toxic torts have influenced suggestions for change in radically different ways. The first series of Rule 23 reform proposals was prompted by the serious emergence of mass toxic torts in the 1980s. Rule 23 provided a mechanism which plaintiffs, and subsequently the judiciary, hoped would facilitate the aggregation of individual exposure claims. The motivation behind efforts of reform Rule 23 was very much a concern that funds be appropriately distributed amongst the burgeoning number of individuals exposed to toxic substances deposited in the environment.

That motivation had dissipated by the time the Advisory Committee embarked on the second phase of Rule 23 reform in 1995. Although a new sub-species of mass toxic tort – involving the settlement of “future” exposure claims – had provoked suggestions to amend Rule 23 in a way that would address the legal and ethical concerns appertaining to

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<sup>136</sup> See discussion at supra note 47 and accompanying text.

such claims, in reality it was the mass toxic tort phenomenon that blocked those reforms from advancing. Two reasons arose: the more obvious was that reforms to Rule 23 designed to accommodate mass toxic torts threatened unintended consequences that were likely to disturb, perhaps fundamentally, settled class action practice in areas outside the toxic tort context. But the less obvious reason was perhaps more influential - a stark change had occurred in academic and judicial attitudes to the new sub-species of mass toxic tort litigation, including specific concerns that Rule 23 should not be amended to entertain litigation giving rise to serious (and at that time not fully understood) legal and ethical apprehensions.

The final phase of class action rule reform has again been flavored by the mass tort phenomenon, but this time concerns over mass toxic torts have effectively stripped the reforms of any significant ambition to address concerns that continue to emerge regarding aggregated toxic exposure claims. The current reforms impliedly recognize that amendments to Rule 23 aimed at accommodating the mass toxic tort phenomenon are inherently problematic: only significant reforms can ever hope to address the legal and ethical concerns that flow from mass toxic litigation, but such reforms may have side-effects that sacrifice settled areas of class action practice, and otherwise raise concerns associated with the Rules Enabling Act. Current administrative proposals designed to resolve the continuing and significant backlog of asbestos litigation are perhaps indicative of an acceptance of this position and the necessity of Congressional intervention. Such administrative measures may be the first step towards a recognition that mass toxic torts should no longer drive class action rule reform in the United States if

there is any hope of achieving an appropriate mechanism to deal with aggregated exposure claims.

The common theme throughout the three phases of rule reform is that the judicial and academic attitude towards mass toxic tort litigation (in particular, whether such litigation should be certified) has essentially determined the fate of the litany of changes to Rule 23 proposed since 1966. When mass toxic torts first emerged, the judicial desire to accommodate such litigation effectively triggered calls for Rule 23 reform which ultimately dissipated when the judiciary itself found innovative solutions to volume pressures presented by such litigation. In the second phase of reforms, academic concerns with the propriety of mass toxic tort “futures” settlements soured attempts to revamp Rule 23, just as judicial apprehension with Amchem-type settlements dampened the motivations of those seeking to overhaul class action practice with provisions dealing with settlement-only classes. As Congress considers the current proposals, judicial and academic attention has turned to the need for alternatives to rule reform designed to accommodate the challenges presented by mass toxic tort litigation. Accordingly, with the latest phase of Rule 23 amendments, the Advisory Committee appears to be waving the white-flag against further attacks from the mass toxic tort phenomenon against Rule 23. The current proposals are effectively an admission that class action rule reform cannot properly accommodate the legal and ethical tensions associated with mass toxic torts and this explains the substantial failure of the proposals to deal squarely with this sub-species of aggregate litigation. Reflecting earlier judicial calls for legislative intervention, the Advisory Committee, and now the Supreme Court, are sending a clear, if not express, message to Congress which highlights the futility of allowing mass toxic

torts to drive a reform process that has consistently failed to crystallize into meaningful improvements in class action procedure. Even if the potential myriad of unexplored consequences associated with the current proposals are overlooked by Congress such that the amendments become effective, it remains true that after three rounds of robust combat between a steady stream of mass toxic tort litigation and Rule 23, the rule remains standing, essentially in its original 1966 format. The resilience of Rule 23 cannot be attributed to foresight – the Advisory Committee did not foresee the pressures that mass toxic torts would bring to bear on efforts to reform class action procedure. Rather, the emergence of mass toxic torts have defined and sharpened the boundaries of class rule reform in the United States – boundaries that it has become increasingly clear are too confined to appropriately accommodate the mass aggregation of toxic exposure claims without significant, and perhaps overdue, Congressional involvement.