

THE DEFENSIVE USE OF FEDERAL CLASS ACTIONS IN MASS TORTS

Francis E. McGovern*

The defensive use of federal class actions in mass torts is currently having its fifteen minutes of fame. Defendants have historically used federal class actions to resolve their litigation problems in the context of securities, financial, commercial, employment, and other types of cases.¹ They have long been successful in obtaining finality, predictability, and a cessation of financial and public relations bleeding by agreeing to class action settlements to disputes. Class actions in the mass tort context, however, are relatively new phenomena. The comments to Rule 23 of the Federal Rules of Civil Procedure in particular do not encourage the use of class actions in mass torts either to try or to settle cases because of the perceived individuality of each plaintiff's case and the manageability problems generated by that uniqueness.² In the 1980's, however, the increasing use of multidistrict litigation led some judges to focus on the similarities among mass tort claims and to promote the use of class actions for trial or settlement purposes.³ Indeed, there developed a cottage industry of suggestions for various forms of aggregative treatment of mass torts from scholars,⁴ judges,⁵ the American Bar Association,⁶ the

* Professor of Law, Duke University School of Law. The author has been and is currently a participant in many of the mass tort cases discussed herein. He was a special master in the Ohio, East Texas, Baltimore, and Mississippi asbestos litigation and a trustee in *Celotex* and a "trustee-in-waiting" in *Fibreboard*. He also served as a special master in the A.H. Robins Dalkon Shield, Alabama DDT, Tucson TCE, Stringfellow, and Higgs Road mass torts and is currently a special master in the silicone gel breast implant cases.

1. See generally HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* (3d ed. 1992 & Supp. 1994); *MANUAL FOR COMPLEX LITIGATION, THIRD* (1995) [hereinafter *MANUAL*].

2. See 1966 comments to subdivision (b)(3) FED. R. CIV. P. 23 ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action....").

3. See generally PAUL B. RHEINGOLD, *MASS TORT LITIGATION* ch. 3 (1996).

4. See, e.g., Francis E. McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 *FORUM* 1 (1983); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 *HARV. L. REV.* 849, 852 (1989).

5. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

American Law Institute,⁷ and others.⁸ Then plaintiffs' counsel began to perceive certain advantages for themselves and their clients, and proposed class actions in a host of contexts, some quite innovative.⁹

It was only natural that defendants would also begin to create strategic uses for class actions to assist them in resolving their mass tort litigation problems, resulting in a fragrant, and sometimes not so fragrant, bouquet of opt-in, opt-out, and mandatory class actions. One settlement even involved a Rule 23(b)(3) opt-out class, a Rule 23(b)(3) opt-in class, a Rule 23(b)(1)(B) mandatory class, and a Chapter 11 bankruptcy, all at the same time.¹⁰ Another settlement contained a Rule 23(b)(1)(A), (b)(1)(B) and (b)(2) mandatory class.¹¹

That there would be both general and specific opposition to this increased use of class actions for trial or settlement is not surprising. Although many defendants favor consolidation of mass tort cases for discovery purposes, few defendants favor a class action trial unless it is organized precisely to their liking, such as a causation-only trial.¹² Likewise, although there are some plaintiffs' counsel who have never met a class action they didn't like, there are others who do not favor having their individual clients included in any class action,¹³ unless it is their class action. The proposed changes to Rule 23¹⁴ and some notable recent judicial opinions have crystallized this anticipated opposition.¹⁵

What is unusual is not the opposition itself, but the collection of unlikely allies in this opposition to the defendants' use of federal settlement classes. United States Circuit Judge Edith Jones and Professor Laurence Tribe are not the usual suspects to march behind the same banner; United States Circuit Judge Jerry Smith and plaintiff's lawyer Fred Baron are not generally viewed as ideological soul mates. There is virtually an endless stream of these exquisite juxtapositions. Yet these individuals with quite diverse political views are joining together in their opposition to some defendants' use of settlement class actions, most notably illustrated in *Ahearn v. Fibreboard*¹⁶ and *Amchem Products, Inc. v. Windsor*.¹⁷

Rather than assume that one of more of these exceptionally capable judges,

6. COMMISSION ON MASS TORTS, AMERICAN BAR ASS'N, REVISED FINAL REPORT AND RECOMMENDATIONS OF THE COMMISSION ON MASS TORTS, *in* REPORT TO THE HOUSE OF DELEGATES 5-6 (1989).

7. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (1993).

8. MANUAL, *supra* note 1.

9. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dismissed*, 995 F.2d 1066 (6th Cir. 1993).

10. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1463 (N.D. Ala. 1995).

11. *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995).

12. *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

13. Alison Frankel, *Et tu, Stan?*, AM. LAW., Jan.-Feb. 1994, at 68.

14. Proposed Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil and Criminal Procedure (1996).

15. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

16. *In re Asbestos Litig. (Ahearn v. Fibreboard)*, 90 F.3d 963 (5th Cir 1996).

17. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996).

scholars, and lawyers is a few french fries short of a Happy Meal, there must be some set of reasons that lead them toward this unusual coalescence. There were earlier suggestions that certain plaintiffs' counsel and certain normally defense-oriented judges would ally in their opposition to class actions for trial purposes under the theory that each would prefer the marketplace of litigation to mass aggregation.¹⁸ There are also instances where both the left and right opposed the use of alternative dispute resolution and managerial judging because of a perceived threat to the sanctity of the judicial process.¹⁹ But here, judges who would normally be viewed as pro-business are joining with plaintiffs who are suing businesses to oppose settlement classes favored by businesses. This paper will use this unanticipated alliance as a vehicle to explore various theories for explaining this confluence, an exploration may also tease out some of the more interesting issues underlying the mass tort class action debate. First, it may be helpful to attempt to define mass torts and to trace a rapid history of mass tort case management techniques, including a brief survey of the use of class actions in mass torts. Second, there will be a series of proposed theories for the unusual alliances in opposition to federal mass tort settlement classes. Finally, some brief conclusions might be drawn from this intellectual exercise.

MASS TORTS AND THE USE OF CLASS ACTIONS

Mass torts have been defined in a number of different ways, none of which is particularly helpful.²⁰ From a functional perspective, characteristic mass torts have a large number of plaintiffs who have similar tort claims pending during roughly the same time frame and concentrated in a limited number of jurisdictions. Some suggested taxonomies of mass torts focus on the nature of the tort itself: single event catastrophes, traditional product liability cases, and toxic tort cases.²¹ Other taxonomies concentrate on factual and legal issues, special risk profiles, risk of future injury and conflicting interests.²² Other suggestions include a laundry list of variables: (1) clear cause, single event, proximate injuries; (2) clear cause, multiple events, nonproximate injuries in place; (3) unclear cause, multiple events, nonproximate injuries; (4) unclear cause, multiple events, nonproximate injuries, defendant and plaintiff identities unclear.²³

Most commentaries suggest that mass torts are not necessarily fungible; that is, there are different types of mass torts depending upon (1) the number and identifiability of plaintiffs; (2) the number, identifiability, and solvency of defendants; (3) the timing of the allegedly tortious conduct; and (4) the level of certainty of liability, causation, and damages.

18. Francis E. McGovern, *Looking to the Future in Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022 (1995).

19. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

20. See generally Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1823-26 (1995).

21. COMMISSION ON MASS TORTS, *supra* note 6, at 5-6.

22. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1031-50 (1993).

23. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 16-19 (1995).

Courts have approached the case management of mass torts very differently. Judicial treatment of the asbestos personal injury litigation offers a helpful window to understanding the varieties of case management technique which include: (1) traditional individual case management, (2) consolidation for pretrial, (3) case flow orders, (4) trial consolidation, and (5) class actions.²⁴

In jurisdictions where asbestos filings have not been overwhelming, judges have managed them with individual calendars or with consolidation for pretrial and then separate assignment for trials.²⁵ Over time it has become generally accepted that one to ten cases can be tried at the same time as long as the individual case characteristics are suitable for consolidation.²⁶ Sometimes the cases are bifurcated or reverse bifurcated for trial with the separation of damages, causation, and liability issues.

Jurisdictions that have significant numbers of cases have typically consolidated them for pretrial purposes before a single judge.²⁷ Once pre-tried, there are several different approaches for trial. Some courts have case flow management orders that assign a predetermined number of cases to specifically assigned judges each month.²⁸ Generally, the determination concerning the case flow is made annually, depending upon the case backlog, the number of new filings, and judicial availability. Under this approach trials usually are assigned for groups of one to ten cases at a time. Other courts assign larger numbers of cases for trial, varying from several hundred to several thousand.²⁹ Under the latter system there generally is a common issue trial for liability, perhaps general causation, and punitive damages. Then there are mini-trials on individual causation, defenses, and compensatory damages, either to the same or a different jury.³⁰

Federal class action trials in asbestos personal injury litigation are the exception, rather than the rule.³¹ The comments of Rule 23 of the Federal Rules of Civil Procedure note that mass torts are not suitable for class action treatment.³² Indeed, historically there was almost universal opposition even to consolidating the asbestos personal injury cases in a multidistrict litigation.³³

This opposition generally arose from the defendants' desire to deal with the plaintiffs separately under a divide and conquer type of strategy and the plaintiffs' counsel's concern for maintaining control over their respective cases. Neither side recognized the potential benefits for pretrial consolidation. In 1985, Judge Robert

24. *Id.* at 23-32; RHEINGOLD, *supra* note 3, ch. 2.

25. ALEXANDER B. AIKMAN, *MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES* ch. 3 (1995).

26. *Id.* ch. 9.

27. STEVEN A. ARBITTIER ET AL., *PHILADELPHIA COURT OF COMMON PLEAS CIVIL PRACTICE MANUAL* § 9 (8th ed. 1995).

28. *See generally* RHEINGOLD, *supra* note 3, ch. 3.

29. *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986).

30. *Aoate v. A.C. & S. Inc.*, No. 89236705, slip. op. (Md. Cir. Ct. June 3, 1993).

31. *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990).

32. *See supra* note 2.

33. *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977).

M. Parker certified a Rule 23(b)(3) trial class for asbestos personal injury cases pending in the Eastern District of Texas. The class certification order was affirmed by the Fifth Circuit Court of Appeals and the case was settled during trial.³⁴ Judge Parker certified another trial class in 1990 and the Fifth Circuit allowed him to proceed with a trial.³⁵ An appeal from the subsequent verdict is currently pending.³⁶ Several attempts have been made by other judges to certify trial classes under Rule 23(b)(1)(B) without any success.³⁷

Federal settlement class actions in the asbestos litigation have, as well, been infrequent. Courts seemed to follow the comments to Rule 23 that class action treatment of mass torts was inappropriate.³⁸ Judge Jack Weinstein oversaw a successful Rule 23(b)(1)(B) settlement for the Manville Trust.³⁹ In 1993 the Center for Claims Resolution entered into a Rule 23(b)(3) settlement that was approved at the trial level in 1994, reversed by the Third Circuit in 1996, and is pending before the United States Supreme Court.⁴⁰ Also in 1993 the Fibreboard Corporation filed a settlement class action, but under Rule 23(b)(1)(B). It was approved by the district court in 1993 and a panel of the Fifth Circuit in 1996, and a petition for certiorari is pending before the U.S. Supreme Court.⁴¹

Although asbestos personal injury class actions have received the most notoriety, there has actually been substantially more class action activity outside the asbestos context. In the first phase of the development of the use of class actions in mass torts, it was primarily the more adventuresome judges who instigated the use of trial and then settlement classes. Faced with intimidating numbers of plaintiffs and an apparently insurmountable case load, a few judges, generally appointees of Democrat presidents, decided to cope with the immense queue of plaintiffs by certifying class actions. As they searched for more efficient methods of managing mass torts, the class action became an obvious candidate. Judge Weinstein pioneered the use of trial and settlement, opt-out, and mandatory classes in the *Agent Orange* litigation in the early 1980's.⁴² Another pioneer in the early 1980's was Judge Carl Rubin, who certified cases for trial arising from a single incident fire⁴³ and, subsequently, the *Bendectin* litigation.⁴⁴

Also in the early 1980's there were unsuccessful attempts to establish a Rule

34. *Jenkins*, 782 F.2d at 468.

35. *Cimino*, 751 F. Supp. at 649.

36. *Id.*

37. *In re* N.D. Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981).

38. *See supra* note 2.

39. *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

40. *Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir.), *cert. granted sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996).

41. *In re* Asbestos Litig., 90 F.3d 963, 977 (5th Cir. 1996).

42. *In re* Diamond Shamrock Chems. Co., 725 F.2d 858 (2d Cir. 1984).

43. *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

44. *In re* "Bendectin" Prods. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio), *rev'd*, 749 F.2d 300 (6th Cir. 1984).

23(b)(1)(B) class for punitive damages and a Rule 23(b)(3) opt-out class for compensatory damages in the A.H. Robins Dalkon Shield litigation.⁴⁶ Judge Robert Merhige, who had been one of the early judicial innovators in the Kepone spill class action, oversaw the ultimate Chapter 11 bankruptcy filing by A.H. Robins and certified a Rule 23(b)(1) class for Aetna's potential liability as Robins' insurer, a class upheld on appeal by the Fourth Circuit.⁴⁷ There were also early class certifications in the asbestos property damage cases⁴⁸ and Three-Mile Island.⁴⁹

Aside from these judges and a very few plaintiffs' and defendants' lawyers, there was substantial resistance to the use of trial or settlement classes. Plaintiffs' counsel did not want to lose control of their cases or have their fees set by judges; defendants felt that a divide and conquer strategy was preferable to any form of aggregation where a defendant might be forced into a bet-your-company trial. Judges tended to adhere to the Rule 23 comments and respected the choice of law and individuality problems of certifying a class in any mass tort. One would need, so the argument went, at least fifty different subclasses to accommodate plaintiffs from each state and endless mini-trials on individual issues such as causation, defenses, and damages. At the same time the defendants would fight each and every ruling, creating a litigation nightmare. Where, they inquired, would there ever be efficiency in this morass? If one wanted a mass trial, consolidation would be just as effective without the intricacies of the law of class actions and without reaching out for new filings. Unsuccessful class action attempts included the DES litigation,⁵⁰ the Hyatt Skywalk collapse,⁵¹ tetracycline,⁵² foam urea,⁵³ and penile implants.⁵⁴

In a second phase of development, commencing generally in the mid to late 1980's, plaintiffs' counsel observed that mass tort cases which were certified for trial almost inevitably settled, and settled for large sums of money in damages and attorneys' fees. In addition, plaintiffs' counsel who were adept in the use of class actions in other contexts, which were less financially attractive in the 1980's, decided that their procedural expertise could be translated into the mass tort world. At the same time there was recognition that the attorneys who were the first to file for a class action did not need to have large numbers of individual clients, but could instead select the most advantageous court, and would be natural choices for lead counsel. As a critical mass of these similarly-minded attorneys developed, the financial barriers for plaintiffs to create quite expensive litigation disintegrated. By pooling resources garnered from other major cases, it was possible to spread the

46. *In re* N.D. Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981).

47. *In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989).

48. *In re* Asbestos School Litig., 104 F.R.D. 422 (E.D. Pa. 1984).

49. *In re* Three Mile Island Litig., 87 F.R.D. 433 (M.D. Pa. 1980).

50. *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983).

51. *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).

52. *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985).

53. *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530 (M.D. Pa. 1984).

54. *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

financial risk. In some instances the funding mechanisms appear closely akin to other investment opportunities for capable entrepreneurs. By investing relatively modest sums in a number of class actions, an attorney could reduce the risk of either a catastrophic loss or an unsatisfactory settlement forced by inadequate funding. Every potential mass tort soon became a potential class action: radioactive waste,⁵⁵ Bork-Shiley heart valves,⁵⁶ Velsicol,⁵⁷ Albuterol,⁵⁸ silicone gel breast implants,⁵⁹ Norplant,⁶⁰ cigarettes,⁶¹ HIV-tainted blood,⁶² orthopedic bone screws,⁶³ automobile roll-overs,⁶⁴ and side saddle truck gas tanks.⁶⁵ The list is rather extensive.

At roughly the same time in the late 1980's, defense counsel began to see the potential for closing the floodgates of mass tort litigation by the use of settlement classes. Interests of defendants began to coincide with desires of plaintiffs' counsel, thereby accelerating the class action settlement momentum. Potential mass torts soon became potential mass tort global settlements.

Most recently, there has been renewed skepticism on the part of federal judges for trial classes and a wait-and-see attitude toward settlement classes. The silicone gel breast implant cases that were provisionally certified by Judge Rubin were never certified for trial—they were transferred under the multidistrict procedure. The certification of the HIV blood cases for trial at the district court level was reversed by the Seventh Circuit.⁶⁶ The cigarette trial class was overturned by the Fifth Circuit.⁶⁷ Trial class certification motions were denied in Norplant⁶⁸ and orthopedic bone screws.⁶⁹ There continued to be a number of settlement classes—

55. See *Fernald Payment Made*, PLAIN DEALER (Cleveland, OH), Dec. 14, 1990, available at 1990 WL 4631371.

56. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992).

57. *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986), *aff'd in part, rev'd in part and remanded*, 855 F.2d 1188 (6th Cir. 1988).

58. *In re Copley Pharm. Inc.*, 158 F.R.D. 485 (D. Wyo. 1994), *motion denied*, 161 F.R.D. 456 (D. Wyo. 1995).

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

60. *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996).

61. *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995).

62. *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410 (N.D. Ill. 1994).

63. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 1995 WL 273597 (E.D. Pa. Feb. 22, 1995).

64. *In re Ford Motor Co. Bronco II Prods. Liab. Litig. (Bronco II)*, 1994 WL 643125 (E.D. La. Nov. 14, 1994).

65. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

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

67. *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995).

68. *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996).

69. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 1995 WL 273597 (E.D. Pa. Feb. 22, 1995).

silicone gel breast implants⁷⁰ and asbestos⁷¹—but judges began to reject others—future asbestos plaintiffs,⁷² automobile roll-overs,⁷³ and side-saddle gas tanks,⁷⁴ for example.

The current phase in this saga recognizes the recent chilly reception of mass tort class actions in federal courts, and has changed the focus to state courts, either for national or statewide classes. The class action investment engine and the defendants' drive for global peace are still moving apace, but on different tracks. Class actions rejected for trial in federal courts are now being filed in state courts⁷⁵—and proposed class action settlements rejected by federal courts are being refiled in state courts.⁷⁶ The United States Supreme Court has given some momentum to this trend in *Matsushita Electric Industrial Company v. Epstein*.⁷⁷ The dynamics created by this attitudinal shift in federal courts is beyond the scope of this paper, but are worth noting with a fleeting observation.

THE CONFLUENCE THEORIES

The primary question raised by this Article is why there is a confluence of opinion on both the political right and left rejecting the use of settlement class actions in mass torts. The following four theories are suggested: (1) the underlying facts do not support proposed class action settlements under a careful reading of Rule 23; (2) there is agreement that certain individual rights cannot be abridged under the provisions of Rule 23; (3) mass torts are a problem but the court system is not the appropriate institution to solve the problem; and (4) there is an identical strategy to reject the use of class actions in mass torts but the rationales that underlie that common strategy are based upon radically different assumptions concerning the effects of the strategy. Reality is naturally more complex, but an analysis of these four hypotheses may be helpful in enhancing our understanding to the dynamics of the use of settlement classes in the mass tort context.

Under the first theory—"You can do it, but you haven't done it right so far"—there is no prohibition against settlement class actions; the parties have just been pushing the envelope of acceptability beyond the breaking point. Judge Edward Becker stated at the New York University Law School conference on the proposed

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

71. *In re Asbestos Litig.*, 90 F.3d 963, 977 (5th Cir. 1996).

72. *Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994).

73. *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1994 WL 643125 (E.D. La. Nov. 14, 1994).

74. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

75. For example, the current tobacco litigation post-*Castano*. See Claudia MacLachlan & Andrew Blum, *Tobacco Foes Dealt Blow*, NAT'L L.J., June 3, 1996, at A6; Michael Peltier, *State Courts Can Expect Tobacco Class-Action Lawsuits*, PORT ST. LUCIE NEWS (Stuart, FL), May 27, 1996, at B3.

76. See *supra* note 74, refiled as *White v. GMC*, No. 42-86J Div. D. (18th Jud. Dist. Ct. La. 1986).

77. 116 S. Ct. 873 (1996).

changes to Rule 23 he would have preferred to approve the use of settlement classes without the prerequisite elements of a trial class, but "it just wouldn't write."⁷⁸ Under this theory a fair reading of Rule 23 simply does not support different criteria for trial and settlement classes, although Rule 23 could be amended to recognize different criteria, as is currently proposed. If a trial class can be certified, however, there is no reason to prohibit an acceptable settlement class. Under this approach the ability to certify a settlement class that did not meet the Rule 23(a) criteria for trial purposes amounts to nothing more than creating a new rule of civil procedure.

Absent a rule change, this reading, along with restrictive interpretations of the applicability of trial class actions to any mass tort, such as Judge Richard Posner's opinion in *Rhone-Poulenc*⁷⁹ and Judge Jerry Smith's opinion in *Castano*,⁸⁰ would have the net effect of virtually eliminating the use of class actions in this context. Defendants find the trial class action an anathema for the reasons stated above and would be extremely reluctant to agree to a trial class even in conjunction with a settlement class for fear that the settlement class might fail, leaving them in the untenable position of facing a trial class. Even if a defendant were to take the risk, the narrowly construed prerequisites for a trial class are daunting, save in exceptional circumstances, thereby dooming any effort to achieve a settlement class at all.

Other rationales under this theory include an inherent problem termed by Professor John Coffee as a "reverse auction,"⁸¹ the temptation for collusion between plaintiffs' counsel and the defendants described by Professor Susan Koniak,⁸² and the ethical pitfalls noted by Professor John Leubsdorf.⁸³ Although a settlement class would be feasible in this context, according to those legal scholars the temptation on the part of the defendant to find the least resistant plaintiffs' counsel and the temptation on the part of plaintiffs' counsel to feather their own nests are simply too great. The outcome is virtually inevitably to the detriment of class members; these are fatal structural flaws will always lead to an unacceptable outcome in the bargaining process. These observations would be particularly true if the same plaintiffs' counsel represent both current claimants and future claimants. The benefits to the class members would be sufficiently undercut by these attorney conflicts, so that the settlement would be inadequate for at least some class members. Lo and behold, that is precisely what has actually happened in the recently proposed settlement classes. Ironically, the original silicone gel breast implant settlement which was favored by many of these critics was ultimately revised in large part because the safeguards urged by these critics made the original

78. See Remarks, Symposium, *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. REV. 1 (1996).

79. 51 F.3d 1293 (7th Cir. 1995).

80. 84 F.3d 734 (5th Cir. 1996).

81. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-73 (1995).

82. Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

83. John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222 (1995).

settlement impossible to complete. This may suggest that the logic of these objections will greatly reduce the potential for all mass tort settlement classes.

The second theory—"You can't do it"—suggests a true ideological confluence that each citizen's right to an individual trial simply should not be abridged. The dimensions of the two fundamental issues that underlie this analysis can be illustrated by the exquisite juxtaposition of the United States Supreme Court's granting of certiorari on the same day to both the *Amchem Products, Inv. v. Windsor*⁸⁴ and *Metro-North Commuter Railroad v. Buckley*.⁸⁵ *Buckley* raises the issue of when a compensable harm arises in the asbestos personal injury context—when a case can get into the legal system—and *Windsor* deals with when a legal right can be settled—when a case can exit the legal system.

A typical analysis would suggest that the pro-plaintiff bar would agree that a compensable harm arises when a plaintiff is exposed to asbestos and suffers risk of future injury, mental suffering and anguish, and additional medical expenses for medical monitoring. Some of these lawyers would also argue that a class action device would be a quite acceptable mechanism for introducing these cases into the legal system; some cases have value only in the aggregate. The anti-class action attorneys on the left would also assert that, once an individual plaintiff has a cause of action in our litigation system, there is an inviolate right of the plaintiff for individual, not aggregative, treatment. We are a society that respects individual rights and those rights cannot be abrogated except through a well-defined procedural process that must be followed strictly.

A more pro-defendant position might be that no plaintiff has a legally recognizable cause of action until there is some physical manifestation of harm in the form of physical impairment or disability—it takes more than mere exposure to have a right to receive damages. Lawyers on this side of the bar would also argue that class actions should not be used to aggregate cases into a justiciable controversy when no single plaintiff had a viable claim for relief. Notwithstanding this disagreement, some attorneys on the right would argue, like their compatriots on the pro-plaintiff left, that, once an individual plaintiff has a cause of action in our litigation system, there is an inviolate right of the defendant to individual, not aggregative, treatment.

A third approach, less based on principle and more on pragmatism, might suggest that neither extreme is correct. Not every perceived harm needs to be remedied by the tort system, but there should be ample opportunity for truly aggrieved parties to seek legal redress. Class actions might be acceptable in certain circumstances, even for claims that had more value in the aggregate than individually. At the same time this more pragmatic view of litigation would argue that, once in the judicial system, there should be some type of mechanism to enhance the resolution of cases so that all litigants would not suffer from the queuing effect created by the lack of judicial resources to give each case individual treatment. Once a case is in the legal system, under this view, it is simply unconscionable to let it be denied due process because it cannot be heard. If justice

84. 117 S. Ct. 379 (1996).

85. *Id.*

delayed is justice denied, then justice that is delayed for a long time is really denied. That is exactly what, so the view goes, is happening with mass torts. How can there be justice if a few plaintiffs benefit from the full array of procedural due process rights while the many plaintiffs wait without any due process? There simply are not sufficient judicial resources to accommodate an ideal but unrealistic model of due process espoused by extreme left and right. Isn't a settlement class that generally works better than virtually no legal solution at all?

Under the theory that left and right agree that individual trials are mandated in the mass tort context, the pragmatic middle is being squeezed into a minority position. If ideology is viewed as linear, then the line is in a circle and the extremes meet. Left and right share a principle that the functionally oriented middle is willing to forego on the altar of efficiency. From a slightly different perspective the rights based theorists on the left and the right are joining forces to trump the more utilitarian middle.⁸⁶ The typically American *modus operandi* of functional *ad hoc* pragmatism is being contested by a more principled deontological approach that stresses individual rights over group utility.⁸⁷

The third theory—"Gee, you may be right after all, but that's not my problem"—contemplates a more thorough understanding of mass torts. As has been suggested elsewhere, the normal litigation paradigm of a single plaintiff against a single defendant in the marketplace of litigation, with precedent determined on liability and case values by the decisions of judges and jurors, does not apply to mass torts. There is a qualitative as well as quantitative difference between discrete torts and mass torts. This difference arises mainly because of the fungibility and "elasticity" of mass torts.⁸⁸ A given automobile accident or medical malpractice case is limited to certain plaintiffs and the actions of judge and jury are specifically related only to the case at hand. In a mass tort there may be a virtually inexhaustible supply of plaintiffs with virtually identical claims who can file suit once the conditions are propitious, thereby creating a virtually instant flood of litigation that can overwhelm the system. Many torts are elastic in the sense that plaintiffs' counsel will attempt to expand the number of plaintiffs, the scope of liability, and the range of damages to maximize the overall recovery, and hence the fees, rather than maximizing any individual case. Oftentimes the two converge, but not necessarily. Mass torts may also be elastic in the economic sense that there will be a demand for new plaintiffs as long as the supply of recoveries can be achieved with acceptable transaction costs. An aircraft crash case is inelastic in this sense because the number of potential plaintiffs is limited by the passenger list. The asbestos litigation is highly elastic in that the reservoir of potential plaintiffs is virtually limitless and plaintiffs will emerge as long as damages can be obtained cost effectively.

86. See McGovern, *supra* note 20. This debate has been termed a Bentham-Kant contest.

87. See, e.g., Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992); Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

88. See McGovern, *supra* note 86.

Mass torts can be viewed as investment opportunities for enterprising plaintiffs' counsel, even absent class actions. Dollars spent in asbestos screening programs will generate plaintiffs with viable claims. Those claims can often be resolved with some defendants in a settlement program with very low transaction costs that result in an immediate net recovery to the investing plaintiffs' counsel. Then the plaintiffs' counsel can invest more money to pursue additional recoveries against additional defendants or can share future recoveries with other investing attorneys who are willing to pursue defendants who will eventually settle but at higher transaction costs. There is no light at the end of the asbestos tunnel; the elasticity is so high that even fourth generation plaintiffs' firms are doing quite well.

Defendants, facing this reality, are attempting to staunch the flow of cases by putting the reservoir of plaintiffs into a pool with defined benefits, thereby depriving plaintiffs of the elasticity that is the hallmark of a problematic mass tort. If a defendant can channel plaintiffs into a settlement program with defined benefits, then the defendant has the level of predictability to limit liability to those defined benefits; otherwise the defendant is subject to the investment whims of the plaintiffs' bar. And it is the class action that is the currently preferred procedural device.

Astute members of the plaintiffs' bar are aware of the effort by defendants to plug the pipeline of plaintiffs and eliminate this elasticity of demand. They have three choices: (1) assist the defendants as settlement counsel, (2) fight the defendants' settlement efforts, or (3) participate or free ride on those in (1) or (2).

The single most critical player in the elasticity enterprise is the judge.⁸⁹ Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam. Judges who regulate the flow of case resolutions reduce the elasticity of the mass tort by increasing transaction costs. The longer plaintiff's counsel has to wait for a return on an investment in the form of settlements or jury awards, the costlier it becomes. As the cost goes up, the principle of elasticity suggests that the filings will go down.

Once these cases are in the system, say the pragmatists, we must do something about it; we cannot just reject the reality of these cases clogging the system; we cannot ignore what is empirically correct. It is simply unfair to allow the extreme volume of tort cases to supplant the rights of those litigants to have access to our court system. Something must be done to resolve this litigation.

Even if the less utilitarian and more rights based opponents of the use of class actions in mass torts do recognize the reality of mass tort plaintiffs creating a litigation queue that effectively denies other plaintiffs and defendants their day in court, they have a principled answer to the pragmatists' argument that something must be done. Their response is that uncompromised individual trial rights are so

89. *Id.* at 1838-41.

critical to our concept of due process that there can be no dilution of that principle because of a temporary phenomenon of large case filings. Individual rights are simply too important to be subservient to transient utilitarian needs.

This tension between more traditional methods of case management and the innovative approaches suggested by judges assigned mass tort cases is not limited to the class action context. Trial judges have typically expedited the discovery process in mass torts by forcing counsel to use depositions from related cases even though there is no exact identity of parties, a procedure that would normally be unacceptable under the traditional model of case management. Trial judges have also instigated reforms by informal jurisdiction-wide coordination in discovery and trial. Interestingly, appellate courts have often been quite skeptical of this bottom-up reform based on practice and, eventually, custom. In the area of case management, however, they have generally deferred to the troops in the trenches. Even the Judicial Panel on Multidistrict Litigation did not transfer the asbestos cases until a letter recommending transfer was signed by the federal trial judges who had the bulk of the asbestos litigation in the United States.

Yet another characteristic that bears on this analysis of mass torts is the concept of "maturity."⁹⁰ Asbestos personal injury cases are mature mass torts because so many have been tried before so many different juries that the trials are quite routinized and the outcomes are generally predictable. For these cases the trial process is more of a case flow mechanism than a procedure for determining liability, causation, and damages.

In the mature mass torts, so the pragmatist argument goes, the bulk of the cases are currently handled by counsel in the aggregate anyway without the trappings of individual rights characterized by an idealistic view of due process, so why not recognize this reality and use procedures such as class actions that at least would have the benefit of some judicial scrutiny? As a practical matter only a minute number of asbestos cases receive individual treatment. The plaintiffs' own counsel process them in bulk and settle them in bulk, so the image of full due process rights is, at best, a fiction.

Even if there were agreement with this view of reality, the more doctrinaire left and right would argue that this is a problem for someone other than the federal judicial system: from the left, the legislature should provide more judicial resources and from the right, provide a legislative claims process; from the left, state courts do a great job and from the right, these types of cases belong in state courts anyway.

Probably the most effective method for appreciating this analysis of class actions in mass torts is to look at three specific and distinct instances where settlement class actions have been used with varying results so that it is possible to feel the texture of the problems faced by all sides of the argument: Alabama DDT, Eagle-Picher, and silicone gel breast implants.

In 1979, approximately 1200 residents of Triana, Alabama, sued the Olin Corporation for personal injury and property damage caused by exposure to

90. *Id.* at 1827.

dichloro-diphenyl-trichloro-ethane ("DDT") manufactured by Olin.⁹¹ The case was settled in 1981 for a \$10,000 payment to each plaintiff, a health facility for all plaintiffs, and a five-year cleanup of the DDT site.

Within months, new plaintiffs from the Triana area filed suit against Olin. By the end of 1983, the litigation involved nearly 10,000 plaintiffs in actions against Olin, the Tennessee Valley Authority and the United States Department of the Army.⁹² In May of 1986, one month before a trial scheduled for seven individual plaintiffs, the case was settled in accordance with Rule 23(b)(3) of the Federal Rules of Civil Procedure for \$15,000,000.⁹³ Eventually there were 13,000 members of the settlement class and three opt-outs.⁹⁴ There was no appeal.

This case represents a fairly typical use of the opt-out class action settlement in the mass tort context and can be used to illustrate two observations that may not be immediately obvious. First, the settlement class device was instigated by the major defendant in a business decision based upon a fundamental distrust of the jury system. The defendant felt that its case on the merits was strong—DDT does not cause injuries to persons—but did not want to run the risk of a jury verdict that could have been quite large and hence disruptive of an ongoing business. Even if the defendant won the first case, there was a belief that a jury would find them liable in at least some future trials. This defendant decided, therefore, to settle at a relatively nominal amount per plaintiff. The first settlement, which was not a class action, effectively "bought" a new lawsuit because people allegedly exposed to DDT who did not sue in the first case decided, upon seeing their neighbors receive \$10,000 apiece, to pile on—a normal characteristic in an elastic mass tort. The defendant was faced with the same situation as before: try the case to a jury it did not trust or settle, thereby encouraging yet more litigation. The bargaining power of plaintiffs' counsel was based, not upon class certification for trial—no judge certified a trial class because of the immaturity of the tort—but upon the threat of multiple individual or small group trials. The Rule 23(b) class settlement became the only practical means for resolving the litigation short of multiple trials, inevitable appeals, and attendant expenses, publicity, and disruption. The defendant's business decision to choose the least painful of the alternatives was not difficult. The settlement class was the only device available.

The second observation that the Triana DDT case illustrates is the historic use of "futures" class actions to settle mass torts. The DDT class was defined as "all persons (a) who are present residents or former residents since 1947 of...[six Alabama counties]; and (b) who drank water or ate fish or animals containing DDT...and...who claim or could claim...any physical injury or impairment or possibility of future injury or impairment...or (c) claim or could claim, on behalf of themselves or others, any other injury or damage...and (d) the children of any of the

91. *Cloud v. Olin Corp.*, CA-796-5128 NE (N.D. Ala. filed July 9, 1979).

92. *Wilhoit v. Olin Corp.*, CV-83-C-5021-NE (N.D. Ala. filed Jan. 11, 1983).

93. *In re Redstone Arsenal DDT Litig.*, CV-86-C-5313-NE (N.D. Ala. filed June 2, 1986).

94. Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61, 63 (1990).

above described persons.”⁹⁵ “The class specifically includes persons who have not yet manifested injury.”⁹⁶ The principal defendant made its \$15,000,000 payment to end the litigation, not buy another lawsuit, and the inclusion of future claims was a critical element of that settlement bargain.

Our understanding of the interaction of class actions and mass tort phenomena can also be advanced by lessons derived from the proposed Rule 23(b)(1)(B) mandatory class settlement in *White v. Eagle-Picher Industries, Inc.*⁹⁷ Between 1966 and 1989 Eagle-Picher resolved approximately 60,000 asbestos personal injury claims for almost \$500 million and still faced an additional 60,000 plaintiffs.⁹⁸ After exhausting its insurance coverage and facing closed capital markets, Eagle-Picher was forced to fund future asbestos settlements out of asset sales and operating income.⁹⁹ Rather than filing for bankruptcy, a process that had been shown in UNR and Johns-Manville to be lengthy, expensive, and vitriolic, management decided to seek a mandatory class action settlement. The federal district court where the settlement was sought granted an injunction barring all asbestos actions against Eagle-Picher, appointed a committee of plaintiffs’ counsel to negotiate with Eagle-Picher, and selected a special master to determine if Eagle-Picher’s assets constituted a limited fund and whether the Rule 23(b)(1)(B) class action would be a superior alternative to bankruptcy.¹⁰⁰ Over the vociferous objections of the asbestos plaintiffs’ bar and the two other counsel appointed for the plaintiffs’ class, two of the four counsel designated to represent the plaintiffs agreed to a settlement for \$625 million and 25% of equity in the company.¹⁰¹ The court approved the settlement but, before it could be finalized and in the face of substantial legal maneuvering by opponents of the mandatory class settlement, Eagle-Picher ran out of cash and filed for bankruptcy.¹⁰²

This case history supports an initial observation that the “reverse auction” phenomenon,¹⁰³ where a defendant uses the competition among plaintiffs’ counsel to fashion a more favorable settlement, is not likely to occur in a mature, elastic mass tort where each plaintiff’s case has substantial value. The economic incentives for lawyers who have invested in the mass tort—by definition, they have invested heavily because it is mature—and who anticipate substantial future income—again, by definition, because of the elasticity and the value of claims—

95. Order with Respect to Notice, Hearing, Class Certification and Administration of Class Action Settlement, *In re Redstone Arsenal DDT Litig.*, CV-86-C-5313-NE (N.D. Ala. filed June 2, 1986).

96. *Id.*

97. 134 F.R.D. 32 (E.D.N.Y. 1990).

98. *Id.* at 34.

99. *Id.*

100. *See In re Joint E. & S. Dist. Asbestos Litig.*, 132 F.R.D. 332 (E. & S.D.N.Y. 1990); *In re Joint E. & S. Dist. Asbestos Litig.*, 1990 WL 126572 (E.D.N.Y. Aug. 31, 1990); *In re Joint E. & S. Dist. Asbestos Litig.*, 1990 WL 126474 (E. & S.D.N.Y. Aug. 13, 1990); *see also* Andrew Blum, *A Routine Hearing Quickly Turns Less So*, NAT’L L.J., Dec. 24, 1990, at 8.

101. *See supra* note 100.

102. *See supra* note 100.

103. Coffee, *supra* note 81.

will, as was illustrated by the extreme level of conflict in Eagle-Picher, fight or opt-out of a (b)(3) class or attempt to stymie a (b)(1)(B) class. The only way a defendant can succeed in this contest is to negotiate with established and respected plaintiffs' counsel. Even then there is a substantial risk in a (b)(3) class of opt-outs by other established counsel and in a (b)(1)(B) class of enormous legal opposition thereby diluting the value of a settlement.

A second observation concerns the relative efficacy of a limited fund class action as opposed to bankruptcy. The financial elements of the proposed Eagle-Picher settlement in 1990 and similar financial details of Eagle-Picher's emergence from bankruptcy in 1997 are now public.¹⁰⁴ It should not be too difficult to determine the relative merits of each approach for the various interested parties. Is it possible to save the transaction costs and financial disruption that occur during bankruptcy by reaching a settlement in a mandatory loss class action? In this instance, the bankruptcy approach appears to be more favorable for the asbestos plaintiffs and the (b)(1)(B) seems to favor equity and management. In theory, there seems to be an opportunity for a better solution for both sides with a (b)(1)(B) class; in practice, however, the information and negotiation costs may swallow any potential joint gains.

The final example in this brief foray into examples of the use of the class action device involves the silicone gel breast implant cases¹⁰⁵—a settlement with a (b)(3) opt-out, a (b)(3) opt-in, a (b)(1)(B) mandatory class and a bankruptcy—the legal equivalent of a dive with a ___ point degree of difficulty. The silicone gel breast implant litigation followed the typical mass tort cycle: a series of single plaintiff trials with mixed results and then an event, or in this case, two events—a well-publicized plaintiff's verdict and FDA removal of the product from the marketplace—that led to the filing of larger numbers of lawsuits.¹⁰⁶

When the federal cases were transferred to Judge Sam C. Pointer, Jr. by the Judicial Panel on Multidistrict Litigation in 1992,¹⁰⁷ there were less than 5,000 cases filed in federal and state court. By 1994, when the \$4.25 billion settlement was announced, there were approximately 10,000 plaintiffs in lawsuits around the country.¹⁰⁸ The original settlement was in a (b)(3) opt-out class for the major defendants with (b)(3) opt-in provisions for foreign claimants. There was also a (b)(1)(B) class settlement for one limited fund defendant and bankruptcy for another folded into the overall fund. That fund was to be distributed to all plaintiffs regardless of the manufacturers' identity and was based upon a benefit grid of up to \$1.2 million depending on the age, disability and disease process of each qualifying plaintiff. There were two opt-out periods, one after the fairness hearing and another if the payments on the grid had to be reduced because of an excess

104. See *supra* note 100.

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

106. See Alison Frankel, *From Pioneers to Profits*, AM. LAW., June 1992, at 82. See also McGovern, *supra* note 20.

107. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. at 1098.

108. Frankel, *supra* note 13, at 68.

number of eventual claimants. Ultimately, there were 7,000 domestic opt-outs and over 400,000 claimants.¹⁰⁹ Because of the unanticipated size of the class, the grid amounts would have been reduced some 95% to accommodate all members if the settlement had gone forward in an identical form.

As a result of this situation, one of the major defendants filed for bankruptcy¹¹⁰ and the remaining defendants in the original settlement reconstituted the offer in a revised settlement program that was superior to the 95% reduction but far below the original grid amounts.¹¹¹ The opt-out period will end during the summer of 1997 and the current estimate is for over 20,000 additional opt-outs.

One observation that can be drawn from this case is that the defendants who were the driving forces behind the original settlement to obtain early closure of a potentially larger mass tort arguably created, or at least intensified, the mass tort by the combination of a large fund, massive publicity, and few barriers to receive compensation from that fund. As a result, the economic realities drove the plaintiffs' bar and individual plaintiffs to join in the settlement because the entry costs were quite low and the stated benefits were quite high. As is the situation with any quasi public good; there was overuse. People who normally never would have entered the tort system decided to participate in the settlement. In a rather large irony, the number of plaintiffs who opted out of the revised settlement program may be roughly equivalent to the number of plaintiffs who would have filed suit absent a settlement at all, that is, the same number of plaintiffs who have litigation calibre cases.

The second observation relates to the second opt-out right, the ability to exit the settlement once there is a full determination of the individual payout rights. This feature, which was part of the Bjork-Shiley settlement,¹¹² has been greatly applauded for its efficacy and fairness. Unfortunately, in an elastic mass tort, this second opt-out right does not promote closure and may even prevent a complete resolution of the litigation. The Bjork-Shiley second opt-out to the tort system for people who do have broken heart valves worked because the tort was inelastic. Courts virtually uniformly ruled out damages for fear of a breakage by itself;¹¹³ there were only a relatively small number of plaintiffs whose heart valves would actually break and so the potential number of second opt-outs was small. This is not the situation in an elastic mass tort. Once the barriers to entry are reduced large numbers of additional non-litigation calibre plaintiffs decide to participate in a class. The dilution effect soon becomes obvious and almost inevitably the litigation calibre plaintiffs will exercise their opt-out right, thereby defeating the purpose of the settlement for the defendants.

109. Alison Frankel, *Dow Corning Goes for Broke*, AM. LAW., Jan.-Feb. 1996, at 78.

110. *Id.*

111. Order No. 27, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, Civil Action No. CV 94-P-11558-S (N.D. Ala. Dec. 22, 1995) (order approving revised settlement program and injunction).

112. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992).

113. *Khan v. Shiley, Inc.*, 266 Cal. Rptr. 106, 111 (Ct. App. 1990); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 578-80 (Mo. Ct. App. 1990); *see also O'Brien v. Medtronic, Inc.*, 439 N.W.2d 151 (Wis. Ct. App. 1989) (pacemakers); McGovern, *supra* note 86.

The fourth theory—"We agree on the strategy, but not the outcome"—suggests that there is agreement on the left and right that mass tort cases should be resolved one at a time, but that there is a very different perception as to the ramifications of such a traditional case management process. On the right it could be termed the Stockman theory: one rationale for the Reagan tax cuts was that a resulting increase in the deficit would create such pressure on the budget that a reduction—or at least a reduction in the increase—in expenditures would be inevitable.¹¹⁴ Or it could be termed the Weiner theory: by allowing only a limited number of trials of plaintiffs' asbestos personal injury cases in federal court, the cases will eventually settle because of financial pressures on plaintiffs and their counsel and no new cases will be filed in federal court because of the lack of trial dates.¹¹⁵ Both theories suggest that creating a temporary problem will lead to the long-term achievement of a desired goal. The net effect of this approach from the right is for all new asbestos personal injury cases to be filed in state court, precisely what is happening now.

In essence, this theory views the bulk of the asbestos cases as ones which never should have been brought in the first place, so having them clogged in the federal system is really not a huge problem. The economic pressures on industry should not be that great if they would just require a full trial in each case rather than succumbing to blackmail by litigation. If like-minded judges would just be rigorous in their requirements for proof, the bulk of these mass tort cases would fall by the wayside and fewer new ones would be filed. The proposed revisions in the new *Restatement (Third) of Torts* will go a long way toward restoring the fundamental legal requirements that should be prerequisites for any legitimate recovery of damages. The solution is for judges to be judges, not for judges to be activist legislators. Granted there may be temporary embarrassment and a short-term backlog of cases, but the backlog will be fleeting in the larger scheme of litigation. Eventually the plaintiffs' bar will recognize that it simply is not cost effective to bring these mass tort cases in federal court and they will not bring them or file them in state court where they really belong.

From the left, there is an agreement that cases should be tried one by one and an accord that state courts are just fine for resolving mass torts. There is much more political responsiveness among state judges, so the argument goes; the procedures are far less rigorous and significantly more relaxed, and the calibre of state judges assigned the mass tort docket is generally excellent. In the short run, plaintiffs are certainly better off than in a class action, even if the federal docket is clogged. In the long run, capable and innovative plaintiffs' counsel will always be able to locate the judicial resources to set trial dates and resolve cases. Plaintiffs who cannot receive this type of representation or who have to wait in a long queue to receive judicial treatment have a problem, but it is not nearly as severe a problem as having their rights adversely affected by aggregative policies.

114. See generally DAVID A. STOCKTON, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED* (1986).

115. *In re Asbestos Prods. Liab. Litig.* (No. VI), 1996 WL 239863 (E.D. Pa. May 2, 1996).

CONCLUSION

The confluence of left and right in their opposition to mass tort settlement class actions can be attributed to a number of possible rationales. Arguably both groups see most of the current generation of class action settlements as deficient at the detail level and unwarranted at the policy level. They also share a risk aversion for any changes in our existing legal procedure—the status quo is just fine. They agree that the concepts and implementation of due process are based upon shared principles of fairness that must remain unchanged by transient exigencies. Although their expectations differ radically concerning the benefits to them—either long or short term—they remain united in their opposition to the more pragmatic plea that the status quo is not just fine.

For the right, the mass tort phenomenon is not such a major problem for business or the economy and it will take care of itself over time, one way or another. Certainly the problem is not sufficiently severe to warrant violating more critical principles such as the adjudicative role of judges, a traditional reading of our rules of civil procedure, and our principles of due process. The ideal procedure must be maintained regardless of current reality. For the left, there are substantial problems for mass tort plaintiffs who are forced to wait in a long justice queue, but not so severe as to warrant the mass extinction of individual rights.

Pragmatists reject these more doctrinaire positions in favor of policy-based problem solving that, to their perception, relieves the inherent unfairness of remedying certain plaintiffs' legal rights while leaving other similarly-situated plaintiffs without legal recourse simply because they fall later in the litigation queue. At the same time they see mass torts creating massive problems for our businesses and our economy that may have a deleterious effect on everyone. The legislature seems paralyzed in the face of these difficulties, leaving it to the judiciary to find acceptable solutions. Judges should not uphold an idealistic version of due process and procedure that does not even exist in the real world, particularly when there is little cost to relatively minor changes that will achieve many benefits.

Much of this debate seems to be empirical with the various factions having radically different perceptions of future events. The empirical foundation of the debate lies in a host of disparate assumptions about the underlying nature of mass tort litigation. This variation in assumptions can be amply illustrated by noting the evolution of the Fifth Circuit Court of Appeals in its trek up the learning curve in appreciating the variety and nature of asbestos litigation¹¹⁶ to the state of questioning by the United States Supreme Court in *Amchem Products, Inc. v. Windsor*.¹¹⁷

At the oral argument in *Windsor* a number of questions from the United States Supreme Court suggested that assumptions concerning what is happening in the

116. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660–75 (1989).

117. See Official Transcript of Proceedings Before the Supreme Court of the United States, *Amchem Prods., Inc. v. Windsor* (Feb. 19, 1997) (No. 96–270).

world of mass torts were at variance with the assumptions made by United States district judges handling day-in and day-out litigation. The apparent lack of appreciation of the breadth of injunctions barring the filing of cases, the surprise at the intricacies of claims resolution facilities, the unawareness of customary sequencing of trials and settlements, and the reaction to the immense power of a single judge in approving a national class would probably be surprising to the federal, and even more to state trial judges who have been grappling with mass torts for the last twenty years. When the Supreme Court recognized that they had not decided any of the cases that these judges have been relying upon all this time, it was a recognition that the Court faces a serious task of assimilating an enormous amount of information in the context of the quite limited perspective offered by *Windsor*. Even counsel for the parties, brought in to argue the case on appeal, found it difficult to absorb the intricacies of the mass tort phenomenon. Big picture decision-making in the context of discrete appeals is certainly not novel for the United States Supreme Court, however.

One of the beauties of our rules of civil procedure is that in a world filled with constantly changing plaintiff, defendant, and judicial strategies there are ample opportunities for bottom-up and top-down adaptation. When the top and bottom tectonic plates of procedure diverge, however, the tension can be quite disruptive to an orderly judicial process. The conflict in the mutually exclusive approaches to dispute resolution may generate major alterations in the normally accepted balance of outcomes in the face of competing interests. The issue is whether the mass tort phenomenon has created such burdens on our system that tinkering, radical solutions, or inaction are the warranted solutions.