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Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction

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INDIVIDUALIZED JUSTICE, MASS TORTS, AND "SETTLEMENT CLASS ACTIONS": AN INTRODUCTION

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The tension between individual justice (party autonomy in an adversary system) and collective justice (aggregated handling of legal claims) is the basic theme of the symposium featured in this issue of the *Cornell Law Review*. Nowhere is this tension more evident than in recent efforts to use "settlement class actions" as a means for large-scale resolution of personal injury or property damage claims arising out of exposure to defective products or toxic substances. Important and novel issues of tort law, civil procedure, constitutional due process, and lawyer behavior are presented by settlements resolving the tort claims of future as well as current claimants.[1] Pending cases provide a number of examples: (1) a class containing millions of persons occupationally exposed to asbestos,[2] (2) a class of more than one mil-

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† Roger C. Cramton is the Robert S. Stevens Professor of Law, Cornell Law School. These comments were prepared for a two-day colloquium on the use of "settlement class actions" to resolve mass exposure torts, held at the Cornell Law School on October 23-24, 1994. The reader should know that I served as an expert witness on legal ethics issues for asbestos victims objecting to the proposed settlement in Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994), discussed *infra* note 2. I have also been consulted by lawyers representing intervenors in Beeman v. Shell Oil Co., No. 93-47363 (Tex. Dist. Ct., Harris County Feb. 16, 1995) (*infra* note 6).

1 "Current claimants" are persons who have already asserted a claim against a defendant. "Future claimants" include two groups of people—those who have a matured claim but have not yet asserted it, and those who may have been exposed to a substance but have not yet suffered the harm that gives rise to a tort cause of action.

2 Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994). The case was filed as *Carlough v. Amchem Products, Inc.* on January 15, 1993, with simultaneous filings by the Settling Parties of a complaint, answer, and stipulation of settlement. On Dec. 22, 1993, Robert A. Georgine was substituted as a representative plaintiff for Edward J. Carlough. Several opinions in the case have been published: Carlough v. Amchem Products, Inc., 834 F. Supp. 1437 (E.D. Pa. 1993) (rejecting various objections to the subject matter jurisdiction of the district court); Carlough v. Amchem Products, Inc., 158 F.R.D. 314 (E.D. Pa. 1993) (giving conditional approval to the settlement and dealing with various notice issues); and Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (Judge Reed's decision approving the proposed class action settlement as fair and reasonable and rejecting attacks on the settlement and Class Counsel's representation of the class). Another large asbestos class action settlement is currently pending. *See* Ahearn v. Fibreboard Corp., No. 93-526 (E.D. Tex. Sept. 9, 1993 and Mar. 20, 1995) (unreported orders provisionally certifying class for settlement purposes and approving the settlement providing the agreement is modified to eliminate one conflict of interest). *Ahearn* is similar to *Georgine* in that in both the class is limited to future claimants (*i.e.*, those who did not file a lawsuit before a specified date), but the cases differ in important respects: (1) *Ahearn*

lion women who received breast implants,[3] (3) a class containing all of the owners of Ford Bronco all-terrain vehicles,[4] (4) a class of owners of GM pickups with saddlebag gas tanks,[5] and (5) a class of current and future owners of homes that have a polybutylene plumbing system, an allegedly defective plumbing material that has been installed in three million mobile homes and an estimated four to five million site-built homes.[6]

This use of the class action device, like most other new developments, has both long- and short-term antecedents, such as the historic powers of equity judges[7] and the modern phenomenon of "managerial judges" who actively participate in case handling and take a forceful role in pressing settlement.[8] Yet, the recent class actions mentioned above, which contain a novel combination of features, illustrate something quite new in degree and kind. For example, the cases were either brought or certified for settlement purposes rather than to be tried; the plaintiff class includes future victims, many of whom have yet to suffer a legally cognizable injury; approved settlements will bind absent class members, many of whom may not have had an effective opportunity to opt out of the class; the settlements affect claims nationwide and may have the effect of a federal decree eliminating claims governed by state law or a state decree eliminating claims governed by federal law; and in some of the cases, the plaintiffs' lawyers representing the class entered into side settlements with

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is a mandatory class action brought under Federal Rule of Civil Procedure 23(b)(1); and (2) the terms of the two settlements differ in many details. The *Georgine* case is discussed in Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995), and Carrie J. Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995).

3 *See In re* Silicone Gel Breast Implant Prods. Liab. Litig. (Lindsey v. Dow Corning Corp.), Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (Judge Sam C. Pointer, Jr.'s order approving, with certain modifications, as either within the court's power or believed acceptable to the parties, the proposed class action settlement as fair, reasonable, adequate, and non-collusive).

4 *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., No. Civ. A. MDL-991, 1995 WL 222177 (E.D. La. Apr. 12, 1995) (settlement disapproved because not a fair, reasonable, and adequate compromise of plaintiff's claims).

5 *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219, 1995 WL 223209 (3d Cir. Apr. 17, 1995) (disapproving and remanding for further consideration a settlement of the property damage claims of a class of about 5.7 million owners of most GM pickups and recreational vehicles for most model years between 1973 and 1991, but excluding Texas owners). In Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. Ct. App. 1994), the court held that the trial court abused its discretion in approving a class action settlement involving Texas owners and containing substantially the same terms.

6 Beeman v. Shell Oil Co., No. 93-47363 (Tex. Dist. Ct., Harris County, Feb. 16, 1995) (class action and proposed settlement summarily dismissed without explanation).

7 *See, e.g.*, Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269.

8 *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

the defendants, giving their current clients different and more favorable relief than the class settlement provides to future claimants.[9] A class action settlement with these features would have been unthinkable to lawyers of a decade or so ago.

This symposium, which deals with an interrelated whole, is organized in parts that explore the common problems from the perspectives of tort law, class action law, and the law and ethics governing lawyers. Two papers from each perspective are followed by two or three short comments. The papers and comments are preceded by this introduction, a foreword by Judge Jack B. Weinstein,[10] a pioneer in this field, and an afterword by Judge William W Schwarzer,[11] former director of the Federal Judicial Center.

Recent class action settlements such as those previously mentioned raise several questions. Some of the most central are:

> (1) Is the individual justice provided by tort law in the courts so delayed, erratic, and inefficient that it should be replaced by schemes of collective justice molded by self-interested parties and approved by a single federal district judge? If administrative schemes are to be substituted for the tort system, should this be accomplished by legislation rather than by private settlements approved by a single judge? The papers by Peter Schuck, John Siliciano, and the commentators on their papers address these questions.
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> (2) Does a federal district court have authority to enter a decree that eliminates or displaces the personal injury rights, otherwise governed by state law, of individuals who have been exposed to a product or substance but have not yet suffered a legal injury (future claimants whose claims have not yet matured when notice is given of the opportunity to opt out)? Similarly, does a state court have authority to perform the same function on a nationwide basis, eliminating claims both under other states' laws and under federal law? These questions are among those that Richard Marcus, John Coffee, and the commentators on their papers address.
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> (3) How can adequate notice of opportunity to opt out of a class action, required by due process, be provided to "exposure only" persons who do not and cannot know that they will suffer an

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9 The *Georgine* case involves all of these features in addition to the following: (1) the claims-handling process available to future claimants is run and controlled by the defendants rather than by an independent or neutral body supervised by the court; and (2) class counsel, who monitor and supervise this claims-handling process, may handle claims before panels whose members they assist in selecting and monitoring.

10 Jack B. Weinstein, *An Introduction to Who's Who in Mass Toxic Torts*, 80 CORNELL L. REV. 845 (1995).

11 William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995).

injury in the future?[12] Is "adequate representation" provided when a lawyer negotiates cash settlements for the lawyer's current clients simultaneously with a class action settlement providing different terms for future claimants? Do the virtues of private settlement and alternative dispute resolution justify departures from general principles of legal ethics? These questions are among those that Susan Koniak, Carrie Menkel-Meadow, and the commentators on their papers address.

This introduction provides a setting for the reader's consideration of the many issues raised by the symposium and, in a concluding section, states my personal views on some of them.

The American common-law system emphasizes party control of litigation rather than judicial prosecution and investigation.[13] The adversary system presupposes opposing parties who exercise a wide range of choice on whether, where, and when a lawsuit is filed; what claims and defenses are asserted; what resources should be devoted to the litigation; and whether the case is settled or tried. The common-law judge is envisioned as a neutral, relatively passive arbiter of conflicting private interests who rules on questions of law and supervises the conduct of the litigation. Party initiative and the underlying principle of individual autonomy are supported by the constitutional right of trial by jury, which presupposes a detailed evaluation of particularistic facts bearing on the plaintiff's claim and the defendant's defenses.

The American tort system reflects the same values by requiring proof of fault, causation, and harm before one person's loss is shifted

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12 In the asbestos cases, such as *Georgine*, at least two types of future claimants constitute the plaintiff class: (1) persons who had fully matured legal claims but who had not filed suit against the defendants prior to the date of filing of the class action; and (2) persons who were occupationally exposed to defendants' products but had not yet suffered a legal injury. In the polybutylene pipe case, Beeman v. Shell Oil Co., No. 93-47363 (Tex. Dist. Ct., Harris County Feb. 16, 1995), the settlement purports to bind future owners of homes with this type of plumbing system, individuals who as yet have not even been exposed to defendants' product. Exposed persons whose claims may develop in the future may not recognize that class notice is applicable to them and, even if they do recognize its relevance, may lack knowledge about the injury necessary for an informed decision to opt out of the class. Those who have not been related to the defendants' conduct in any way cannot know that a published notice pertains to them, nor can they have a realistic opportunity to opt out unless a "back-end opt-out" is built into the settlement agreement.

13 *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (comparing common law and continental civil procedure); Judith Resnik, *From "Cases" to "Litigation"*, LAW & CONTEMP. PROBS., Summer 1991, at 5, 64 (stressing "the weakening of the link between individuals and lawsuits" as aggregative techniques of disposition have become both more frequent and more acceptable); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (restating the arguments for individual adjudication). An earlier article dealing with "public law litigation" helped to shape judicial and professional attitudes. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

to someone else.[14] The injured plaintiff must establish by a preponderance of the evidence that the defendant's wrongful acts caused the plaintiff's harm. Although tort law serves mixed goals—compensating accident victims, deterring conduct that is wrongful or involves unreasonable risks to the health or safety of others, and punishing wrongdoers—the central notion until quite recently has been one of corrective justice—repairing, to the extent possible with a money award, the harm that one individual's wrongful act has caused another.[15] Proof that the defendant's wrongful act has caused the plaintiff's injury inevitably requires a particularistic assessment of the plaintiff's and defendant's conduct, a causal relationship between their actions and the claimed harm, and a valuation of the plaintiff's resulting injury.

Two developments in the twentieth century threaten to displace the traditional model of individual rights and party autonomy. First, many judges participate more actively in the management, conduct, and settlement of litigation. Second, pressures flow from the volume, complexity, cost, and interrelatedness of what are referred to here as "mass exposure torts."

Since the development of negligence doctrine in the nineteenth century, the paradigm case of the traditional tort is an accident in which an actor's vehicle—whether stage coach, railroad, or automobile—has injured a stranger. The individualized approach to adjudicating such disputes seemed natural, if not inevitable, given the premises of American law and the constitutional right to a jury trial. In today's world, however, America's market economy encourages mass distribution of products of new, and perhaps untested, technology. Thousands of strangers may be injured by the dissemination and use of a single product. Mass exposure to these products or substances creates situations in which a large number of people believe, or are led to believe, that the defendant's product caused their injuries. The resulting volume of litigation poses problems that threaten both the tort system's reliance on individual responsibility and the procedural system's reliance on party initiative and control.

Mass exposure torts threaten these aspects of the tort system for several reasons. First, proving or determining whether exposure to the product or substance caused the claimed injury is difficult.[16] Frequently, the exposure that leads to claims of injury occurs over a sub-

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14 *See* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995).

15 For discussion of corrective justice in tort law, see George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

16 Causation issues are discussed in David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); Siliciano, *supra* note 14, at 992-95.

stantial period of time, and the injury itself may have a long latency period. Often there is scientific uncertainty as to whether the exposure caused the alleged harm or whether the condition was the result of the individual's conduct (smoking, for example) or the presence of background substances in the natural environment. Frequently, expert witnesses will be able to testify about causation only in terms of statistical probabilities based on scattered or inconclusive epidemiological studies.

Second, in many cases it is difficult or impossible to determine which of multiple actors caused the claimed injury.[17] If the harm has a long latency period, evidence of whose product or substance caused the harm may be unavailable fifteen or thirty years after the product's distribution and consumption. A related problem arises in cases involving long-term occupational exposure, such as in the asbestos field. The worker may have been exposed to several products, each with somewhat different injury characteristics, manufactured by a number of companies over a lengthy period of time. In such a case, it may be difficult for the plaintiff to establish that the named defendant or defendants were responsible for the plaintiff's harm.

Third, it is doubtful whether individualized justice can be provided when thousands or even millions of claims flow from mass exposure to a product or substance. For example, millions of Americans were exposed occupationally to asbestos products from the 1930s through the 1970s, before regulatory and safety controls reduced the future danger. Many of those exposed have died or suffered injuries, and the exposure will claim further victims well into the twenty-first century.[18] As another example, over one million women had silicone gel breast implants between 1979 and 1994. As of yet, only a small

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17 The problem of identifying the correct defendant led to the creation of a theory of market-share liability in the DES cases, such as Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), under which all defendants marketing the harmful substance are liable in proportion to their share of the total market. The market-share approach, adopted in six states in DES cases, has not been extended to other products or activities, such as asbestos. Products containing DES are virtually identical, exposure to DES results in a rare and distinct form of cancer, and the long latency period prevents the plaintiff from establishing which manufacturer produced the DES that the plaintiff used. In contrast, market-share approaches have been rejected in asbestos cases because a wide variety of asbestos products pose somewhat different dangers, the varied uses of asbestos result in differing exposure rates, and asbestos may cause a number of different diseases, some of which (*e.g.*, lung cancer) are not specific to asbestos exposure.

18 For discussion of the health dangers of asbestos and estimates of the likely injuries, see *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 730-745 (E. & S.D.N.Y. 1991). The volume of court filings are discussed in AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 10 (1994) (containing caseload data and stating "[t]he giant of complex litigation has been and continues to be asbestos") [hereinafter ALI PROJECT].

portion of this group has suffered injury, and the causal relationship between implants and some injuries remains uncertain.[19]

The sheer number of claims in cases like these creates troublesome problems of judicial delay, repetitive trials, high transaction costs, and an inevitable interrelationship among claimants. As indicated earlier, claimants may suffer from a "disease" rather than the type of immediate physical injury associated with a traumatic accident. Causation may be established only by reliance on probabilistic methods. Publicity given to the dangers of use or exposure to the product gives rise to new claims, such as the emotional harm flowing from fear of contracting the disease in the future, and increases the percentage of victims who assert claims. Evidence that defendants knew of the products' risks but failed to warn those exposed to them supports punitive damage claims that threaten producers with large, unpredictable, and recurring judgments based on the same conduct.

Individual trials that replicate evidence of exposure, causation, and injury in case after case burden the courts, create judicial delay, and carry high transaction costs. In conventional tort litigation, approximately sixty percent of amounts paid go to accident victims. A study of asbestos litigation estimates that plaintiffs only receive about forty percent of each litigation dollar.[20] Critics assert that lawyers, insurance companies, and litigation expenses consume too much of the amounts available to compensate victims.[21] If fault and causation requirements were eliminated entirely from complex, difficult cases of mass tort exposure, as was done in social security disability or workers' compensation cases, transaction costs could be greatly reduced.

The model of individualized justice posits that each claimant should make all relevant decisions with respect to her claim. The existence of a host of other similar claims inevitably affects these decisions because a claimant will "now have to take into account the existence of the other claimants, the extent to which the other claims may deplete the assets of the tortfeasor, and the possible savings which may be achieved by sharing the costs of litigation."[22] If payment of compensatory and punitive damages to early claimants results in a producer's insolvency, future claimants will receive little or nothing.

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19 *See* Heidi Feldman, Science and Uncertainty in Mass Exposure Litigation 27-40 (1994) (unpublished manuscript, on file with author) (discussing the breast implants litigation and the scientific evidence concerning causation).

20 *See* JAMES S. KAKALIK ET AL., RAND CORPORATION INSTITUTE FOR CIVIL JUSTICE, COSTS OF ASBESTOS LITIGATION 40 (1983); JAMES S. KAKALIK ET AL., RAND CORPORATION INSTITUTE FOR CIVIL JUSTICE, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 91 (1984).

21 *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990) (discussing studies of costs of asbestos litigation).

22 Courtland H. Peterson & Joachim Zekoll, *Mass Torts*, 42 AM. J. COMP. L. 79, 97 (1994).

Some courts assume that maintaining the solvency of corporate actors is a desirable objective wholly apart from its effect on future claimants.

The high costs of proving causation in the individual case may be reduced by a collective action that spreads the costs of discovery, expert testimony, and litigation among many claimants. Thus, collective justice appeals to all parties to some degree and to courts and judges almost without exception. Plaintiffs avoid the "free rider" problem by sharing the costs of discovering evidence and proving causation and fault. Defendants benefit from reduced transaction costs and fixed liability, displacing the uncertainty of unpredictable future liability. Courts similarly benefit from reduced caseloads because thousands of individual cases are combined into one large class action, and claims are processed outside the courts.

These characteristics of mass exposure torts produce pressures that result in efforts at aggregative or collective justice. One possible technique of aggregation, that of party joinder, has only limited application to mass tort situations.[23] Permissive joinder leaves to the parties the decision of whether to join other persons as plaintiffs or defendants, and does not permit judges to expand litigation when they believe doing so would be more efficient. Compulsory joinder provisions, which require necessary parties to be joined and do not permit the action to proceed if an indispensable party cannot be joined, have little application to mass tort situations because each claimant has an independent claim that may proceed without the joinder of other claimants. Federal court joinder of plaintiffs and defendants is also greatly limited when, as in most tort matters, jurisdiction rests upon diversity of citizenship. Complete diversity, required for joinder, generally cannot be satisfied in mass tort situations.

Consolidation of cases offers somewhat greater promise. A federal court has broad discretion under Federal Rule of Civil Procedure 42(a) to consolidate specific issues or cases involving a common question of law or fact when doing so would promote judicial economy.[24] Consolidation, however, applies only to cases pending before one particular court and does not affect claims filed in other courts or claims that have not yet been filed ("future claims").

Since 1968, the Judicial Panel on Multidistrict Litigation has had authority to consolidate in a single district all civil actions pending in federal district courts when the cases involve common questions of fact, and transfer would serve interests of judicial economy, fairness,

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23 *See* FED. R. CIV. P. 19 (compulsory joinder); *id.* 20 (permissive joinder).

24 *Id.* 42(a). For a discussion of the use of aggregative techniques in mass tort cases, see Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991).

and the convenience of the parties and witnesses.[25] A multidistrict transfer for pretrial proceedings almost invariably results in settlement of the transferred claims. The transfer facilitates investigation and discovery of underlying factual issues, and the common understanding flowing from exchange of information may provide the middle ground consensus that often leads to settlement.

Other less palatable reasons also further settlement of multidistrict cases. The transferee judge often takes an active role in encouraging or pressing settlement. Defendants normally refuse to settle individual cases, holding out for "global settlements" involving both future and current claimants. In addition, plaintiffs and their lawyers are in a weaker bargaining position because their cases probably will not be set for trial for three to five years, a period in which plaintiffs are without remedy and their lawyers have large amounts of working capital tied up in their portfolio of cases.[26]

The third major device—the class action—is the principal focus of this symposium. The class action is a procedural technique in which representatives of a group (class representatives) may assert against the defendants both their own claims and similar claims of other persons who share a common interest. Federal Rule of Civil Procedure 23(a) requires that class actions meet four prerequisites, generally referred to as numerosity, commonality, typicality, and adequacy. First, the class must be so numerous that joinder of all members is impracticable. Second, questions of law or fact must be common to the class. Third, the claims or defenses of the representative parties must be typical of the class as a whole. Finally, the representative plaintiffs and their lawyers must "fairly and adequately protect the interests of the class."[27]

If the mass tort situation does not involve a bankruptcy, a trust or estate administered by the court, or a limited fund, the prevailing rule is that absent members of the class must be provided both with reasonable notice of the class action and with an opportunity to exclude themselves from the class by opting out.[28] Class actions under Rule 23(b)(3), often referred to as "non-mandatory" or "opt-out" class actions, may be maintained as a class action if the action satisfies the requirements of "predominance" and "superiority" contained in the following rule provision:

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25 *See* ALI PROJECT, *supra* note 18, at 21-24 (discussing the multidistrict litigation statute, 28 U.S.C. § 1407 (1988), and other relevant materials).

26 *See* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986) (discussing cyclical evolution of asbestos litigation).

27 FED. R. CIV. P. 23(a).

28 *See* Koniak, *supra* note 2, at 1087; Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 12-13 (1986); HERBERT B. NEWBERG, CLASS ACTIONS § 1.07 (2d ed. 1985).

> An action may be maintained as a class action if the prerequisites of subdivision (a) [discussed above] are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[29]

If questions of defendant fault or cause in fact cannot be resolved on a class-wide basis, most courts refuse requests for certification in mass tort cases on the ground that common issues do not "predominate" over individual issues.[30] Some courts, but not all, view the interest of claimants in controlling their own personal injury case as negating the "superiority" of a class action.

Although the legislative history of the 1966 amendment to Rule 23 states that the class action device is "ordinarily not appropriate" for "[a] 'mass accident' resulting in injuries to numerous persons,"[31] federal courts in recent years have authorized class actions in a number of single-incident mass accident cases[32] and a smaller number of mass exposure tort cases.[33] The Agent Orange class action, involving the claimed injuries of Vietnam veterans from battlefield exposure to dioxin manufactured by the defendants, was the first such case.[34] Bankruptcy situations involving a major asbestos defendant and the manufacturer of the Dalkon Shield intrauterine device had class action aspects.[35]

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29 FED. R. CIV. P. 23(b)(3) (alteration added). Following this statement, the Rule specifies four factors relevant to these findings.

30 Cases involving personal injuries occurring at different times and places as a result of separate events resulting in exposures with some similar qualities generally are not certified. *See, e.g., In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985). *But see* Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986), *reh'g denied en banc*, 785 F.2d 1034 (5th Cir. 1986) (upholding certification of an asbestos class action).

31 *See* ALI PROJECT, *supra* note 18, at 27-28 (quoting and discussing the 1966 Advisory Committee Note); Resnik, *supra* note 13, at 7-22 (same).

32 *See, e.g.*, Sala v. National R.R. Passenger Corp., 120 F.R.D. 494 (E.D. Pa. 1988) (train passengers injured in a derailment).

33 *See, e.g.*, Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986), *reh'g denied en banc*, 785 F.2d 1034 (5th Cir. 1986); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990) (both involving asbestos workers in the Eastern District of Texas).

34 The history of the Agent Orange litigation is chronicled in PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986). *See In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (upholding district court's approval of Agent Orange settlement); *see also In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), *cert. denied sub nom.* Ivy v. Diamond Shamrock, Inc., 114 S. Ct. 1125 (1994) (rejecting collateral attack on Agent Orange settlement decree by a subsequent claimant).

35 *See* A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989).

During the last year or two, a spate of mass exposure class actions have raised novel and interesting questions. The major current cases, discussed to varying degrees in the papers and comments of this symposium, are: two class action settlements in the asbestos field (the *Georgine*[36] case in the Eastern District of Pennsylvania and the *Ahearn*[37] case in the Eastern District of Texas), the settlement of the silicone gel breast implants litigation in the Northern District of Alabama (involving the *Lindsey* class[38]), the *Ford Bronco II* property damage case in an Alabama state court,[39] the similar litigation involving General Motors pickup trucks,[40] and the polybutylene plumbing case in a Texas state court.[41] In each of these cases, defendants facing mass tort claims have combined with class action plaintiffs' lawyers in efforts to settle the claims of current and future claimants. Some of these proposed settlements have been approved by district courts as fair and reasonable, but have not been reviewed by appellate courts (*Georgine* and *Ahearn*). The proposed settlements have been rejected in the two motor vehicle cases. The breast implants case and other class action filings are pending before trial courts. Appellate review has occurred in only one case (*General Motors*). These legal innovations will be tested over the next few years until authoritative decisions, new procedural rules, or legislative solutions replace conflicting arguments with stable law—innovations which may be a long time coming. The dialogue in this symposium may contribute to a fair and rational resolution of disputed issues.

Collective justice, as this symposium demonstrates, has its distinctive vices as well as its virtues. To the extent that compensating victims becomes a major goal, considerations of fault, responsibility, and deterrence are muted or eliminated. Collective action may solve the "free rider" problem of individualized justice—some litigants benefitting from, but not contributing to, the expensive efforts of another litigant in discovering causation and fault. But collective action creates the new and serious problem of the "kidnapped rider," an individual deprived of any freedom of action by being drawn involuntarily

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36 157 F.R.D. 246 (E.D. Pa. 1994).

37 No. 93-526 (E.D. Tex. Sept. 9, 1993 and Mar. 20 1995).

38 *In re* Silicone Gel Breast Implant Prods. Liab. Litig. (Lindsey v. Dow Corning Corp.), Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

39 *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., No. Civ. A. MDL-991, 1995 WL 222177 (E.D. La. Apr. 12, 1995).

40 *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219, 1995 WL 223209 (3d Cir. Apr. 17, 1995).

41 Beeman v. Shell Oil Co., No. 93-47363 (Tex. Dist. Ct., Harris County Feb. 16, 1995).

into collective litigation.[42] Collective action may also deprive individuals of meaningful control over their own legal claims, pushing them involuntarily into compensation grids and administrative claims-handling processes to whose ministrations they have not consented.[43]

Collective justice also departs from the normal lawyer-client relationship in which the client makes decisions concerning objectives and the client's lawyer makes tactical and procedural decisions. The plaintiff's lawyer in traditional tort litigation is probably more in charge of the case than traditional theory would suggest.[44] But an individual plaintiff represented by a lawyer retained on a contingent-fee basis may discharge the lawyer at will and may decide whether or not to accept a settlement offer. In most class actions, especially those involving large classes of absent persons whose claims are of limited worth or future creation, the lawyers representing the class ("class counsel") are clearly in charge. Class counsel typically pick the class representatives, frame the issues, push or abandon particular claims, and make settlement decisions.[45] Class action law even permits class counsel to submit a settlement to the court that some or all of the class representatives oppose. Class action lawyers, even more than government lawyers who represent an amorphous "public," are their own clients in the sense that their fiduciary responsibilities to class members are what they determine them to be in the absence of court supervision and scrutiny.

Judicial involvement in class action settlements is highly variable and controversial. Court supervision and scrutiny may be present at various stages of a class action and is required at a few stages. In some multidistrict transfer situations, such as the breast implants case, the trial judge participates extensively in the framing of the class action, the designation of class counsel, and the negotiation of the settlement. The active, behind-the-scenes role of some judges in "encouraging" settlement was a principal feature of the Agent Orange and

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42 See Koniak, *supra* note 2.

43 *Compare* Trangsrud, *supra* note 13 (attacking the fairness of aggregative techniques) *with* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) (arguing that aggregative tecbniques lead to fairer treatment of claimants) *and* Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992) (discussing aggregative techniques used in Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990)).

44 *See* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89.

45 For discussion of ethical issues in class action representation, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469 (1994); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

Dalkon Shield cases.[46] In other cases, such as those like *Georgine* in which the proposed class action settlement was filed on the same day as the class action, the judge participates publicly only when formal motions are made to certify the class or to approve the settlement. Facts about judicial participation and role are largely dependent upon what the judges themselves reveal.

Moreover, the provision governing the court's approval of class action settlements offers very little guidance. 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.[47]

This provision contains no standards, and the other provisions of Rule 23 provide only general ones—a "fair" and "reasonable" settlement negotiated by class counsel who have provided "adequate representation" to the entire class, including its absent members. As Judge Schwarzer argues in his afterword,[48] many current problems are related to the generality of these standards. Judicial scrutiny of class action settlements, influenced by judicial approbation of the docket-paring results of settlement, suffers from the absence of a prescribed procedure and detailed standards for considering fairness to absent claimants and adequacy of representation.

This symposium illuminates the important legal and public issues settlement class actions raise. The papers also suggest some answers that judges and rulemakers would be well-advised to consider.

Some Personal Views

As organizer, moderator, and introducer, I have viewed my role as one of asking questions, framing issues, and promoting the vigorous exchange found in this issue of the *Cornell Law Review.* In closing, I would like to add my personal views on some of the major policy issues.

The term "settlement class action" refers to a class action that is desigued to be settled rather than litigated, with the defendant not objecting to certification of the class providing the settlement is approved. Federal Rule of Civil Procedure 23 does not provide for settlement class actions as such. The Rule provides for class actions which meet its many requirements and further provides that "[a] class

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46 *See* SCHUCK, *supra* note 34, at 259-60, 295-96 (discussing the powerful role of Judge Weinstein in the Agent Orange case); RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 336-42 (1991) (discussing the powerful role of Judge Merhige in the Dalkon Shield case).

47 FED. R. CIV. P. 23(e).

48 *See* Schwarzer, *supra* note 11, at 840-43.

action shall not be dismissed or compromised without the approval of the court."[49] It is an open question whether a settlement rather than litigation purpose has the effect of relieving the court of making the findings Rule 23 requires.[50]

Class actions in mass tort cases are different than two other major types of class actions that have influenced the development of class action law and led to judicial attitudes and practices that are inapplicable to mass tort cases: (1) aggregated small claims and (2) public interest suits seeking injunctive relief. The consumer class action, in which a large group of people have claims of small value against a common defendant, is the classic example of the aggregative function of class action procedure. An individual consumer with a small claim will not bring an enforcement action because the claim has little value, and no lawyer will undertake the representation. The class action device, however, allows the pooling of small claims, and if substantive law provides for an attorney's award to a prevailing plaintiff, lawyers will be available to vindicate the rights of the class of consumers. In theory, optimal enforcement of law results.

Due process notice and participation issues are very different for cases involving claimants with small claims than for those involving claimants with claims worth independent action and separate representation. When a million consumers have a ten dollar claim against a common defendant for an illegal business practice, no single claimant has a legal right that is worth individual pursuit. Thus, opting out of the class is neither feasible nor practical. In contrast, opting out of the class is more likely for claimants in mass tort cases who often have valuable claims worthy of independent action. Furthermore, an individual claim worth so little need not receive the same due process protection as a substantive tort claim worth many thousands of dollars. Finally, claimants with small-value claims are dependent upon class counsel—who has recognized the problem, identified some representative plaintiffs, and pursued the aggregative remedy—to a degree that claimants of mass torts do not share.

Public interest litigation seeking injunctive relief, often on federal constitutional grounds, provides yet another paradigm.[51] Where injunctions are appropriate as an extraordinary remedy ordering the future, they inevitably affect the rights of current and future class

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

50 *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219, 1995 WL 223209 (3d Cir. Apr. 17, 1995) (settlement classes are permissible under Rule 23 but must meet the same requirements of certification required of litigation classes).

51 Public interest class actions seeking injunctive relief are discussed in John Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222 (1995), and Koniak, *supra* note 2, at 1089-90 n.205.

members, who will be subject to the same terms governing the affected school, prison, mental institution, or government agency. Rule 23 and surrounding law treat injunction cases separately from other class actions. The class action is a mandatory one, opt-outs are prohibited, published notice satisfies due process, and the arrangements resulting from the decree are subject to the court's continuing jurisdiction, periodic modification, and eventual elimination.

Mass tort cases have very different characteristics than public interest suits seeking injunctive relief. Aggregation in mass tort cases is done for efficiency, not out of necessity; opt-out is required rather than prohibited; and there is usually no mechanism for modification of the amounts awarded or of the procedures to be followed in distributing the fund the defendants have agreed to establish. The tort claimant's right to damages is forever compromised by the class action settlement.

Recent experience with class action settlements in mass tort cases provides notice of danger signals that trial and appellate courts should be alert to in reviewing the adequacy and reasonableness. Cases like *Georgine*,[52] *General Motors*,[53] and *Ford Bronco*[54] teach us that some fact patterns carry a red warning flag that class counsel may not have given the entire class its single-minded, dedicated attention: (1) The fact that the class action is being certified for settlement purposes only and that defendants essentially selected class counsel by choosing to negotiate with them; (2) a class definition that arbitrarily excludes a large group of similarly-situated persons—those who filed claims against the defendants prior to an arbitrary date at or near the time the class action was filed; (3) the existence of side settlements between class counsel and the defendants of large inventories of cases during the period in which class counsel has been negotiating different (and usually less favorable) terms for members of the class; and (4) provisions that permit class counsel to perform conflicting roles in the dispute resolution process handling future claims (filing claims for individual claimants while simultaneously monitoring the overall pro-

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52 The district court's approval of the *Georgine* settlement is awaiting appellate review as of April 1995. A pending appeal in the Third Circuit raises jurisdictional and due process issues. Appellate review of the fairness and reasonableness of the settlement awaits a final order of the district court. For discussion of *Georgine*, see Koniak, *supra* note 2.

53 *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208, 94-1219, 1995 WL 223209 (3d Cir. Apr. 17, 1995) (remanding for reconsideration, under principles stated in the opinion, a settlement of property damage claims of a class of GM pickup owners).

54 *In re* Ford Motor Co. Bronco II Prods. Liab. Litig., No. Civ. A. MDL-991, 1995 WL 222177 (E.D. La. Apr. 12, 1995) (rejecting proposed settlement as unfair, inadequate, and unreasonable where little discovery was performed prior to settlement, proposed settlement did not give fair value to the compromised claims, and class counsel's premature settlement did not involve adequate representation of the plaintiff class).

cess on behalf of the entire class).[55] Happily, the recent Third Circuit decision striking down the proposed property damage settlement involving General Motors pickup trucks suggests that appellate courts are learning these lessons.[56] Skeptical and thorough inquiry of the issues described below, among others, is required at both the trial and appellate level.

1. *Representation Issues*

Class counsel must be a vigorous advocate of the interests of *all* members of the class. It is unlikely that competent, diligent, and loyal representation of the entire class will result when defendants essentially select one or several plaintiffs' lawyers to represent the class by expressing a willingness to negotiate with these lawyers. Adequate representation ordinarily requires representation by lawyers the court designates after extended consideration of the composition of the class and the differing interests of various groups within it. As Professor Coffee states, defendants' ability to select plaintiffs' lawyers in this manner often sets up a "reverse auction" in which defendants seek to identify the plaintiffs' lawyer who will submit the lowest plausible settlement offer on behalf of the plaintiff class.[57] The incentives involved may overwhelm the judgment of otherwise highly ethical lawyers.

An adversary system rests upon the premise that lawyers for a party are selected by that party, not by the opposing party. When a

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55 Several recent class action settlements allow class counsel to monitor and supervise the administration of the claims-handling process the settlement creates and, at the same time, represent individual claimants in presenting cases to the claims administrator. In *Georgine*, for example, class counsel participates in picking the medical experts, arbitrators, and others who will pass on claims, including those handled by class counsel. Arrangements of this kind provide class counsel with information not available to other claimants' lawyers that may benefit those whom class counsel represents. Class counsel's authority as representatives of the class may also consciously or unconsciously influence the deciders in passing on claims. The district court in *Georgine*, 157 F.R.D. 246, 304 (E.D. Pa. 1994), thought appointing additional lawyers as class counsel would solve the problem. A similar arrangement in *Ahearn* was the only aspect of the settlement that the district court did not approve. Ahearn v. Fibreboard Corp., No. 6:93-CV-526 (E.D. Tex. Mar. 30, 1995) (unreported memorandum opinion). I believe a flat rule should bar such an obvious conflict of interest.

56 Judge Becker's thorough and thoughtful opinion in the *General Motors* case provides safeguards that, if followed by trial judges, will limit the abuse of the class action process in mass tort cases. *See* Koniak, *supra* note 2, at 1152-58. The limited review of class action settlements many trial court judges provide suggests that they view settlements primarily in terms of the convenience to the judiciary in getting rid of cases rather than in terms of the interests of those for whom the judicial process is being invoked—class members. Appellate courts, which are in a position to take a more disinterested view, need to redress the balance.

57 John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853 (1995), and John C. Coffee, Jr., WALL ST. J., Sept. 7, 1994, at A15 ("In short, settlement class actions permit defendants to run a reverse auction, seeking the lowest bidder from a large population of plaintiffs' attorneys.").

client is unable to pick a lawyer because of incompetency or indigence, the court selects a lawyer for that party. When a large class of future tort claimants constitutes the plaintiff class, defendants should not determine the representation of the class. Rather, a judicial process that gives careful consideration to the diverse interests within the plaintiff class should make such a determination. This judicial inquiry is essential to ensure adequate representation of all members of the class. It also will aid a court in determining whether the class is too large, unwieldy, or diverse to be certified either for settlement or litigation purposes.

Class action settlements generally involve large tradeoffs in which certain valid legal claims are subordinated to other claims. In the *Georgine* case, for example, a substantial portion of the class (claimants who have pleural markings from asbestos exposure but only limited breathing disability and no malignancy) receive no cash recovery in the likely event that disability or malignancy does not occur.[58] Similarly, some causes of action recognized by state law are eliminated entirely: claims for punitive damages, loss of consortium, fear of getting cancer, etc. Although the compensation process the settlement creates is expected to last several decades, the average awards to claimants with particular injuries are not adjusted for inflation over that period.

These and other circumstances indicate that some groups within the class are being treated less favorably than others. Those class members who have the most serious injuries now or in the very near future receive the bulk of the settlement proceeds; others who have valid and valuable legal claims under governing state tort law receive nothing; and those who will be injured later will receive amounts substantially reduced by inflation.

The question here is not whether these tradeoffs are a reasonable resolution on the part of an Olympian policy maker engaged in allocating the limited assets of an insolvent company. The settlement class action is not a bankruptcy proceeding. Most settlement class actions involve solvent companies that are attempting to stabilize and limit their future tort exposure. Even if judicial authority and federalism permit the choices the settling parties made to bind future claimants, an essential precondition is that future claimants consented to the elimination of their state tort rights by a settlement resulting from a process in which they were adequately represented by class counsel. It is a due process issue, not merely a fairness concern, whether class

58 The pleural claims of current claimants, however, received substantial cash compensation in the inventory settlements that accompanied the negotiation of the *Georgine* class action. *See* Koniak, *supra* note 2, at 1064-65.

counsel adequately represented the class as a whole, and major subgroups within it, in the settlement negotiations.

Adequate representation of a huge class of future tort claimants is possible, if at all, only if the lawyers negotiating for the class are representative of all the major divisions and groups within the class. That can be accomplished in either or both of two ways: First, the trial judge can undertake to designate the lawyers for the class, giving careful consideration to the differing interests of various class members. Second, the trial judge can appoint lawyers for identifiable subclasses to supplement the class counsel who filed the action.

Interests that are not represented in a negotiation are unlikely to receive fair treatment. In the breast implants litigation, Judge Pointer appointed a settlement committee that was broadly representative of the class. The resulting negotiation was a reasonably open, participatory, and reliable process. It is noteworthy, however, that foreign claimants made up the only subgroup that fared badly in the proposed settlement. This subgroup was not represented on the settlement committee. The lesson is that a court-approved settlement committee that is broadly representative of the class should negotiate class action settlements affecting the rights of future tort claimants, or, alternatively, adequate representation should be provided to subclasses by separate designation and representation.

2. *Scope of the Class: Exclusion of Current Claimants from the Class*

Future claimants have special characteristics that make them especially vulnerable: They are absent, invisible, and passive. Because future claimants do not have a substantial current interest in the settlement negotiation, they are very unlikely to take an active role in it even if they are aware they may acquire a future interest. Unlike current clients with matured and asserted substantial claims, they are not visiting a lawyer's office to tell the lawyer of the hardships caused by delays in payment of just claims. Nor are they calling to inquire about the status of their cases. Current clients, who do engage in such activities, have presence, voice, and visibility; and the settlement amounts they receive provide immediate relief to them and a substantial contingent fee for their lawyers.

Future claimants, on the other hand, are an imagined group, an abstraction, at the time a "futures" settlement is negotiated. We know that a substantial number of people will in the future assert claims against the defendants, but their identity is unknown to the settling parties, the court, and often to themselves. Future claimants are more likely to be exploited because they are never present at the negotiating table, and their interests are hypothetical, indefinite, and uncertain.

A class that is defined to include only future claimants has an odd shape, which itself is a suspicious circumstance. In a number of recent settlement class actions, such as the *Georgine* and *Ahearn* cases in the asbestos field[59] and the *Beeman* case involving owners of homes with polybutylene plumbing systems,[60] the class is limited to future claimants, excluding all those who have filed a claim prior to or near the date on which the class action was filed. The effect of this exclusion is to carve out of the class all the clients of plaintiffs' lawyers in the particular field for whom lawsuits had been filed on the specified date. This is a suspicious circumstance because the class definition does not conform to the reasons for creating it. The exclusion of current claimants is neither inevitable nor necessary. A number of recent mass tort class action settlements—including those involving the Dalkon Shield intrauterine device,[61] the breast implants case,[62] and the Bjork-Shiley heart valve settlement[63]—do not carve current claimants out of the class by means of side settlements on different terms.

The purpose and justification of nonmandatory opt-out class actions are to resolve claims that present common questions of law and fact in a manner that is superior, more efficient, and fairer than individual lawsuits can provide. Yet, the claims of individuals who have already filed suit raise issues of law and fact identical to those who have not done so.[64] The settling parties should provide a strong justification for any arbitrary exclusion of a large number of people from a class. The reason the parties offer should be consistent with the purposes of creating the class: Resolution of numerous claims involving common questions of law and fact that can be handled better and more fairly in a single action.

Class counsel invariably claim that the proposed settlement is in the best interests of future claimants. They also argue that the current tort system, with its delays, costs, and erratic treatment of individual claimants, is vastly inferior to the expedition, uniformity, and certainty of the methods of administrative resolution that the class action settle-

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59 *See* Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994); Ahearn v. Fibreboard Corp., No. 93-526 (E.D. Tex. Sept. 9, 1993 and Mar. 20, 1995).

60 Beeman v. Shell Oil, Co., No. 93-47363 (Tex. Dist. Ct., Harris County Feb. 16, 1995).

61 *In re* A.H. Robins, Co., 880 F.2d 709 (4th Cir. 1989) grew out of the bankruptcy proceeding involving the manufacturer of the Dalkon Shield. It was a (b)(1) class action involving an insurance fund of Robins's product liability insurer; a limited back-end opt-out was provided to some future claimants. For discussion of *A.H. Robins*, see Koniak, *supra* note 2, at 1104-06.

62 *See In re* Silicone Gel Breast Implant Prods. Liab. Litig. (Lindsey v. Dow Corning Corp.), Nos. CV92-P-10000-S, CV94-P-11558-S, MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

63 Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio), *appeal dismissed*, No. 92-3973 (6th Cir.1993).

64 *See* Koniak, *supra* note 2, at 1057-58.

ment provides. Since the claims of current claimants raise precisely the same questions of fact and law that future claimants will present, the "superior" benefits of the class settlement's policies and procedures should be offered to current claimants. Current claimants, of course, are the group that is most likely to receive notice of the class action. Published notices will get their attention, and their lawyers will likely give them specific notice. Equally important, the lawyers of current claimants are in a good position to advise them in light of individual circumstances whether remaining in the class or opting out would best serve their interests. If the class action settlement has the benefits claimed for it—a fairer, cheaper, earlier, and more uniform resolution of claims—current as well as future claimants should have the opportunity to gain these benefits.

The failure to include those who have already filed suit suggests that reasons other than judicial economy and the efficient handling of common questions of law and fact motivated the shape of the class. The explanation is found in a circumstance that accompanies settlement classes composed only of future claimants: Side settlements of the current inventories of class counsel and of other plaintiffs' lawyers on terms different and more favorable than those to be provided to members of the class.

Why would defendants be willing to take this approach? Defendants' potential liability to a large and uncertain number of future claimants poses a much greater threat to defendants' interests than the provision of favorable settlements in the smaller group of currently pending cases. Nor can defendants make side settlements with class counsel and not offer the same terms to the clients of other plaintiffs' lawyers: The differential treatment given to class counsel's current claimants combined with their negotiation of the rights of future claimants would be too much to swallow. These circumstances suggest the reasons for excluding current claimants from the class: It is a way of rewarding class counsel and other cooperative plaintiffs' lawyers for their help in supporting a settlement that does not reflect the full value of the tort claims of the class of future claimants.

Current claimants are carved out of the class for reasons of defendants' strategy that inevitably create troubling conflicts of interest on the part of class counsel and other plaintiffs' lawyers. The strategic explanation is that defendants were willing to offer favorable terms to current claimants because they hoped to deter plaintiffs' lawyers from opposing the class action settlement. The large cash pay outs to current clients of plaintiffs' lawyers divides the plaintiffs' bar and makes a global settlement easier to reach. The dark side of this strategy is that class counsel—usually plaintiffs' lawyers who have the largest inventories of pending cases—are receiving favorable terms for current cli-

ents in exchange for a cooperative attitude in negotiating arrangements for future claimants who are mostly the prospective clients of other lawyers. The result is that class counsel settles current claims against the same defendants on different and more favorable terms than the settlements provide to future claimants who constitute the class—a troubling conflict of interest.

A sound general principle is that individuals who have similar claims against the same defendants should be treated similarly. The fact that some claimants have hired a lawyer and filed a claim, while others have not, does not justify disposing of their claims on a different basis.[65] The exclusion of current claimants from a settlement class action, carving them out for separate treatment, is inconsistent with the principles that govern the definition of the class (superior and more efficient resolution of cases involving common questions of fact and law) and is a reliable indicator that the interests of the settling parties, rather than those of tort victims, have influenced or determined the definition of the class and the terms of the settlement.

One means of assuring that current and future claimants receive even-handed treatment, as the Second Circuit stated in the *Ivy* case,[66] is the application of the same substantive and procedural dispute resolution provisions to both groups. The breast implants settlement takes this course. However, the *Georgine* settlement excludes the current clients of class counsel and of other plaintiffs' lawyers who were willing to accept the defendants' restrictions on future representation.[67] It is noteworthy that the 1994 amendment to the Bankruptcy Act, authorizing a bankruptcy court to consider and preclude future tort claims against the bankrupt entity, contains two restrictions: Future claimants must be treated in a manner similar to that of current claimants, and there must be assurance that funds will remain to pay their claims.[68] The same policies should be followed when a solvent defendant seeks to terminate and cap future liability to those who

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65 This point is discussed in Koniak, *supra* note 2, at 1075-78.

66 *In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

67 The restrictions on the future representation of asbestos victims by plaintiffs' lawyers in *Georgine*'s side settlements present a troublesome ethical problem. *See* Koniak, *supra* note 2, 1128-37.

68 11 U.S.C. § 524(g), (h) (1994), as amended by § 111 of the Bankruptcy Reform Act of 1994. Section (g) establishes a procedure in a chapter 11 reorganization proceeding for dealing with future personal injury claims against the debtor based on exposure to asbestos-containing products. The procedure involves the establishment of a trust to pay the future claims, coupled with an injunction to prevent future claimants from suing the debtor. In order for the trust arrangements to bind future claimants, § 111 requires that the trust operate in a structure and manner necessary to give reasonable assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner.

have been injured by or exposed to the defendant's product or activities.

3. *"Side Settlements" with Current Claimants Who Are Excluded from the Class*

Simultaneously negotiated side settlements are highly suspect because they may constitute an impermissible representation of conflicting interests resulting in inadequate representation of the class. The side settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class. The question is whether there is a relationship or tie between the terms of the side settlements and those in the class action settlement. Was the settlement posture of defendants one of offering to provide generous cash settlements to class counsel's current clients in return for different, and possibly less favorable, settlement terms with respect to the class of future claimants? In responding to defendants' settlement posture, did class counsel subordinate the interests of the class to those of current clients and themselves? If so, the class was provided inadequate representation during the vital negotiation period.

The burden is on the settling parties to establish that class counsel provided fully adequate representation to the class during the negotiation of the settlement. Because court approval substitutes for client consent under concurrent conflicts rules, and absent class members are deemed to have consented if class counsel provided adequate representation, inadequate representation is a due process violation and not merely a matter of legal ethics. No showing of corrupt intent is necessary.[69] Class counsel must demonstrate that a desire to obtain cash settlements for current clients on favorable terms or an interest in the substantial contingent fees from the side settlements did not materially affect their representation of future claimants.

Courts can and should make detailed inquiries about side settlements in settlement class actions involving future claimants. Cases in which defendants make direct payments to lawyers representing the class in exchange for class settlements are nonexistent or rare; the incentives defendants proffer to plaintiffs' lawyers always take the indirect form of attorneys' fee awards in the class action, side settlements of other cases, or both. If the court ignores indirect incentives, it will be ignoring what courts and scholars have repeatedly said are a great danger in class actions generally and especially in settlement class ac-

69 Collusion is shown by a review of the outcome of the negotiation. *See In re* Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981), *aff'd*, 659 F.2d 1322 (5th Cir. 1981) (collusion established by scrutiny of the settlement terms).

tions, which are maintained or certified solely for purposes of settlement.

Inquiry must be made concerning the settlement posture of defendants who were faced with a number of filed claims and a potentially larger and more expensive group of future claims. If those defendants implicitly or explicitly tied their willingness to settle class counsel's current cases to counsel's agreement to a class settlement providing different and less favorable terms for future claimants, class counsel were engaged in a simultaneous representation of conflicting interests. If so, the class received inadequate representation.

A lawyer's fundamental duty of loyalty stems from agency law and has been part of the common law governing lawyers for centuries. This law provides that a lawyer may not undertake the representation of one client that poses a substantial threat of interfering with a committed, diligent representation of another current client. State and federal courts have applied this general principle in many disqualification decisions, and in 1983, the American Bar Association's Model Rules of Professional Conduct restated it in Rule 1.7(b):[70] A lawyer, in the absence of *both* reasonableness and client consent, is prohibited from representing two clients (or groups of clients) who have separate claims against the same defendant when the defendant is offering terms to one client that adversely affect the other client. The facts in a number of recent settlement class actions make it clear that the two sets of deals are interconnected. If the terms of the two deals are different, the court should presume that representation of the class was inadequate.

The question under the first branch of Model Rule 1.7(b) is whether the defendants' settlement posture (*i.e.*, their willingness to settle the claims of current clients on favorable terms providing the same lawyers agree to terms for the class of future claimants that are different or less favorable) might "adversely affect" or "materially limit" the lawyers' representation of either client. The test is an objective one and does not turn on the subjective good faith of the lawyers. An impermissible conflict in concurrent representation may arise out

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70 A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1992).

of the settlement position or strategy of a common defendant.[71] It is unreasonable for the lawyer to proceed, even if the consent requirement of the rule has been met, if the situation is one in which his representation of either client will be materially limited.

The second requirement of concurrent representation of differing interests—client consent after full disclosure—cannot be literally applied to class action cases. Lawyers for the class should ordinarily consult the representative plaintiffs, but ultimately the consent requirement must be met by court scrutiny of the situation. The court acts as guardian for members of the class. The first requirement, however, must be met in all cases, wholly apart from client consent. Model Rule 1.7(b) is a "consent-plus" rule: The reasonableness requirement must be met even if the client consents or is incapable of consent (arguably the situation involved in class actions limited to future claimants).

The concurrent representation problem is acute in class actions in which large inventories of current cases are settled while putative class counsel is negotiating at the same time and with the same defendants a settlement binding only on future claimants. Will future claimants receive the same terms as current claimants? If not, why not? Was counsel's judgment in representing one group of clients (the class of future claimants) materially limited because of the lawyer's desire to serve the interests of current clients? Were the lawyer's own interests involved because the inventory settlements involved large contingent fees? Even if the class representatives have been informed about the concurrent representation of current clients and of the side settlements made with current claimants, and had consented to the joint representation after being fully informed, it would be unreasonable for class counsel to proceed if defendants' settlement posture tied payment of current claims to settlement terms for the future claimants that were less favorable. In *Fiandaca v. Cunningham*,[72] for example, the court held that it was "inconceivable" that a lawyer could represent a class of female prisoners whose interests were potentially adverse to those of another class, a conflict created by the terms of the defendant's settlement offer.

Lawyers assuming the representation of future claimants owe fiduciary duties to those persons that correspond to the duties a retained lawyer owes to a current client. A technical lawyer-client relationship does not exist until and unless the court appoints class

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71 The Comment to Model Rule 1.7 states explicitly that "[a]n impermissible conflict may exist by reason of . . . *incompatibility in positions in relation to an opposing party* or *the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.*" MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 Comment (1992) (emphasis added).

72 827 F.2d 825 (1st Cir. 1987).

counsel as such. However, the cases all state that lawyers who appoint themselves to negotiate or litigate for a class are required to be loyal, competent, and diligent in advancing the interests of all class members because they held themselves out as acting on their behalf.[73] The putative clients cannot be bound by what lawyers they have not retained have done in purporting to represent them. However, the lawyers are bound by actions taken on behalf of the future claimants. If class counsel fails to give them undivided loyalty, reasonable care, and diligent representation during the negotiation period, they are (or should be) liable to the future claimants in malpractice for harm caused, disqualified in a court proceeding, and subject to professional discipline. The absence of a formal lawyer-client relationship until and unless a formal appointment takes place is irrelevant.

4. *Due Process Notice Issues Relating to Future Claimants*

A settlement cannot bind a tort claimant unless that person has consented to it. A class action purports to bind members of a class of tort victims on the theory that the required opt-out during the notice period provides them with a real opportunity to choose whether or not to participate in the class. "Unknown" but currently injured class members—those who know they are class members but whose names and addresses are not known to the settling parties—may be considered to have an effective up-front opt-out opportunity. Moreover, the monitoring efforts of current claimants who do receive notice and participate in the proceeding will benefit similarly situated current claimants who do not participate. But "unknowing" members of the class—those who do not know that they have been exposed to defendants' products or that they have or will suffer an injury in the future—cannot be given notice. They will not recognize that any notice applies to them, whatever the manner by which it is broadcast. Unknowing future claimants have neither an effective opportunity to opt out during the notice period nor anyone who can embody their interests in the settlement negotiation or its review by the court.

Those who do not have a present awareness of injury or who have no current legal claim have a due process objection to a class action that eliminates their tort rights under governing state law. It is difficult or impossible to give this category of future claimants the required notice of the class action and opportunity to opt out that the

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73 *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978) (analyzing the many situations in which a lawyer owes duties of loyalty and confidentiality to persons with whom no formal lawyer-client relationship has been established); Togstad v. Vesely, 291 N.W.2d 686 (Minn. 1980) (duty of care owed to person who had consulted lawyer to determine whether she and her husband had a legal claim against a third person, even though lawyer declined to undertake the matter).

due process clauses of state and federal constitutions require.[74] Future claimants of this sort will not be attentive to published notices. Even if they see or read them, the lack of a specific injury denies them the opportunity to make an informed opt-out choice. Reasonable notice to absent members of the class is also part of the adequacy of representation that class counsel owe their clients. A class action settlement that treats a substantial portion of the class so unfairly should be rejected under Rule 23(e) as unreasonable and unfair.

Trial courts have approved a number of recent mass tort class actions including both current and future claimants because they provided meaningful back-end opt-outs to future claimants. That is, an individual, after pursuing the claims-handling process created by the settlement, may choose to reject its result, opt out of the class, and pursue judicial remedies. The future claimant makes this decision possessing substantial information about the extent of the loss and about the relief, if any, provided by the dispute-resolution machinery the settlement created. The cases involving the Dalkon Shield intrauterine device, the recent heart valve case (*Bowling v. Pfizer*) and the recent breast implants case (*Lindsey v. Dow Corning*), have included the back-end opt-out approach and have been much praised for this feature. Providing class members with a back-end opt-out goes a long way toward meeting the due process requirements of notice and consent and is fairer to future claimants.

CONCLUSION

Innovation and creativity have marked the rapid development of the settlement class action as a means of handling mass torts. But the process of development has suffered from lawlessness—ad hoc arrangements that rest on little or no precedent, were not anticipated by the drafters of Rule 23, and stretch judicial authority and concepts of federalism beyond their traditional limits. This has been justified in the name of necessity—case disposition as an end that justifies extraordinary means. The recent *General Motors* decision suggests that a regime of law with stated principles and procedures to guide trial court discretion may gradually replace the chaos and lawlessness that now characterize the settlement of mass tort class actions. The development of such principles by judicial decision, court rule, or statute is much needed.

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74 *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (in class actions brought for money damages, and not involving administration of a res, the distribution of an estate or trust, or the handling of a bankruptcy, due process requires that absent class members receive reasonable notice, the opportunity to opt out and adequate representation, at least when the class action form is used as a matter of efficiency). *See* Koniak, *supra* note 2, at 1087; Miller & Crump, *supra* note 28, at 16-38.