They Can’t Do That Can They? Tort Reform via Rule 23

Richard L. Marcus

Recommended Citation
Richard L. Marcus, They Can’t Do That Can They? Tort Reform via Rule 23, 80 Cornell L. Rev. 858 (1995)
Available at: http://scholarship.law.cornell.edu/clr/vol80/iss4/5
THEY CAN'T DO THAT, CAN THEY? TORT REFORM VIA RULE 23

Richard L. Marcus†

In 1988 the New York Times reported that class actions appeared to be "dying." The article explained that, since the heyday of the class action in the 1970s, "use of the courts as a vehicle of social change has subsided." As a consequence, the Reporter of the Advisory Committee on the Civil Rules explained, "class actions had their day in the sun and kind of petered out."3

Careful readers of the Times must therefore have been surprised by the recent resurgence of class actions into the headlines, a resurgence occasioned by the massive settlements of two personal injury cases, one involving asbestos victims and the other involving recipients of breast implants. Whether or not the asbestos future claims and silicone gel class action settlements may properly be viewed as public law litigation, the attention focused on their settlements certainly

† Professor of Law, Hastings College of the Law, University of California. I should mention that during the Summer of 1990 I served as a consultant to the Center for Claims Resolution with regard to developments in asbestos litigation occurring at that time. Although the CCR had no role in the preparation of this Article, I am indebted to a number of people for help with it. Mike Green carefully reviewed a draft and provided extensive and extremely helpful comments and criticisms. Tom Rowe and David Jung also read and commented on a draft, and participants in a work-in-progress session at Hastings made a number of helpful suggestions. In addition, Jennifer Prentiss, a member of the Hastings class of 1996, provided valuable research assistance. Although I am grateful for all of their assistance, I did not take all of the suggestions of any of these people. I am therefore solely responsible for errors that remain despite their efforts to help.

2 Id.
3 Id. (quoting Paul D. Carrington).
4 The breast implant settlement was announced by the Times in a front-page story that characterized it as "the largest settlement ever negotiated in a class-action lawsuit." Gina Kolata, 3 Companies in Landmark Accord on Lawsuits Over Breast Implants, N.Y. TIMES, Mar. 24, 1994, at A1. The story explained that it was "at least twice as large as the largest previous class-action agreement, which involved workers with asbestos." Id. at B10. The Times initially announced the asbestos agreement the day after it was filed in a story suggesting that class actions "may serve as a model for averting tens of thousands of personal-injury lawsuits involving asbestos." Michael deCourcy Hinds, Asbestos Settlement is Proposed, N.Y. TIMES, Jan. 16, 1993, at 85. The paper continued to report the passage of that settlement through the settlement approval process. See Asbestos Settlement Cleared, N.Y. TIMES, Aug. 18, 1994, at D5; A Hearing on Asbestos Settlement, N.Y. TIMES, Feb. 23, 1994, at D3.
should give the general public the impression that the class action is not dead. Indeed, a significant proportion of the public may have to decide whether to opt out of the alternative claims processes that these settlements create if they wish to preserve their right to sue in court. This fact makes it evident that the class action has landed like a 600-pound gorilla in the arena of tort reform, where there has of late been increasing interest in replacing tort litigation with scheduled benefits like those provided in these class action settlements. One reaction to using class actions to accomplish this reform might be: "They can't do that, can they?"

This Article reflects on that question and answers it with a qualified yes. The starting point is an appreciation of the strands of substantive tort reform that have characterized federal judges’ reactions to mass tort litigation, sketched in Part I. Part II connects these strands to features of three recently-confected class action settlement packages, for these agreements seem to respond to the criticisms judges have levelled at tort law in mass tort litigation. Turning to the question whether Rule 23 can be employed to effectuate tort reform of this sort, Part III considers three grounds for categorically rejecting such power—Erie's limitations on the law-making power of the federal courts, the problem of unmatured claims, and the challenge of giving notice. It concludes that these serious obstacles probably do not absolutely preclude an undertaking of this sort, provided there is a genuine opportunity to opt out. But that conclusion says nothing about when this power should be exercised, or about the actual contours of such a class action. Part IV therefore explores other serious obstacles to using this authority and identifies a number of grounds for great uneasiness with what was actually done in the recent settlements. Nevertheless, Part V expresses guarded confidence about the ultimate consequences of the recent settlements. This forgiving attitude is based on the fact that the recent settlements deal with exceptional litigation problems, that they may offer a good deal to some claimants, and that they afford an opportunity for experimentation in tort reform.

I

The Substantive Undercurrent in Federal Mass Tort Litigation

Almost from the beginning, we have known that the distinction between substance and procedure can be as elusive as it is critical.6

---

6 "'Substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different
But at least some heartland should be solid; ever since *Erie* it has been clear as a statutory, and probably constitutional, matter that federal judges cannot develop their own preferred tort law regime or refuse to apply state law because they feel it would lead to unwise results. In *Erie* itself, there was thus no room to argue on remand from the Supreme Court's decision that the district court could have refused to apply Pennsylvania's rule limiting the duty of care to "trespassers" on the ground that it represented an archaic attitude. Nevertheless, as Justice Reed observed in his concurring opinion in *Erie*, "no one doubts federal power over procedure." The problems since *Erie* have therefore dealt with the nether area between substance and procedure, and in this area the Federal Rules of Civil Procedure could control matters to which they apply. Because of the scope and importance of the procedural tools authorized by those rules (including the class action), one must proceed with great caution in declaring that certain maneuvers go beyond the pale.

Nevertheless, one need not read very far between the lines to find a substantive impulse underlying the federal courts' handling of mass tort litigation, and, in particular, class action innovations developed to cope with it. In some ways this development may have been inevitable, since class actions offered a theoretical model for solving some vexing problems of substantive tort law. Other developments in tort law, such as the idea that a court could order "medical monitoring" of persons exposed to a risk, seemed to invite class action treatment because the monitoring could easily be contemplated en masse. But more aggressive judges sought to move beyond such facilitation.

Early on the class action figured as an important cog in such tort reform efforts. The first major instance was in 1981, when Judge Spencer Williams certified a nationwide punitive damages class action in *Dalkon Shield* litigation. Having presided over a jury trial that took nine weeks, the judge convened a series of meetings to "discuss

---

7 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
8 *Id.* at 92 (Reed, J., concurring).
methods for achieving economies of time and expense in the trial of these actions," surely a laudable goal well within the procedural realm. But he also ordered briefing on class certification even though no party favored that treatment, and certified a mandatory nationwide class on punitive damages issues.

Judge Williams justified this action with a number of forceful arguments about the "unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress." Because there is no "right" to punitive damages, he reasoned, in mass tort situations the prospect that the till will be emptied by punitive awards makes them particularly pernicious. Since "[t]he purpose of punitive damages is to sting, not kill, a defendant," he concluded that "[c]ommon sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."

There is much to be said for Judge Williams's concerns. The question whether repeated punitive damage awards should be allowed in product liability cases is highly controversial. If there is a significant risk that a defendant's assets would be exhausted by punitive damages "windfalls" for early plaintiffs, leaving later plaintiffs without recourse, action surely seems warranted. But the problem for a federal court confronting this risk is the same as the core problem in *Erie*—whether to displace this rule of state law because the rule has bad effects. Judge Williams invoked the due process clause as one justification for his action, but he cited no due process authority and his argument sounded more like common lawmaking than constitutional reasoning. The federal constitutional issues remain beclouded today, and state courts have reportedly begun to rely on arguments.

---

13 Id. at 1191.
14 Id. A.H. Robins Co., the main defendant, decided to support the judge's class certification order on appeal, but had not been converted to the wisdom of this course until after the judge acted.
16 Id. at 899, 900.
18 However, Judge Williams may have seriously underestimated the amount of money available to pay damages. See infra text accompanying note 110.
20 See TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (upholding punitive damages award 526 times as large as compensatory award in face of substantive due process argument); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (upholding punitive award four times as large as compensatory award while noting that this "may be close to the line"); cf. Honda Motor Co. v. Oberg, 114 S. Ct. 2391 (1994) (invalidating Oregon's prohibition on postverdict review of punitive award by court on due process grounds). The Court has granted certiorari to consider due process limitations on
like Judge Williams's to limit punitive damages claims as a matter of state law.\textsuperscript{21}

Judge Williams's effort to use Rule 23 to preempt "unwise" state law was problematic but prophetic. For a variety of reasons, the Ninth Circuit reversed the class certification on the ground that the judge had overreached.\textsuperscript{22} In response, Judge Williams wrote an article lamenting the possible demise of the mass tort class action and forecasting that "until Congress addresses these questions by enacting comprehensive federal products liability law . . . the inequities and shortcomings of the present system require that we judges work in an innovative fashion."\textsuperscript{23}

Whether it was a prescription or merely a prediction, Judge Williams's forecast proved true. Asbestos litigation has been the prime area in which federal judges have used innovation to achieve essentially substantive goals. A frontal assault on state law occurred in 1985, albeit not in a class action.\textsuperscript{24} Judge Rubin urged the Fifth Circuit to adopt federal common law principles in asbestos cases to guard against two evils. The first was the risk cited by Judge Williams in \textit{Dalkon Shield}—that repeated awards of punitive damages would not only add no deterrent effect to the enormous compensatory liability borne by asbestos producers but would also create a risk that later plaintiffs would receive nothing. Moreover, added Judge Rubin, federal common law would correct "the inequity resulting from the fact that some states do not permit such awards."\textsuperscript{25}

The second evil, according to Judge Rubin, resulted from the willingness of some states to recognize claims for those exposed to asbestos, despite the absence of current disabling symptoms: Those who exhibited signs of exposure to asbestos such as pleural thickening could sue immediately for the risk of developing worse conditions even though they might never suffer a more serious condition. In Judge Rubin's view, this sort of suit would further deplete the assets available to pay those who actually developed serious conditions.\textsuperscript{26}

\begin{footnotesize}
\begin{enumerate}
\item Sheila L. Birnbaum \& J. Russell Jackson, \textit{Since TXO, State Courts are Relying on Grounds Other Than Federal Due Process to Limit or Modify Punitive Damages Schemes}, Nat'L L.J., Mar. 14, 1994, at B4 ("State courts are relying on grounds other than federal due process to limit or modify their existing punitive damages schemes.").
\item Spencer Williams, \textit{Mass Tort Class Actions: Going, Going, Gone?}, 98 F.R.D. 323, 325 (1982).
\item Jackson v. Johns-Manville Corp., 750 F.2d 1314 (5th Cir. 1985). The case was filed as a class action but was not certified as one.
\item \textit{Id.} at 1332 (Rubin, J., concurring).
\item Judge Rubin stated:
\end{enumerate}
\end{footnotesize}
Like Judge Williams's concerns about punitive damages, Judge Rubin's doubts about the wisdom of allowing "risk of cancer" claims have much to commend them. Perhaps juries are too prone to credit the risk of catastrophic events such as the development of cancer. More significantly, making pleural thickening actionable might start the statute of limitations running and preclude a later suit for a more serious condition if one should actually develop, although state law could avoid this result.27 Thus, such a regime might not only confer a "windfall" on those who never suffer harm but also deny or minimize a recovery for those who ultimately develop serious conditions. Despite these arguments, the Fifth Circuit ruled en banc that the requisites for promulgating federal common law were not present.28

Ironically, because many cases were filed in federal court or removed, much of the law on asbestos personal injury claims has been made by federal courts.29 Under Erie, however, these courts were not free to fashion law as they saw fit, and federal judges continued to grind their teeth about state law in asbestos cases. In 1986, the Third Circuit found it necessary to overturn a mandatory class action in a suit regarding the cost of removing asbestos from schools, although the case did continue as an opt-out class action.30 Citing "an unparal-

---

27 In various states, courts have found that the later filing of a suit for cancer is not barred by an earlier recovery for asbestosis, in part to avoid the conundrum that would otherwise exist for plaintiffs. See Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 519-22 (5th Cir. 1984) (applying Mississippi law); Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 520-21 (Fla. App. 1985). In settled cases, however, the shift away from the single judgment rule may not be significant; a release will accomplish the same thing. For example, in approving the Philadelphia future claims asbestos class action settlement, the judge noted that in over 90% of the cases settled by the participating defendants, the plaintiffs gave "'full' releases, whereby the claimant releases all claims for any future asbestos-related injury, including cancer." Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 284 (E.D. Pa. 1994).

28 See 750 F.2d at 1323-27. For an argument favoring the use of federal common law, see Georgene M. Vairo, Multi-Tort Cases: Cause for More Darkness on the Subject, or A New Role for Federal Common Law, 54 FORDHAM L. REV. 167 (1985). Defendants were not the only ones to ask the federal courts to develop federal common law in asbestos litigation. See Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480, 1486 (11th Cir. 1985) (refusing to adopt federal common law rule of rebuttable presumption of exposure, as requested by plaintiff).

29 I am indebted to Mike Green for this point.

leled situation in American tort law," the court lambasted the aura of the gaming table found in "uneven, inconsistent and unjust awards" which flowed in part from the presence of suits for pleural thickening. The court foresaw no real prospect that state courts or legislatures would meaningfully address these problems. Instead, they would probably act in "a parochial and near-sighted manner" because any state attempting to "impose some equitable form of apportionment to claims presently pending and to those inevitably arising in the future" would be frustrated since other states would not be so enlightened. The court explained that "[a] forum wishing to take the long-range view might find that its efforts were not only ineffective but unfair to its citizenry because claimants in the other states could drain off all the assets available for satisfaction of claims."

In the Summer of 1990, similar concerns about the long-term financial viability of defendants in asbestos litigation prompted several judges to initiate possible class action proceedings to solve the asbestos problem. After meeting together, this ad hoc group divided up the asbestos world in hopes of averting more bankruptcies. Ultimately, the effort was scotched by the Sixth Circuit, which held that these judges did not have jurisdiction to do what they were doing.

Substantive considerations came to the fore in 1991 in the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1990. After surveying the difficulties wrought by asbestos litigation and noting that "this litigation impasse cannot be broken except by aggregate or class proceedings," the Committee recommended that Congress create "a na-

---

31 Id. at 1000.
32 Id. at 1001. The court quoted the lament of a Philadelphia state court judge:
Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure.

Id. (quoting The Rand Corp., Asbestos in the Court (1985)).
33 789 F.2d at 1001.
34 Id.
35 See Stephen Labaton, 10 Federal Judges Agree on Plan to Consolidate Asbestos Lawsuits, N.Y. Times, Aug. 11, 1990, at 1 (describing "unusual agreement [reached after] a rare private meeting [of judges that] would bring about a way for compensating more than 100,000 asbestos victims that is more uniform, less costly and quicker than the present way of adjudicating cases").
36 In re Allied-Signal Corp., 915 F.2d 190, 191 (6th Cir. 1990) ("This panel acknowledges and strongly reaffirms this basic principle of limited jurisdiction and is unable to find any congressional authority for an 'ad hoc national coordinating committee' to issue orders as an Article III court.").
tional system for resolving asbestos claims which at the very least permits consolidating all asbestos claims in a single forum.” It urged that such a scheme be employed to “ensure uniform consistent recovery to claimants” and that special attention be given to areas of tort law such as punitive damages and development of recovery tables to determine levels of compensation. The Committee noted that some judges had created “inactive dockets” that permitted suits to be filed at the first sign of injury, but held inactive until the onset of disability, if that occurred. The Committee also suggested that Congress make provision for dealing with disease progression. As a fallback in case this “ultimate solution” was not adopted, the Committee recommended that Congress expressly authorize class actions or collective trials in asbestos cases. Failing such measures, the Committee foresaw the bankruptcy of all or most available defendants.

It is unclear whether there was a genuine hope that Congress would act, but that surely did not happen, and the federal judiciary did not wait long for a legislative solution. Eight judges with large asbestos caseloads asked the Judicial Panel on Multidistrict Litigation to transfer all federal asbestos personal injury cases to a single judge, or to otherwise use its transfer powers to combine the cases. The Panel, despite having already refused five previous transfer requests, decided that the magnitude of the litigation had reached a point that justified transfer, and it therefore ordered the transfer of some 26,000 cases. It also endorsed “a new, streamlined approach,” mentioning the risk of further bankruptcies and the threat of insufficient funds to compensate all injured parties due, in part, to punitive damage.

Id. at 30.
Id.
Id. at 32-33.
Id. at 34.
Id. at 25.
Id. at 34.
Id. at 3.
Id. at 36. One member of the Committee, Judge Thomas F. Hogan, dissented from this part of the Report. See id. at 41-43.

The Report stated that:

The committee believes it to be inevitable that, unless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources for payment of these claims will be exhausted in a few years.

Id. at 27.

Id. at 417-18. The Panel explained that only the first refusal to transfer in 1977 offered detailed analysis of the issues presented, such as unanimous opposition by the parties, the advanced stage of some of the actions, and the importance of individual questions. The later refusals, in 1980, 1986, and 1987, were more limited in their analysis.

Id. at 418.
awards. Overall, the Panel’s goal was to create a single comprehensive direction for this litigation.

What emerges from this survey is a picture of federal mass tort litigation plagued by a number of pressure points that most properly are labelled “substantive”—the availability of punitive damages, the influx of present claims for the threat of suffering serious harms in the future, the complications caused by proof regarding causation, and the risk of ever-increasing bankruptcies. What also emerges is a picture of federal judges convinced that the states were immobilized in dealing with these issues. Whether or not these circumstances resulted from a “failure of political will,” that impasse is likely to continue. What was needed was a method to solve these problems. Enter Rule 23.

II

CLASS ACTIONS BREAK THE GRIDLOCK

As even the general press has divined, the recent future claims class action settlements seem ideally suited to solve the substantive problems which have plagued the federal courts in mass tort litigation. Indeed, that is one of the themes of those who confected the settlements. Perhaps Rule 23 can serve as the Final Solution to the problem of mass torts. There is no precise formula for this solution, however, and a number of the variables might be modified without upsetting the overall scheme. Accordingly, it is worthwhile to survey the features of the recent experiments to see their tort reform aspects.

_Georgine v. Amchem Products, Inc._ was a package deal from the outset. It was filed as a class action on January 15, 1993 with a pre-arranged and extremely detailed settlement agreement. The deal itself seems to have emerged in part from meetings sponsored by the

---

50 _Id._ at 422.

51 _Cf._ Linda Mullenix, _Federalizing Choice of Law for Mass-Tort Litigation_, 70 TEX. L. REV. 1623, 1630 (1992) (asserting that the American Law Institute’s Complex Litigation Project suffered from a “failure of political will” in its handling of choice of law in mass tort cases); _see also_ Linda Mullenix, _Complex Litigation and Article III Jurisdiction_, 59 FORDHAM L. REV. 169, 197 (1990) (arguing that expansion of federal subject matter jurisdiction to accommodate mass torts is insufficient to accomplish the desired objective unless “accompanied by a substantive tort law provision or a federal common law of mass torts”). Professor Mullenix explained:

Ultimately, the problem is not a theoretical one at all: it is political. Stated simply, the reformers do not wish to pay the price of true complex litigation reform, which is to federalize both the problem and the solution. The reformers are willing to pay ritual lip service to the federal nature of the problem . . . but are not willing to commit to a federalized substantive-law solution to this problem.

_Id._ at 222.

Federal Judicial Center. Pursuant to the deal, the class was defined to include all persons exposed in the workplace to asbestos products of any of the twenty asbestos producers who are members of the Center for Claims Resolution (CCR), an organization these defendants formed to coordinate litigation of asbestos cases. The class definition obligingly excluded all persons who had lawsuits pending as of the date on which Georgine was filed, but the case was designed to bind all other potential workplace claimants. From the perspective of these defendants, the objective was clear—to put an end to their involvement in asbestos litigation by cutting off new filings and obtaining a discharge of all claims in return for a structured payment scheme.

The class action accomplishes this result by shunting all future claimants into a claim review process managed directly by the CCR. This process, in turn, was modeled on its experience in handling thousands of litigated cases over the years of the CCR’s existence. In order to qualify for compensation, a claimant has to show a compensable medical condition and occupational exposure to asbestos products of a member of the CCR. This simplified proof process would streamline the causation problem and jettison a number of defense issues that formerly consumed a great deal of trial time.

The stipulated settlement agreement spells out very specific medical criteria for qualification. Those who do not satisfy these criteria—most notably persons who might have claims for pleural

---

53 Id. at 264.
54 The CCR’s stated objective with regard to these claims was to settle them within five years. See Stipulation for Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, Jan. 15, 1993, at 3, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) [hereinafter Settlement Agreement].
55 The class did not include claims by persons exposed to asbestos products outside the workplace.
56 For example, consider the definition in § V.B.4.d of the Settlement Agreement, supra note 54, of whether bilateral pleural thickening warrants compensation. Compensation is allowed only if X-rays show that the thickening includes "blunting of at least one costophrenic angle," and if it is not explained by any other condition in the subject’s history, has not been followed within two years by malignancy, and:
   i. If the bilateral pleural thickening is, in the opinion of a Certified B-reader, of ILO Grade B2 or greater, then Pulmonary Function Testing that, in the opinion of a Board-certified Internist or Pulmonary Specialist, shows:
      (1) If TLC is available, TLC < 75% of predicted; or
      (2) If TLC is not available, a VC or FVC < 75% of predicted with FEV1/FVC (actual value); and in either case
         (3) a statement by a Board-certified Internist or Pulmonary Specialist that the asbestos-related changes are a substantial contributing factor in causing the pulmonary function changes; or
   ii. If the bilateral pleural thickening is, in the opinion of a Certified B-reader, of ILO Grade C2 or greater, then Pulmonary Function Testing that, in the opinion of a Board-Certified Internist or pulmonary Specialist, shows:
thickening which are not compensable under the agreement—will not be eligible for current compensation. Those who do exhibit qualifying conditions may elect either a "simplified payment procedure" set at the minimum value of the schedule attached to the agreement, or they may submit evidence to the CCR to be evaluated according to "traditional tort principles" within the range of compensation amounts specified by the agreement. In addition, the agreement provides for review of claims asserted to be "extraordinary," in that they would truly stand out if litigated, and such claims are not limited to the compensation schedule applicable to the others. A claimant who rejects the amount offered by the CCR may sue for damages in court. The suit is limited, however, to the questions addressed in the claims proceeding—whether the claimant was exposed to a CCR defendant's asbestos in the workplace, whether the claimant has an asbestos-related condition that is compensable under the agreement, and the amount of compensation. No punitive damages are allowed, and only a very small proportion of claims can proceed to litigation in any given year.

The agreement also provides limits to ensure the financial viability of the compensation program. Overall, the CCR compensation proposals are to fall within specified dollar averages for each year and each disease category. Furthermore, the number of claims paid in each category in any given year is limited, so those who fail to make the cut in one year must wait until the following year.

(1) FVC < 80% of predicted with FEV-1/FVC > 75% (actual value), or, if the individual tested is at least 68 years old at the time of the testing, with FEV-1/FVC > 65% (actual value); or
(2) TLC < 80% of predicted; and in either case
(3) a statement by the Board-Certified Internist or Pulmonary Specialist that the asbestos-related changes are a substantial contributing factor in causing the pulmonary function changes.

Exhibit B to the Settlement Agreement, supra note 54, provides the following Compensation Schedule:

<table>
<thead>
<tr>
<th>Compensable Medical Category</th>
<th>Minimum Value</th>
<th>Negotiated Average Value Range</th>
<th>Maximum Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mesothelioma</td>
<td>20,000</td>
<td>37,000-60,000</td>
<td>200,000</td>
</tr>
<tr>
<td>Lung Cancer</td>
<td>10,000</td>
<td>19,000-30,000</td>
<td>86,000</td>
</tr>
<tr>
<td>Other Cancer</td>
<td>5,000</td>
<td>9,500-12,000</td>
<td>32,000</td>
</tr>
<tr>
<td>Non-Malignant</td>
<td>2,500</td>
<td>5,800-7,500</td>
<td>30,000</td>
</tr>
</tbody>
</table>

57 Exhibit B to the Settlement Agreement, supra note 54, provides the following Compensation Schedule:
58 Id. § VIII.B.2.
59 There are also special provisions for claims involving extreme financial hardship or other exigent circumstances. See id. § XI.
60 See id. § X.
The settlement in *Lindsey v. Dow Corning Corp.*,\(^{61}\) the silicone gel implant case, displays some similarities but also shows pertinent differences. It was not a package deal negotiated by class counsel selected by the defendants. Rather, it was negotiated by five attorneys deputized by the court to represent the class. The agreement defines the class to include all recipients of silicone gel implants produced by the participating defendants, including those with suits pending. It discharges participating defendants from future liability to class members so long as they make specific scheduled payments to the funds it creates. Among other things, these payments finance a Disease Compensation Program that provides compensation according to a specified schedule. The disease definitions specified in the agreement are much less precise than those used in the CCR asbestos case. The agreement also disallows punitive damages.\(^{62}\) This compensation program is to be operated by a Claims Administrator who may in turn hire claims officers.\(^{63}\) To be eligible, claimants have to register by a stated deadline. The Agreement also provides a series of funds to provide benefits to those not presently eligible for compensation from the Disease Compensation Program for such things as medical-diagnostic evaluation, explanation, and rupture.\(^{64}\) The fiscal integrity device under this agreement is reduction of benefits rather than a delay in payment, and as a trade-off, class members are to be accorded a second opportunity to opt out should reduction be found necessary.\(^{65}\)

*Ahearn v. Fibreboard Corp.*,\(^{66}\) a third recent effort to use a Rule 23 settlement to solve problems of mass tort litigation, has not received the publicity accorded the two cases profiled above. It presents an even more complicated picture. The driving force behind this settlement of all future personal injury claims against Fibreboard was a dispute between Fibreboard and two of its insurers that was the subject of substantial litigation in the California courts. With the encouragement of Judge Robert Parker, Fibreboard, the insurers, and leading plaintiffs' attorneys were able to negotiate a series of interlocking agreements to settle all potential future claims against Fibreboard.\(^{67}\)

---


63 *Id.* § IV.A.

64 *Id.* § III.C.1.

65 *Id.*

66 No. 6:93CVS26 (E.D. Tex. 1993).

67 The agreements include not only a settlement between Fibreboard and its insurers and a class action settlement between the class of future asbestos claimants and Fibreboard but also a settlement of a class action against third party claimants, such as other asbestos companies who might assert claims against Fibreboard and its insurers. The underlying
These agreements specify that the insurers will pay over $1.5 billion into a trust which would process and pay claims by class members.\(^6\) Based on the limited independent financial ability of Fibreboard itself,\(^6\) Judge Parker certified for settlement purposes a mandatory Rule 23(b)(1)(B) class of all persons who had not yet sued on the date the agreement was announced. Under the agreement, class members may file claims with the trust, which will offer compensation based on historical settlement values for the amount of the claimant's harm attributable to Fibreboard products. Compensation is available for five categories of conditions, including pleural thickening. There is no schedule of benefits, although the maximum compensation for any one person's exposure is $500,000. Claimants who reject the offer from the trust may sue it eventually, but only after completing mediation, nonbinding arbitration, and a mandatory settlement conference by a judge or special master. If a claimant does sue, he or she may seek neither punitive damages, nor compensation in excess of Fibreboard's share of responsibility, nor any compensation for the risk of contracting cancer, nor any amount greater than $500,000. The notice materials predict that there will be sufficient funds to pay all claims, but there are also "spendthrift" provisions that limit payments in any given year.

These agreements are intricate and convoluted; unravelling them is reminiscent of sorting out the Internal Revenue Code. But the central point for our purposes is that they implement an alternative to the tort system that is responsive to the federal courts' substantive concerns about mass torts. Thus, they (1) abolish punitive damages; (2) abolish or curtail claims for fear of future harm; (3) substantially simplify issues of causation with regard to individual claims; (4) adopt categorical compensation formats to even out amounts of compensatory payments; (5) provide for further compensation for actual worsening of conditions (rather than a present payment for risk that worse things might follow); and (6) cap or define the tort litigation costs for defendants.\(^7\) In these respects, they resemble compensation schemes devised by Congress such as the federal Black Lung program.\(^7\) It has

\(^6\) Fibreboard itself is to pay $10 million into the trust.

\(^6\) Disregarding asbestos liabilities, Fibreboard would reportedly have a net worth of approximately $200 million. See Notice of Class Action, Settlement and Third-Party Claimant Class Settlement and Hearing at 18, Ahearn v. Fibreboard Corp., No. 6:93cvS26 (E.D. Tex. July 29, 1994).

\(^7\) This is not to say that these agreements only have "substantive" characteristics. For example, items (3) and (4) also serve to reduce costs. But in any customary \(Erie\) categorization, these features would be classified as "substantive."

\(^7\) The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988). This Act creates a benefits program for miners afflicted with pneumoconiosis, and facilitates recovery with statu-
not been a secret that the agreements have a substantive impact on tort law—the parties discuss it openly.\textsuperscript{72} The question is whether, and how, the courts can use Rule 23 to do this.

\textsuperscript{72} For example, in \textit{Georgine} the proponents of the settlement offered the following critique of the existing tort scheme and their reasons for favoring their solution:

[I]n the current tort system, an individual who has been exposed to asbestos and who exhibits even minor x-ray changes must generally file suit promptly or face the bar of the statute of limitations. Having filed suit, most claimants accept a modest settlement for their pleural claims and release their right to sue for more serious later-developing diseases. In other words, plaintiffs in the tort system often compromise their future claims on a prospective basis, without knowing the full extent of their damages. The choice that the proposed settlement affords the plaintiffs here is less risky, because it provides for compensation based on what actually happens in the future, and thus does not require the class members to compromise their claims for insufficient amounts prematurely.


Appearing as amicus curiae, the Commonwealth of Pennsylvania stressed the "crisis" in asbestos litigation and endorsed the settlement as "an important first step toward solving this crisis . . . through an efficient administrative mechanism." Brief Amicus Curiae of the Attorney General of Pennsylvania on Fairness and Notice to the Plaintiff Class at 2-3, \textit{Carlough v. Amchem Prods., Inc.}, 158 F.R.D. 314 (E.D. Pa. 1993) (No. 93-CV-0215). The Commonwealth went on to invoke the Ad Hoc Committee Report, \textit{supra} text accompanying notes 37-46, and observe that "[a]lthough Congress has failed to act on these recommendations, the proposed settlement is largely responsive to their substance." \textit{Id.} at 4.

The point was not lost on the opponents of the deal. Thus, objectors asserted that "[t]he obvious purpose of this class action is to require persons who sustain asbestos-related injuries in the future to resolve their claims against the CCR defendants through the alternative dispute resolution system privately negotiated by counsel for CCR and self-appointed class counsel, rather than through the tort system.” \textit{Wiese Parties' Memorandum of Law in Opposition to the Settling Parties Joint Motion for Approval of the Notice to the Class at 3, Carlough v. Amchem Prods., Inc.}, 158 F.R.D. 314 (E.D. Pa. 1993) (No. 93-CV-0215). Similarly, 37 law professors who signed an amicus brief raising ethical issues (which was not accepted by the court) observed that "counsel have yielded to the temptation to reform the substantive law by aiding some class members at the expense of others.” Brief of Law Teachers as Amicus Curiae at 10, \textit{Georgine v. Amchem Prods., Inc.}, 157 F.R.D. 246 (E.D. Pa. 1993) (No. 93-CV-0215).

The judge appears to have understood the point. Thus, when he approved the class notice he reasoned that "[t]he primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims.” \textit{Georgine v. Amchem Prods., Inc.}, 157 F.R.D. 246 (E.D. Pa. 1994).
A simple reaction to these developments is to conclude that courts absolutely cannot do what these cases propose to accomplish. As a reporter asked, "Can a court really do this? Isn't it just legislation?" By their own near admission, the federal courts have resorted to these expedients in asbestos litigation because Congress has not acted. Three obvious obstacles to such judicial action are considered here. Although an in-depth analysis of these obstacles is beyond the scope of this Article, it does appear that they could be surmounted even if they have not successfully been overcome in these particular cases.

A. The *Erie* Problem

Describing these settlements as tort reform highlights an infrequently discussed *Erie* problem. Certainly the recent history chronicled above indicates that Rule 23 is effecting, on a case-by-case basis, what Congress has not done, and that Congress could cry foul. There is a strong argument that Rule 23 provides no warrant for this sort of judicial activism. As all are aware, in regard to Rule 23(b)(3), the Advisory Committee Notes accompanying the 1966 amendments assured that class actions should not ordinarily be used even in single accident cases. In the words of the leading treatise on federal practice, "allowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule." Although some of those involved in the drafting of the 1966 amendments have since experienced an epiphany concerning the desirability of mass tort class actions, it is hard to see how that change of heart should alter the *Erie* and Rules Enabling Act issues. As noted below, Roger Parloff, *The Tort That Ate the Constitution*, AM. LAW., July/Aug. 1994, at 75. Interestingly, Ronald Motley, one of the attorneys who negotiated the CCR settlement, criticized a 1992 proposal for legislation with provisions somewhat similar to the CCR settlement on the ground that it would deprive plaintiffs of their constitutional rights to alter their accrued rights through legislation. Ronald L. Motley & Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 Cardozo L. Rev. 1919, 1944 (1992).

Cf Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 967 (1993) ("Congress should have the last word when it comes to construing the Rules, for they are promulgated pursuant to a congressional statute and obtain whatever authority they possess from that statute.").


See infra part III.C.
this problem can be solved, and may have already been resolved in the recent cases, by genuine consent to the settlement regime. Absent such consent, however, these arrangements appear to violate basic Erie principles.

Until recently, the substance-procedure distinction in the class action context focused on fitting the substantive law into the class action mold, an effort that became necessary because attention to individual circumstances came at a cost and the class action mechanism put a premium on simplification and blending. Problems of causation and damages have long posed puzzles in this regard. For example, in adopting the fraud on the market theory to eliminate individual proof of reliance,79 and in endorsing use of a rescissory rather than a consequential damages measure in a securities fraud class action in order to facilitate treatment as a class action, the Ninth Circuit rebuffed challenges based on the Rules Enabling Act.80 Similarly, the courts grappled with the propriety of generalized proof of impact in antitrust class actions.81 Such tensions led Judge Weinstein to warn in 1973 that in class actions there might be "a subtle erosion of substantive law. . . . A substantive change may be desirable on policy ground, . . . but it is, it seems to me, quite unwise to slip into important changes in substantive law on the happenstance that a suit is brought by a class rather than by an individual claimant."82

These misgivings must be stronger when state law dictates the substantive rules that govern an action. In the securities class action mentioned above, the Ninth Circuit was able to deflect Enabling Act criticism by pointing out that the courts themselves had given birth to the private securities fraud action, so that they could alter those standards.83 Whenever state law dictates the rule of decision, Erie's constitutional predicate stands as an obstacle to modifying substantive law to

79 The theory assumes that, when misleading statements are disseminated into a well-developed impersonal market, the market will rely on them. Accordingly, it makes proof of individual reliance unnecessary. The theory was endorsed by the Supreme Court in Basic Inc. v. Levinson, 485 U.S. 224 (1988). Legislation pending before Congress may alter the fraud on the market theory. See Securities Litigation Reform Act, H.R. 1058 § 4, 104th Cong., 1st Sess.
80 See Blackie v. Barrack, 524 F.2d 891, 908 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976).
81 See, e.g., Windham v. American Brands, 565 F.2d 59 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (concluding that to allow class action in this antitrust action would alter substantive law and would violate the Rules Enabling Act).
83 The Court explained that, "[I]ndeed, we could, in the exercise of our Article III jurisdiction, transform the 10b-5 suit from its present private compensatory mold by predating liability to purchasers solely on the materiality of a misrepresentation (i.e., economic damage) regardless of transactional causation, without implicating the Enabling Act limitation." Blackie, 524 F.2d at 908 n.24.
facilitate class action treatment. As the Third Circuit recognized in overturning a mandatory class certification, "the dictates of state law may not be buried under the vast expanse of a federal class action. The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used." The Fifth Circuit emphasized this theme in rejecting Judge Parker's initial method of trying an asbestos class action in 1990, concluding that Judge Parker's approach would contravene "the very culture of the jury trial":

Texas has made its policy choices in its substantive tort rules against the backdrop of a trial. Trials can vary greatly in their procedures, such as numbers of jurors, the method of jury instruction, and a large number of other ways. There is a point, however, where cumulative changes in procedure work a change in the very character of a trial. . . . We do not suggest that procedure becomes substance whenever outcomes are changed. Rather, we suggest that changes in substantive duty can come dressed as a change in procedure.

This decision is difficult to square with another Fifth Circuit decision, but the opinion's basic point is an important if indistinct caution against excessive judicial tinkering with state law.

---


In the same vein, the Seventh Circuit recently granted a writ of mandate overturning a class certification designed to permit a nationwide class action for hemophiliacs suffering from AIDS due to blood transfusions. In part the appellate court granted the writ because the district court proposed to instruct the jury on an amalgam "consensus" tort law to enable the case to proceed as a class action. Writing for the court, Judge Posner characterized this as an "Esperanto instruction, merging the negligence standards of the 50 states" and explained:

The diversity jurisdiction of the federal courts is, after Erie, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law for diversity cases. . . . No one doubts that Congress could constitutionally prescribe a uniform standard of liability for manufacturers of blood solids. It might, we suppose, promulgate pertinent provisions of the Restatement (Second) of Torts. The point of Erie is that Article III of the Constitution does not empower the federal courts to create such a regime for diversity cases.

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

85 In re Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990).

86 In Rosales v. Honda Motor Co., 726 F.2d 259 (5th Cir. 1984), the plaintiff objected to the bifurcation of liability and damages, citing Texas cases that refused to sever the issues on the ground that they "are elements of an indivisible cause of action and may not be tried piecemeal." Id. at 261 (quoting Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967)). In an opinion by Judge Higginbotham (the author of In re Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990)), the court rejected the argument. The court stated: The provision for separate trial of separate issues, including those of liability and damages in personal injury suits, does not . . . implicate [a] primarily substantive, as opposed to procedural rule, either because affecting "people's conduct at the stage of primary private activity," or as concerning "a right granted for one or more non-procedural reasons, for some
The recent settlements reflect a telling shift in the *Erie* issue that should strengthen limitations on the federal courts' freedom of action. Until now, the streamlining that has accompanied class treatment has been just that; Judge Parker was trying to find an expedient way to provide an overload of plaintiffs with some semblance of a trial. The Fifth Circuit had assented to other class action innovations the judge devised to achieve that goal in another case, and on remand from the 1990 decision, the judge devised a more elaborate plan to use statistical inference as a substitute for individual trials. If the depiction of the recent mass tort class actions set forth above is correct, however, courts are going far beyond mere streamlining. They are making changing the substantive law a prime objective of the arrangement, with the class action serving as the vehicle. Now the cart is, to a large extent, pulling the horse.

Even where the federal courts might have authority to effect such transformation in nonfederal substantive law, they properly tread lightly. Thus, the Third Circuit recently declined, in its role as supreme arbiter of the law of the Virgin Islands, to cap punitive damages in asbestos cases:

We do not disagree with the concerns that have been expressed about punitive damages awards, particularly in the asbestos cases. We differ instead with those who would have the judiciary resolve the conflicting policy arguments. We refrain from adopting such an activist role on what is essentially a policy matter.

Using class actions, the recent settlements have enabled the federal courts to rush in where the Third Circuit feared to tread.

Some judges attempt to justify such a revision of tort law by invoking a residue of "equitable jurisdiction." They argue that this reserve of authority empowers them to accomplish desirable ends like tort reform in response to pressing problems like those presented in mass tort litigation. Thus, when he insisted that the parties address possible

---

purpose or purposes not having to do with the fairness or efficiency of the litigation process." Rather, at best, a rule authorizing or prohibiting a bifurcated trial of liability-damage issues falls "within the uncertain area between substance and procedure" and is "rationally capable of classification as either."

*Id.* at 262 (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) and 19 *WRIGHT ET AL.*, supra note 76, § 4509, at 144-45).

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


89 Whether or not the federal judges involved in these cases favor the substantive changes wrought, it seems obvious that the defendants do and that the class action is the tool that effects the change.

class certification in the *Dalkon Shield* litigation and then imposed it over the opposition of all concerned, Judge Williams explained that he had "inherent power" to "certify a class when such a decision is in the collective best interest of the plaintiffs." This power came, he reasoned, from "the court's equitable jurisdiction over bills of peace," a power that was not "limited" by the federal rules. In a thoughtful 1991 article, Judge Weinstein reflected on the implications of such "equitable jurisdiction," particularly as embodied in the Bankruptcy Act, to extract courts from the mass tort labyrinth. He asked whether federal courts should, in mass tort situations, "strip the state courts of their historic role in developing tort law" and concluded that "[i]f the courts are to be the instrument of compensation . . . we cannot hope to apply the usual tort standards of liability and causation." This approach contrasts interestingly with his earlier concern about a "subtle erosion of substantive law" in class actions as the more recent impulse toward tort law innovation seems neither subtle nor a mere erosion.

Although "inherent power" may exist as an ill-defined penumbra in limited areas, there is no credible source of equitable authority for such a reformation of state tort law. Whatever ancient power the courts had to invoke the bill of peace, that history hardly augments the authority conferred by Rule 23. Nearly thirty years ago, the Supreme Court announced that "federal interpleader was not in-
tended to serve the function of a 'bill of peace' in the context of multiparty litigation arising out of a mass tort.” The contemporaneous adoption of amendments to Rule 23, which were ordinarily not even to apply to mass accidents according to the Advisory Committee Notes, hardly conferred such authority on the courts. Yet the “equitable jurisdiction” argument posits that the courts already had this “bill of peace” authority. As a basis for the abrogation of state tort law, such “equitable principles” might reverse *Erie* whenever they invite a more enlightened view (as would seemingly have been the case in *Erie* itself). For the same reasons that the Fifth Circuit refused to adopt a federal common law of torts to achieve “justice” in asbestos cases, this assumption of inherent power must ultimately fail.

Within the text of Rule 23, the courts have fastened on Rule 23(b)(1)(B) for authority. This is the justification, for example, for Judge Parker’s mandatory class action in *Fibreboard*. But this provision offers little support for the sort of law reform the courts are undertaking. Its application to mass torts relies upon a gloss on a gloss. The first gloss is the comment in the Advisory Committee Notes that (b)(1)(B) class treatment might be appropriate in a suit involving a limited fund. The second gloss is that the limited fund concept embraces the situation in which a defendant's assets might not suffice to cover all claims to be asserted in future suits (not this one). This justification was also invoked by Judge Williams in 1981 in the *Dalkon Shield* litigation, and it has been invoked several times since then.

---

100 State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 537 (1967).
101 In *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986), the court explained:

> It could be argued that federal courts have an institutional interest in maintaining a federal judicial system that is fundamentally “just.” While we are sympathetic to such an argument, it is clear that such an abstract, all-encompassing interest cannot form a sufficient basis upon which to rest the displacement of state law. First, we find implicit in *Erie* the idea that in diversity actions federal court concerns in a just judicial system cannot be used as a reason for supplanting substantive state policies. Second, certainly as a practical matter, the effect of resting assertions of federal judicial power on so vague an interest as “justice” would be to eviscerate *Erie* completely and thus ignore its constitutional underpinnings.

*Id.* at 1325-26.

102 Fed. R. Civ. P. 23(b)(1)(B) authorizes a class action to avoid a risk that “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.”

103 In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.


104 *See Dalkon Shield*, 526 F. Supp. at 893-98.
although rarely surviving appellate review. For the law reformer, this justification has the attractiveness (beyond mandatory class certification) of inviting something resembling a bankruptcy cram-down to cope with the expected shortfall of assets.

Whatever its viability in other cases, the limited fund concept does not work well in mass tort litigation. Whether there is a limited fund might present either a legal or a factual question. Certainly there could be situations in which there is a finite legal limit to the fund available to satisfy claims. For example, interpleader can involve such situations as insurance policies, where the policy places a dollar limit on recovery. The law may similarly impose a monetary limit on aggregate recoveries, such as the Price-Anderson Act’s $560 million cap on damages in connection with certain nuclear accidents. But there is no such legally imposed cap pertinent to mass tort situations. The closest analogy would be a constitutional limitation on repeated punitive damages awards or a common-law limitation that accomplished the same thing, but there is presently no such limitation. Only by the sleight of hand of assuming the desired substantive result—a punitive damages cap—can the federal court find such a limited fund as a matter of law.

There remains, then, the possibility that the fund may be limited as a matter of fact. In 1981 Judge Williams was persuaded that such a risk existed regarding Dalkon Shield claims because the A.H. Robins Company faced over 1,500 suits nationwide seeking compensatory damages totaling in excess of $500 million and punitive damages in excess of $2.3 billion while Robins’s net worth was, the judge understood, some $280 million. Although on its face this seems persuasive, in reality the question is much more complicated.

To begin with the prospective liabilities, toting up the sum of the prayers for relief seems unwarranted. There is no reason to assume that, if one plaintiff is successful in suing Robins, all other plaintiffs will necessarily be successful. Differences in factual circumstances and applicable principles of state law regarding liability make that un-

---

105 See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 14 F.3d 726 (2d Cir. 1993); In re School Asbestos Litig., 789 F.2d 996 (9th Cir.), cert. denied, 479 U.S. 852 (1986); In re Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).


107 See, e.g., Dalkon Shield, 526 F. Supp. at 898-900 (arguing that common sense shows there must be a limitation on punitive damages in mass tort cases).

108 Id. at 893.

109 Of course, offensive use of collateral estoppel might make this prediction appropriate, but given the fact that defendants ordinarily win some cases, along with the differences among plaintiffs and state laws, it is unlikely that the issues will be identical in different cases, or that it would be considered fair to apply collateral estoppel.
likely. Therefore, the cumulation of the claims made in all suits is unwarranted. Moreover, even if one could assume all plaintiffs would be successful, assessing the true value of the suits by the prayer, particularly as to punitive damages, is even more dubious. Plaintiff lawyers are notoriously and understandably generous in their prayers for relief, and these should not be taken as reliable indicators of probable recovery. Although detailed data on actual results of tried cases (and perhaps settled cases as well) might provide some meaningful indication of likely future recoveries, one would still need to take account as well of the severity of individual injuries. Thus, the actual computation of prospective liability is extremely difficult.

Turning to the assets side of the ledger, the question is much more complicated than obtaining a simple net worth figure from the defendant's books. Regarding the Dalkon Shield litigation, we cannot be blind to the fact that, some six years later, bankruptcy proceedings led to the sale of the company and the creation of a fund of $2.475 billion for claimants, an amount seemingly sufficient to satisfy even the inflated liabilities in Judge Williams's worst case scenario. Moreover, it is critical to take account of other sources of payment including insurance and co-defendants. As a consequence of the eventual sale of the company, Messrs. Robins Sr. and Jr., heads of the firm, received $385 million and were granted indemnity against further claims. Absent that indemnity, they could have been viable targets for suits and seem to exemplify the additional defendant possibility. Perhaps the remarkable circumstances confronting Judge Parker in Fibreboard justified finding a limited fund there. In most cases, though, it will probably be impossible to factor in the possibility that claimants unable to recover from one defendant would be able to collect from other, more economically vibrant, entities.

Beyond these difficulties in determining whether the limited fund concept actually applies, there are further challenges for the court seeking to employ Rule 23(b)(1)(B) in a mass tort case because


111 Id. at 333-34.

112 See supra text accompanying notes 66-69. The insurance companies reportedly refused to settle on the terms provided unless there was a mandatory class action, thus arguably creating a limited fund not otherwise available. But Fibreboard had successfully litigated against the insurance companies in the California courts, and the insurance companies' willingness to pay would not always be up to them.

113 It should be noted that this argument does not address the possibility of a claim for contribution by these other defendants against the financially weak entity. Though this might support the conclusion that there is actually a limited fund, it also compounds the problem of assuring that all affected persons are before the court, discussed infra pp. 124-25.
of the diversity of prospective claimants to the defendant’s assets. If the class action is truly to adjust all claims to the defendant’s limited assets, then all claimants must presumably be included. By definition, however, the class action does not do this. At best, a class action emphasizes that many creditors of an entity—often called the “involuntary creditors”—base their claims on events with a factual link. Others (trade creditors and the like) do not, but they presumably have an equal pro rata claim on the net assets of the entity, perhaps even a secured claim. Moreover, some involuntary creditors do not share common questions of fact with the voluntary creditors. Consider, for example, someone injured by an A.H. Robins truck who is suing for damages. As the Third Circuit discovered in In re School Asbestos Litigation,¹¹⁴ it may not be possible to include all asbestos tort claimants in one class action. In Rule 19 terms, the limited fund theory would call for the inclusion of all claimants, whatever the source of their claims.

Most fundamentally, Rule 23(b)(1)(B) simply does not prescribe any standards for resolving competing claims to the limited fund, if one is found to exist.¹¹⁵ One animating objective for the class certifications in mass tort cases has been to subordinate punitive damages claims to compensatory damages claims. In some circumstances, the Bankruptcy Act may authorize a court to do this,¹¹⁶ but Rule 23 provides no similar warrant for doing so. This difficulty explains the attractiveness of the concept of “equitable jurisdiction,” since that invites some rough justice. The reality is that the Bankruptcy Act provides a statutorily-established method for dealing with actual inadequate assets cases, sometimes permitting a cram-down that overrides substantive rights created by state law. As the Second Circuit recently put it in rejecting an aggressive invocation of Rule 23(b)(1)(B) to accomplish a similar objective, “the function of the federal courts is not

¹¹⁴ 789 F.2d 996, 1005-07 (3d Cir.), cert. denied, 479 U.S. 852 (1986) (holding the class incomplete because it included only claimants seeking damages for the cost of removing asbestos from schools, but excluded personal injury claimants and claimants who incurred costs removing asbestos from other structures).

¹¹⁵ The closest thing to a standard is the suggestion in the advisory committee notes that in limited fund cases “[a] class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.” Advisory Committee Notes, 39 F.R.D. 69, 101 (1966). It is quite a stretch to find in this passage authority for a federal court to develop its own rules about what should be treated as a “valid” claim if that issue ordinarily would be governed by state law. Furthermore, the suggestion of “proportionate distribution” hardly authorizes the creation of a hierarchy that puts claims for compensatory damages ahead of claims for punitive damages.

to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges.\textsuperscript{117} Moreover, the Bankruptcy Act affords some protections for the claimants affected by the cram-down, protections that may not be replicated in a judge-fashioned alternative confected under Rule 23. At both a substantive and procedural level, then, the contrast between the Bankruptcy Act and the class action authorization provided by Rule 23(b)(1)(B) suggests the impropriety of aggressive use of the class action rule.

\textit{Erie} has not become irrelevant, and neither Rule 23 nor a residue of "equitable jurisdiction" authorizes wholesale tort reform in class actions. But that need not entirely spell the doom of mass tort class actions. As Professor Hazard observed over twenty years ago, there is an unavoidable synergy between substance and procedure, and "[t]he necessary technique is one of circumspect consideration of the appropriate role of the judicial institution in shaping the substantive consequences of procedures such as those established by Rule 23."\textsuperscript{118} Courts handling mass tort class actions do more than aspire to tort reform of the type described above. They also attempt to deal creatively with problems of cost and delay, which are suitably characterized as "procedural" concerns. Moreover, even conceding the applicability of state substantive law, one must also take care to note whose substantive interests are protected by it. For example, when asbestos plaintiffs consented to an abbreviated class action procedure in Judge Parker's court in Texas, defendants asked the Fifth Circuit to disallow the approach on the ground that it contravened state law. In rejecting defendants' arguments, the appellate court was able to note that "it seems that the defendants enjoy all of the advantages, and the plaintiffs incur the disadvantages, of the class action—with one exception: the cases are to be brought to trial."\textsuperscript{119} When he was overturned for further innovations in a later asbestos class action,\textsuperscript{120} Judge Parker could have argued that the objecting defendants suffered no aggregate harm since they would not incur any greater net liability, and that the plaintiffs' assent to the plan should suffice.

Even though federal judges may not arrogate unto themselves the power to achieve mass tort reform nor use Rule 23 to cram defendants' version down plaintiffs' throats, Rule 23 may provide the glue that allows the parties to arrange tort reform by consent. But meaningful consent is essential to this undertaking. For the defendants in

\textsuperscript{117} \textit{In re Joint E. \\& S. Dist. Asbestos Litig.}, 14 F.3d 726, 733 (2d Cir. 1993).
\textsuperscript{119} Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).
\textsuperscript{120} See supra text accompanying note 85.
recent cases, consent is obvious. For the plaintiffs, however, consent depends upon a program of notice that genuinely gives members of the class meaningful notice and a choice, a topic addressed below.\textsuperscript{121} If notice is provided, the court should ordinarily enforce the agreement to submit to a separate compensation regime.\textsuperscript{122} Rule 23 therefore can facilitate tort reform in certain instances. But it is not enough that the court desires to impose it. The parties must consent to tort reform.

B. The Future Claims Problem

Central to the defendants'—and the courts'—desire to achieve litigation clouture in mass tort litigation is the inclusion of future claims. Indeed, the \textit{Georgine} settlement in Philadelphia and the \textit{Fibreboard} settlement in Texas are confined to claims of those who have not yet sued.\textsuperscript{123} For these purposes, one might view "future" claims as including three distinct categories: (i) claimants who have suffered injury but not yet filed suit, (ii) claimants who have been exposed but have not yet suffered or manifested injury, and (iii) claimants who have not yet been exposed. Claimants in the third category are an insignificant factor in the recent settlements because the products in question are no longer in general use. Nevertheless, for many class members covered by the recent settlements the existence or extent of a substantial claim is impossible to gauge at present. Perhaps, as a consequence, the court may not affect their rights under the aegis of Rule 23.

At its most basic, this seems a sort of Article III jurisdictional argument. In order for a court to have jurisdiction there must first be a case or controversy, and that may not occur until the claimant can determine that he or she has a claim. In the class action situation, the challenge is not to the ability of the court to adjudicate the claims of the individuals who have filed the class action, whether or not they have manifested injury. It would seem a given that they have standing to sue since they have already been exposed,\textsuperscript{124} and presumably a claim for relief sufficient to endow a federal court with jurisdiction to determine its validity.\textsuperscript{125} Rather, the challenge in the class action situ-

\textsuperscript{121} See infra part III.C.
\textsuperscript{123} See supra text accompanying notes 54-55, 69.
\textsuperscript{124} See, e.g., \textit{Duke Power Co. v. Carolina Env. Study Group, Inc.}, 438 U.S. 59, 72-78 (1978) (finding standing satisfied in suit regarding risks of \textit{future} operation of nuclear power plant that had not been completed).
\textsuperscript{125} \textit{Bell v. Hood}, 327 U.S. 678 (1946) (suit that fails to state claim for relief nevertheless suffices to endow court with jurisdiction unless "wholly insubstantial and frivolous").
ation is whether others who have not invoked the court's jurisdiction can nevertheless be bound by the exercise of it.\textsuperscript{126}

Assuming there is a possible defense of prematurity, the issue is whether a settlement in the face of that uncertainty should be binding. For individuals who filed suit, an individual settlement that precludes later suit for after-arising manifestations should ordinarily be effective to bar the later claim. Indeed, that is part of the problem for pleural thickening claimants, and it might make the recent settlements more attractive for them.\textsuperscript{127} As a matter of jurisdiction, it seems that the same should hold true for unnamed members of the class, even though they were unaware of their claims at the time of the settlement.

To deny the court the power to affect future claims would run counter to the handling of other class action issues and would threaten to disrupt an important segment of class action litigation. When injunctive or similar relief is the object of the suit, it has been common to include the claims of those who cannot presently be identified in the class. In some instances, this includes claimants who could not identify themselves as members of the class.

The Supreme Court has addressed the mootness limitation on federal judicial power in such cases. In a certified class action that challenged the adequacy of procedures afforded pretrial detainees,\textsuperscript{128} the Court was confronted with the fact that the named plaintiffs had been convicted by the time the case reached appeal, so their pretrial

\textsuperscript{126} Cf. \textit{In re Agent Orange Prod. Liab. Litig.}, 996 F.2d 1425, 1434 (2d Cir. 1993), \textit{cert. denied}, 114 S. Ct. 1125 and 114 S. Ct. 1126 (1994) (upholding jurisdiction over claims of class members who had not manifested injury).

\textit{Compare} Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985), in which the court held that a bankruptcy discharge of a railroad did not affect workers' claims for asbestos exposure against the railroad under the Federal Employers' Liability Act. The court reasoned that the workers should not be viewed as having had "claims" within the meaning of the Bankruptcy Act that were subject to discharge at the time of the bankruptcy proceeding. In large measure, this ruling was based on a substantive judgment concerning the FELA that resembles the criticism directed toward allowing current suit for pleural claims:

If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered.

\textit{Id.} at 942. \textit{Schweitzer} is discussed further \textit{infra} in note 169 and accompanying text.

\textsuperscript{127} For discussion of the predicament of those who sue when their only symptom is thickening of the pleura of the lungs and are later foreclosed when more serious problems arise, see \textit{supra} note 27.

\textsuperscript{128} \textit{Gerstein v. Pugh}, 420 U.S. 103 (1975).
detention had ended. The Court nevertheless concluded that the class action was not moot because the claims were "by nature temporary" and impossible to resolve with full appeal before conviction or release.129 Even though there was "no indication that the particular named plaintiffs might again be subject to pretrial detention,"130 the Court held that the case was not moot because "the constant existence of a class of persons suffering the deprivation is certain."131 But the identity of these people could not be ascertained. Just as there was no way to know if the named plaintiffs would again be subject to pretrial detention, so was it impossible to determine whether anyone else in particular would be so detained. Yet all these people could presumably be properly included in the class action.

A similar indifference to the identity of class members is evident in cases concerning the definition of the class, which frequently includes future members.132 Employment discrimination suits are regularly brought under Rule 23(b)(2) on behalf of classes of present and future job holders or applicants.133 The resulting decrees, possibly involving affirmative action provisions, are binding on individuals who later become members of the class but could not have known that they were included when the decree was entered. Even more dramatically, in school desegregation class actions the resulting decree may be binding on people who were not even born at the time it was entered.134 The decree may be challenged by those who were not members of the class,135 but for those who are members, the decree is ordinarily binding.136 In prison conditions litigation, the handling of individual claims of class members for after-occurring events has presented substantial difficulties,137 but it has not been suggested that

129 Id. at 110 n.11.
131 Gerstein, 420 U.S. at 110-11 n.11.
132 E.g., Yaffe v. Powers, 454 F.2d 1362, 1364 (1st Cir. 1972) (class of persons who "wish to ... engage, in the City of Fall River, in peaceful political discussion ... without surveillance"); Robertson v. National Basketball Ass'n, 389 F. Supp. 887 (S.D.N.Y. 1975) (class of all present and future players in the NBA).
133 E.g., General Tel. Co. v. Falcon, 457 U.S. 147 (1982).
134 For example, in San Francisco, Chinese students must achieve significantly higher scores than applicants from other ethnic groups to obtain admission to the city's academic high school, Lowell, due to a 1983 desegregation decree. They have recently sought to change the terms of the decree, which was entered shortly after the most recent applicants were born. See James Finefrock, Beyond School Quotas, S.F. EXAMINER, July 13, 1994, at A16.
136 Cf Cooper v. Federal Reserve Bank, 467 U.S. 867, 872 (1984) (denial of intervention to class member in employment discrimination action because "she was a member of the class for which relief had been ordered and therefore her rights would be protected in the Stage II proceedings to be held on the question of relief").
137 For example, in Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), there was an opt-out class action for injunctive and declaratory relief against various features of the prison, in-
the class action court was without authority to resolve, or at least to limit, focus, and confine, these claims. In sum, it has long been accepted that in appropriate circumstances the court may alter or foreclose the claims of class members that have not matured at the time the class action judgment is entered.

These cases are admittedly different from the mass tort class actions, which revolve entirely around claims for money damages rather than injunctive relief. Arguably, class actions for injunctive relief are not necessary, and classwide relief could sometimes be granted in an individual action without preclusive effect. But there is authority for the proposition that a class suit is necessary for classwide injunctive relief, and it is beyond question that Rule 23(b)(2) authorizes such class actions. Arguably, too, the Supreme Court's treatment of these class actions leans toward the "representation" rather than the "joinder" mode of analysis. But the occasional assertion that there is greater "cohesiveness" in injunctive class actions than in damages

cluding the practice of arming guards as "trusty shooters" to patrol and discipline the inmate population. One of the prisoners who did not opt out sued for injuries resulting from being shot by a trusty shooter that occurred after the record was closed in the class action, and the state urged that the class action judgment foreclosed his claim. The appellate court rejected this argument on the ground that the class action "was never framed or presented as a suit for monetary relief and nothing in the notice sent to the inmates gave any indication that such relief was possible." *Id.* at 408. Because "[p]rinciples of res judicata are not ironclad," *id.*, the court declined to foreclose the damages claim; cf. *Johnson v. McCaskle*, 770 F.2d 445 (5th Cir. 1985) (dealing with requirement that claims of individual prisoners are handled in conjunction with class action or under auspices of class action court).

---

138 See *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987) ("There is no general requirement that an injunction affect only the parties in the suit.").

139 In *Everhart v. Bowen*, 853 F.2d 1532 (10th Cir. 1988), *rev'd on other grounds sub nom.* *Sullivan v. Everhart*, 494 U.S. 83 (1990), the court of appeals held that the district court had erred in entering a statewide injunction against certain welfare administrative practices even though it found that the practices were illegal:

The statewide injunction entered by the district court was tantamount to a grant of classwide relief . . . . At this juncture, there has been no determination on the issue of class certification; indeed, the district court expressly declined to do so. Absent a class certification, the district court should not have treated the suit as a class action by granting statewide injunctive relief, and accordingly should have tailored its injunction "to affect only those persons over [whom] it has power." *Id.* at 1538-39 (alteration in original citation omitted); see also *Zepeda v. United States Immigration Naturalization Serv.*, 753 F.2d 719, 727-28 (9th Cir. 1983) ("[T]he injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs.").

140 Whether that authorization benefits plaintiffs or defendants is debatable. See Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. Rev. 597 (1983) (arguing that certification of a (b)(2) class action benefits defendants, not plaintiffs, by assuring them that a victory will foreclose later relitigation).

class actions is unpersuasive, and it is hardly clear why, at the raw level of judicial power, this distinction should operate to preclude foreclosing later suits in class actions for damages but not in class actions for injunctive relief. Finally, it is true that the court’s power to modify an injunction later may make the binding effect on future members less onerous, but it is often hard to justify such a modification, and this prospect does not rise to the level of power.

Those who oppose the inclusion of future claims in mass tort class actions nevertheless portray the cases in a lurid light. The petition for certiorari filed by the Agent Orange claimants, for example, said that the consequence of including their claims was “brutalizing

On this question, the points made by Professor Yeazell concerning Rule 23’s requirement of a right to opt out in damages but not injunctive class actions seem trenchant:

‘...If the treatment of (b)(3) actions seems to overprotect individual autonomy, the treatment of (b)(2) actions seems equally puzzling for the opposite reason. For suits falling into that category the rule requires no notice, relying entirely on the threshold findings of common interest, typicality, and adequate representation. Yet the rule does so in circumstances where it is much more likely than in the (b)(3) cases that the interests of the group’s members will conflict and will be least amenable to abstract assessment. An example will make the point. Like many American cities, Boston in the 1970s found itself in the throes of a lawsuit over school integration. Managed by the NAACP, the plaintiffs’ suit alleged numerous discriminatory acts by the Boston School Committee and sought a widespread integration decree that involved busing black children into the schools of South Boston, where they encountered a hostile reception. Derrick Bell has reported that many of Boston’s black parents, on whose behalf the case was brought, would have preferred a remedy that did not require their children to attend school in a section of the city with poor schools and a tradition of violence. Indeed, some of them might have preferred entirely to forgo the legal vindication of their rights if such was the only foreseeable remedy. Under such circumstances, Bell argued, some more searching assessment of interest than the one called for by Rule 23(b)(2) is necessary.

STEPHEN YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 252-54 (1987) (citations omitted).

In school desegregation cases like the example cited by Yeazell, it may be that courts have indulged a substantive preference of their own for integration. The basic point to be made, however, is that assuming greater cohesiveness in injunctive than in damages class actions is dubious.
individual rights."\textsuperscript{143} One might well question the adequacy of the settlement in that case, as it was predicated on a very low prospect of success and therefore offered the defendants a very deep discount.\textsuperscript{144} As noted below,\textsuperscript{145} the settlement review process is very important to protect the interests of absent class members. But that process provides some assurance that class members with future (and present) claims are treated fairly. Despite the risk of mistaken forecasts as to the number of claims to be made,\textsuperscript{146} at least on the surface the recent settlements provide substantial compensation for claimants through a simplified claims process. Whether this option is genuinely attractive to individual class members may be uncertain, but this uncertainty does not make the settlements a "sham," as some have charged.\textsuperscript{147} Moreover, unlike future class members in injunctive class actions, these class members should be able to determine whether they are included in the class definition even if they then have a tough time deciding whether the deal is a good one. There is nothing intrinsic in a settlement of future claims for damages that makes them any more a sham than a settlement in the class action format of future claims for injunctive relief.

In sum, an absolute bar on including in a class action exposed persons who have not manifested serious medical consequences of their exposure would not only prevent these cases from achieving their objective but would also run counter to the handling of other types of class actions.\textsuperscript{148}

\textsuperscript{144} See Peter Schuck, Agent Orange on Trial (1986).
\textsuperscript{145} See infra text accompanying notes 198-208.
\textsuperscript{146} The problem would be significantly more acute if asbestos or silicone gel implants were still in general use, for then there would seem no reliable way to determine how many more claims might be made.
\textsuperscript{147} See Mike McGee, Implant Offer Splits Plaintiffs Bar, S.F. Recorder, Sept. 10, 1993, at 1 (quoting plaintiff's attorney in silicone gel litigation as saying: "It's a sham, deceptive to the women who have been severely injured, because it leads them to believe they will get more money than they will."). In the same vein, a doctor called by the objectors to the Philadelphia asbestos class action settlement said that it was "a lousy, reprehensible, and diabolically cunningly designed document to take the rights and privileges away from the asbestos-exposed workers of America." Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 271 (E.D. Pa. 1994).
\textsuperscript{148} Questions have also been raised about whether the amount-in-controversy requirement for federal jurisdiction has been satisfied in these cases, but these questions do not seem to raise serious obstacles. There are, of course, reasons to question the wisdom of Zahn v. International Paper Co., 414 U.S. 291 (1973), which mandates that each class member satisfy the requirement. Application of Zahn demands a curious inquiry. Usually the court is to ask whether a claim that on its face exceeds the jurisdictional minimum is made in good faith. Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). That does not work very well as to claims that have not really been made, like those of the absent class members, since it is difficult to assess the good faith of somebody who has not made a claim. Probably the best approach is to ask whether a claim in excess
C. Notice and Opt Out

If the analysis above is correct, the limited fund concept should rarely, if ever, be available in mass tort litigation. Even if it can be sustained in some instances, there is no denying that the claims asserted are for compensatory damages, and there is arguably a constitutional right to opt out.\textsuperscript{150} Rule 23(c)(2) surely requires it for most actions for money damages. Even if that requirement somehow would not apply as a matter of due process or Rule 23, the solution to the \textit{Erie} problem discussed above\textsuperscript{151} depends on some level of consent that is fortified by a right to opt out. Even if no such right existed, Rule 23(e) clearly would require notice to the class of any settlement. Notice is thus essential to making mass tort class actions work. Without adequate notice, there cannot be class actions like the ones recently settled.

Notice presents severe challenges in mass tort cases, but perhaps not more so than in some other class actions. We have seen classes of thousands, or even millions, in securities fraud or antitrust cases.\textsuperscript{152} The uncertainty about who is included in the class in some mass tort cases also exists in other cases, particularly consumer class actions. Just as possible class members may not know whether they were exposed to the asbestos products of certain manufacturers, they may be unsure whether they flew on certain airlines,\textsuperscript{153} or used a certain cab company's cabs.\textsuperscript{154} Indeed, the press attention accorded to recent
mass tort settlements could ensure a greater dissemination of information about those cases than many others.

At the same time, it is hard to ignore the reality that meaningful notice to an entire class is extremely hard to accomplish. For many citizens, even a straightforward notice about a class action mailed to their homes may be incomprehensible. There is no question that appreciating the impact of the current mass tort settlements, much less evaluating them, is a formidable task. Even to arrive at the point of objecting that "They can't do that, can they?" requires some appreciation not only of how the settlements implement a new compensation scheme, but also of the attributes of the litigation alternative that these settlements seek to displace. Having passed this point, the class member must attempt to compare the likely value to him or her of the two options available. Because there are many imponderables, such as the number and severity of claims that will be made against the settlement fund, that comparison of options is likely to challenge the experts. In the Fibreboard litigation, the vagueness of the criteria for paying claims, and the absence of any dollar amounts, made the task particularly difficult.

Coupled with the complexity of this analytical task is a nagging sense that the uniquely personal nature of the claims compromised here should matter, as Professor Trangsrud has argued in another context. Whether or not class members can make an accurate assessment of the coupons offered in settlement of price-fixing claims against airlines is less important than whether people who may be relinquishing the right to go to court to recover damages for life-threatening personal injuries understand what they are doing. Indeed, one of the justifications of the consumer class action—that it is more important to deprive the defendant of ill-gotten gains than to deliver compensation to victims—may underlie the indifference the courts have exhibited toward providing notice and the right to opt out in such cases. Rule 23(b)(3) invites consideration of the interest of

---

155 See Arthur R. Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313, 321-22 (1973) (quoting responses of class members who clearly were bewildered by the notices they received).

156 Roger Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 74-76 (exploring "natural law notion" of "individual claim autonomy in substantial tort cases").


The pecuniary costs of notice in large class actions can run well over half a million dollars . . . . These costs would be justifiable if they were outweighed by compensating benefits that might exist in a case with substantial individual claims. In the large-scale, small-claim class action, however, the
claimants in controlling their own cases at the certification stage; in personal injury class actions that means ensuring that they understand what they are giving up in settlements like the ones recently approved. In sum, courts should be singularly sensitive to the adequacy of notice in mass tort class actions, although that sensitivity need not rise to the level of a categorical preclusion of the objectives sought by the recent mass tort class action settlements.

At the heart of the notice problem lie the dual purposes of notice to the class, purposes which may themselves be at odds with one another. One purpose is to allow class members to monitor the performance of the class representatives and class counsel. This purpose is embodied in the right under Rule 23(e) to object to a proposed settlement and the right under Rule 23(c)(2)(C) to enter an appearance through counsel. This notice purpose does not erect a substantial obstacle to mass tort class actions, for adequate notice can be accomplished even if some class members cannot be identified. When there is a right to opt out, however, this partial notice may not suffice to protect those who are not notified since those who opt out are not likely to pursue monitoring that would protect those who do not.

On balance, the monitoring function does not seem to have been undermined in the recent mass tort class actions. Beyond question there have been vigorous and multiple objections in *Georgine*, the Philadelphia settlement. Nevertheless, the class definition in that case—limiting the class to those who have not yet sued—significantly erodes the monitoring function and seems a tactic to be avoided. But even after *Georgine* was commenced, new suits were being filed at the rate of about 1,500 per month, and all of these claimants were individually notified. Unless all or most of these opted out in a timely fashion,

---

159 In its cornerstone ruling on due process rights to notice, the Supreme Court explicitly recognized this fact:
The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.


160 See Declaration of Katherine Kinsella at 10, Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1995) (No. CIV. A. 93-0215) ("CCR counsel gave me a list of over 9,000 plaintiffs... whose suits for asbestos-related personal injuries against one or more CCR defendants were filed and reported to the CCR from January 15, 1993 through July 15, 1995."). Katherine Kinsella is Senior Vice President of The Kamber Group, the enterprise hired by the proponents of the class action to conduct the class notice campaign.
their individual notification provided a source of substantial monitoring. In the silicone gel class action, there was no effort to exclude current plaintiffs from the class definition, so this problem did not exist.\footnote{161} In Fibreboard, Judge Parker appointed a guardian ad litem to scrutinize the fairness of the settlement terms from the perspective of the claimants.\footnote{162}

A greater obstacle is presented by the other objective of notice—enabling the class members to decide whether to opt out. In this connection, class members who receive notice obviously do not protect the interests of those who do not. If those who receive notice all opt out, that may incline the court to reject the settlement, thereby achieving the same result for those who do not receive notice, but this result is not required.\footnote{163} When a significant proportion of those notified do not opt out, the significance of the decision by others to do so is more difficult to fathom. Given the individual interests involved in personal injury claims, the decision by one claimant to opt out does not seem to bear on the decisions of others whether to exclude themselves. There is arguably no substitute for actual notice to each class member to protect the right to opt out. Of course, if the court can deny the right to opt out altogether, as Judge Parker has tried to do, this concern is mooted.

As a starting point, it is settled that in some circumstances parties may be bound even though they do not receive notice. Where a bankruptcy discharge is involved,\footnote{164} or the state's interest in closing trusts applies,\footnote{165} inability to notify all claimants does not deprive these claimants of due process. But when such interests are not present,\footnote{166}

\begin{itemize}
\item \footnote{161} The true motivating force behind the objections is from lawyers, not claimants. Were there no source of lawyers with an interest in opposing or challenging such a settlement, the monitoring purpose might well be compromised.
\item \footnote{162} The guardian ad litem is Professor Eric Green of Boston University Law School. Professor Green submitted a 92 page report to the court concluding that the settlement agreement was fair, reasonable and adequate. See Report of Guardian ad Litem Eric D. Green, Feb. 9, 1995 at 91, Ahearn v. Fibreboard Corp., 1994 WL 480588 (E.D. Tex. 1995) (No. 6:93CV526).
\item \footnote{163} For discussion of the role of class opposition in the settlement approval process, see infra text accompanying note 205.
\item \footnote{165} Mullane v. Central Hanover Bank, 339 U.S. 306, 313 (1950) (referring to “the interest of each state in providing a means to close trusts that exist by the grace of its laws”).
\item \footnote{166} Cf. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (assessing due process rights with a view to three factors, including government's interest in function involved and burdens of more extensive procedures).
\end{itemize}
there could be an absolute rule requiring actual notice. It should be clear, however, that there is no such requirement under current law. In Eisen v. Carlisle & Jacquelin, for example, the Supreme Court appeared perfectly comfortable with the possibility that more than half of the class members would not receive individual notice; the only debate was over whether mailing notice to the approximately thirty-five percent of class members who could be identified was required by Rule 23.\textsuperscript{167} Thus, there appears to be no absolute bar to preclusion of claims by those who do not receive notice; a right to opt out does not necessarily carry with it an absolute right to personal notice.

But one might urge such a bar with regard to future claims. At its most forceful, this argument would forbid preclusion even as to class members who received mailed notice. The adequacy of notice could turn on whether a person who does not currently know whether or to what extent he or she will develop certain illnesses or injuries may constitutionally be required to decide whether to have those claims presented in the regular court system or through the alternative scheme created by the tort reform effected by these cases. In the Agent Orange litigation, the Second Circuit found that preclusion applied to claimants with after-arising claims even though they did not receive notice, emphasizing the adequacy of representation these claimants received from others.\textsuperscript{168} But the Third Circuit, interpreting the Bankruptcy Act and the Federal Torts Claims Act, suggested possible constitutional obstacles to barring unmanifested claims of railroad workers for exposure to asbestos pursuant to a bankruptcy reorganization.\textsuperscript{169} Arguably no notice would suffice until the claim manifested itself.

\textsuperscript{167} Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 166 (1974) (class estimated to contain over six million members, of whom approximately 2.25 million could be identified).

\textsuperscript{168} In re Agent Orange Prods. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 and 114 S. Ct. 1126 (1994). The court stated:

In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. As appellants correctly note, providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be [ ] made available to these claimants," and by ensuring that they receive vigorous and faithful vicarious representation.

\textit{Id.} at 1435 (quoting 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 1.26 at 1-56 (3d ed. 1992)).

\textsuperscript{169} Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir.), cert. denied, 474 U.S. 864 (1985). The court held that, under the Bankruptcy Act, these workers did not have "claims" they had to assert by the bar date of the bankruptcy proceeding. It found in its interpretation of the Bankruptcy Act a way to avoid constitutional shoals:

[If] contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim. The holder of any such "claim" whose whereabouts were known would then
Of course, as with the *Agent Orange* cases, the acid test for the recent settlements will not be presented until there is a suit by a class member who did not opt out and who claims a due process right to sue because he or she was unaware of injury at the time of the settlement. The prospects for such a challenge are not great if the actual notice efforts are found to be sufficient. Consider, for instance, the situation of a potential claimant who has developed pleural thickening. For such a person, the decision whether to opt out and retain the right to sue may be nearly as difficult as for a person who has not yet manifested any condition. Unless due process requires a new chance to opt out with each deterioration of a claimant's condition, the pleural thickening claimant should be unable to avoid binding effect. Accordingly, the difficulty of the decision is hard to accept as a categorical due process limitation on requiring the claimant to choose now. As the Supreme Court is fond of reminding us, due process is a flexible concept. The protective provisions of the class action device itself—court appointment of counsel to represent the interests of absent class members, notice to the class, and substantive review of any settlement by the court—guard the interests of the future claimant and bear on whether notice should also be absolutely required. When the procedural protections are coupled with the provision in the recent settlements of an alternative compensation scheme and the fact that the specifics on this scheme were included in the notice materials, a categorical due process prohibition on precluding later suits by those who do not opt out seems unnecessary. Indeed, other bankruptcy cases suggest that this Third Circuit decision need not lead to such a rule.

---

170 There has already been a variant of this situation in the Philadelphia litigation because two claimants sought permission to opt out after the deadline for doing so on the ground that the disease only manifested itself at that time. Citing the provision in the settlement agreement that allowed defendants to withdraw if they concluded that too many had opted out, the court refused leave on the ground that if belated opting out were allowed “the entire *Georgine* settlement likely would disintegrate.” *Georgine v. Amchem Corp.*, No. Civ. A. 93-0215, 1994 WL 697404, at *8 (E.D. Pa. Nov. 10, 1994).

171 See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (referring to “truism” that due process is not a technical conception with fixed content unrelated to context, and that it calls for such procedural protections as situation demands).

172 The Third Circuit itself has even held that antitrust claims that have accrued are barred by a bankruptcy reorganization, even in the face of allegations that they were concealed in a situation where the result was an absolute bar on all relief. *In re Penn Central Transp. Co.*, 771 F.2d 762 (3d Cir. 1985).

Other courts have questioned the Third Circuit’s interpretation of the Bankruptcy Act in treating the claims of those with after-arising asbestos injuries as not being “claims” for
Assuming that there is no absolute bar to the foreclosure of future claims on grounds of notice, there is still a very serious notice problem. On their face, the recent class actions make a substantial effort to notify class members of their rights. For those who have not manifested any substantial injury, however, there must be a more serious effort than for those who have.\textsuperscript{173} Claims that class members cannot be located through reasonable efforts should be scrutinized with care. Because exposure effectively amounts to inclusion, lists of employees of companies that used asbestos products, and lists of members of pertinent unions, should be highly useful.\textsuperscript{174} Similarly, the notice materials should be as understandable as possible. In the silicone gel litigation, for example, the court tried to foster comprehension by directing that the class notice would supersede the actual settlement agreement unless otherwise noted.\textsuperscript{175} More generally, there should be a significant thrust toward making clear the implications of foregoing traditional tort litigation.


Consider also Judge Posner's speculations about the proper interpretation of the bankruptcy court's power as to entirely unmatured claims, arguendo treating an interpretation like the Third Circuit's as correct:

\begin{quote}
Even in states where exposed workers are not injured in a tort sense till the disease manifests itself, and therefore do not have an accrued tort claim in any sense, and even assuming that an unaccrued tort claim cannot be a "claim" within the meaning of [the Bankruptcy Act], . . . a bankruptcy court's equitable powers . . . just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization . . . . If future claims cannot be discharged before they ripen, UNR may not be able to emerge from bankruptcy with reasonable prospects for continued existence as a going concern. In that event, and assuming that UNR's going-concern value would exceed its liquidation value, both UNR . . . and future plaintiffs would be made worse off, and UNR's current creditors would not necessarily be made better off, by the court's failure to act along the lines proposed by UNR.
\end{quote}

\textit{In re} UNR Indus., 725 F.2d 1111, 1119-20 (7th Cir. 1984).

\textsuperscript{173} Cf. \textit{Urie v. Thompson}, 337 U.S. 163 (1949) (refusing to interpret statute of limitations to bar claims for disease that manifested itself long after initial exposure).

\textsuperscript{174} Cf. \textit{In re} Agent Orange Prods. Liab. Litig., 818 F.2d 145, 169 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (stating that "there was no easily accessible list of veterans").

\textsuperscript{175} "[I]n the event of any direct conflict, the terms of this Notice take precedence over the terms of the Settlement Agreement unless language in the Notice indicates that it is intended as only a general description or is subject to details contained in the Settlement Agreement." Breast Implant Litigation Settlement Notice ¶ 9, In re Silicone Gel Breast Implant Prods. Liab. Litig., 1994 WL 578353 (N.D. Ala. 1994) (No. CV-92-P-10000-S).
from a class action, the ultimate question for mass tort class actions is whether they can adequately identify and inform absent class members of their rights. Given the underlying *Erie* issues and the nature of these claims, intense scrutiny of both the efforts and their results is warranted. Given the immense amounts at stake in the current settlements, even the multi-million dollar efforts mounted by their proponents may not suffice. Moreover, where there are requirements (such as those in *Silicone Gel*) that claimants take affirmative action by registering to protect their rights, the attention to notice should be even more exacting. There are certainly indications that even the million-dollar notice efforts in the recent cases may be found inadequate.

**IV**

**Confining the Exercise of Rule 23 Power to Achieve Tort Reform**

If this Article correctly concludes that there is no categorical prohibition on class action settlements like the recent efforts involving asbestos and silicone gel implants, there still remain very difficult questions about when and how the power to effect tort reform in this fashion may be exercised. It is on these counts that the recent settlements may be most vulnerable.

The starting point is that, as Newberg observes, "[a]part from emotional aspects associated with severe personal injuries or death arising from allegedly tortious conduct, none of the [commonly-offered reasons for disfavoring certification in mass tort cases] is unique to mass tort litigation." But the application of some commonly-encountered requirements for class actions such as common question predominance, typicality, adequacy of representation, and notice to the class present peculiarly vexing problems in the mass tort context. For present purposes, it is important to keep in mind that the actual features of the recent settlements are in no sense legally mandated or invulnerable to attack for failure to satisfy these requirements.

**A. Adequate Representation and the Conflict Problem**

Permitting mass tort class actions does not necessarily endorse the sort of "seamless web" classes seen in the recent settlements. To the contrary, courts are directed to be sensitive to potential conflicts among class members and should create subclasses when needed to protect against unfairness. As Professor Laycock has pointed out so effectively, a negotiation session that enables the negotiators to reach agreement by compromising the interests of those not present is inherently flawed and raises due process questions about the rights of

---

176 3 Newberg & Conte, *supra* note 116, § 17.02 at 17-19.
The same problem results when such conflicts are not explored and provided for within the class. These concern are particularly important in the settlement context. Almost by definition, omnibus settlements in mass tort cases involve subgroups with discrete interests that are, at least potentially, in conflict with each other. If the settlement classifies claimants according to disease category and provides different compensation for different categories, it follows that those in each category require separate representation. There may be no intrinsic "legal" prescription for the relative shares of different groups, but allocation issues intrinsically create at least potential conflicts. Beyond allocation, the definition of the qualifying condition ordinarily would be particular to each group because the sorts of medical showings needed for a claim based on a given condition need to be tailored to that condition. Although there may not necessarily be a conflict between the groups concerning such qualifications, there is a theoretical possibility of trade-offs to ease the path of one group of claimants in return for erecting barriers to other kinds of claims.

The recent cases offer much room for concern regarding claimants with different conditions, and regarding differences in otherwise applicable state law. In asbestos cases, there is almost by definition a difference in stakes between those who currently have manifested serious ailments and those who have not, possibly tempting the former to sell out the latter. The latter group would include persons whose states permit immediate substantial recoveries and others whose states do not offer such liberal opportunities, suggesting a possible need to subdivide this group according to applicable state law. Moreover, relinquishing punitive damages claims altogether would similarly seem to have uneven impact on claimants depending on the pertinent punitive damages rules of their home jurisdictions. In the silicone gel litigation, similar issues arise concerning the treatment of those with conditions entitling them to sue for damages now and those who are

---


178 "[A]dequacy of settlement terms cannot ordinarily redeem a settlement that was bargained for by a party who was in a conflict position." In re Corrugated Container Antitrust Litig., 643 F.2d 195, 211 n.25 (5th Cir. 1981), cert. denied, 456 U.S. 998 and 456 U.S. 1012 (1982).

179 Cf. In re Chicken Antitrust Litig., 669 F.2d 228, 238-40 (5th Cir. 1982) (negotiation and renegotiation of share of settlement provided to indirect purchasers in antitrust class action after Supreme Court held that indirect purchasers have no claim for price-fixing under federal antitrust law).

180 Arguably at some point one might be defining a subclass consisting of persons who have no present right to sue under the law of their states, possibly raising severe "future claims" problems. See supra part III.B.
only eligible for such relief as medical monitoring. Furthermore, the treatment of foreign plaintiffs in the silicone gel cases, who were allowed only a tiny percentage of the compensation through the settlement agreement, may provide a classic example of the sort of disregard of those not present at the bargaining table that concerned Professor Laycock. As to these claimants, however, there are forceful competing considerations.\footnote{The settlement only forecloses suit in this country, not in the home country of the foreign claimant. These foreign claimants face a substantial risk that their American suits would be dismissed on forum non conveniens grounds, and they rarely have great litigation success at home thereafter. See generally David Robinson, \textit{Forum Non Conveniens in America and England: \"A Rather Fantastic Fiction\"}, 103 L.Q. Rev. 398 (1987). One may cavil about this reality, but it provides a proper context for evaluating the claims that the foreign claimants were unfairly deprived.}

The courts' willingness to entrust a single negotiator or set of negotiators with authority to accommodate these conflicting interests in the recent settlements seems highly questionable. True, defining the pertinent subclasses would sometimes present a serious challenge, but there was apparently no effort to do so in these cases. True, providing separate representation for these differing interests might make settlement more difficult to achieve. Yet in a real sense that is the goal, for the settlement should not be achieved at the expense of discernable subgroups who lack separate representation. Moreover, it need not follow that those who have "more to lose," (\textit{i.e.}, claimants from jurisdictions that more readily allow early claims for substantial damages) would necessarily resist an overall package like the ones actually negotiated. The willingness of present claimants to elect class action treatment in silicone gel cases\footnote{See infra notes 216-18 and accompanying text.} suggests that reasonable minds may conclude that an overall settlement package best serves their interests. Certainly claimants who presently show only pleural thickening might similarly be satisfied with a settlement package like the one presented in Philadelphia, which allows them compensation by a simplified procedure should more serious complications arise.\footnote{But here again state law can matter. In some states such people do not confront difficulties under the single judgment rule. See supra note 27.}

But the reality is that this sort of particularized negotiation did not occur.\footnote{Even though it is the topic of a different part of this symposium, some mention of ethical issues is in order here. Beyond providing separate representation for definable groups, one might urge as well that class counsel be scrutinized under a demanding conflict of interest standard, which might prevent any lawyer who has current clients from representing those with future claims. Whether or not this argument would work in individual cases, it seems overblown in a class action. Indeed, in the asbestos litigation it may have pernicious results. There is the risk that all experienced plaintiff's lawyers will be disqualified, but clearly great familiarity with asbestos litigation issues was essential to effective representation in these cases.}
B. Settlement Classes

The preceding section pointed out the need for care regarding the requirements for certification of a mass tort class action. This care has sometimes been lacking, however, due to the practice of certifying settlement classes, an increasingly popular device. Using this device in the mass tort class action may magnify conflict and other difficulties.

One difficulty can be avoided if the court at least selects and deputizes class counsel. It has long been recognized that the defendant may otherwise have an opportunity for lawyer-shopping.\textsuperscript{185} This problem can be solved if the court's approval is sought before the lawyer purports to bind the class to even a tentative settlement. In \textit{Georgine}, however, this option was not taken, and the indifference displayed in that settlement to the distinctions among members of the class may in part be due to that omission.\textsuperscript{186}

The more troubling question is whether the use of settlement classes should be promoted in mass tort class actions. It is clear that settlement classes have found increasing favor in the courts. The original Manual for Complex Litigation counseled against allowing them,\textsuperscript{187} but the Manual (Second)\textsuperscript{188} and the courts\textsuperscript{189} have taken a more charitable view. Although strongly supportive of settlement

\textsuperscript{185} The Third Circuit stated:

\begin{quote}
[A] person who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendants' wishes. This is so because such an individual, lacking official status, knows that a negotiating defendant may not like his "attitude" and may try to reach a settlement with another member of the class . . . . Consequently when the settlement is not negotiated by a court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class.
\end{quote}

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

\textsuperscript{186} It should be noted, however, that the plaintiffs' attorneys who negotiated with the CCR were appointed lead counsel of the consolidated cases of current claimants combined by the Judicial Panel on Multidistrict Litigation. See \textit{Georgine v. Amchem Prods., Inc.}, 157 F.R.D. 246, 265-67 (E.D. Pa. 1994). They were not entirely without portfolio.

\textsuperscript{187} MANUAL FOR COMPLEX LITIGATION § 1.46, 64-66 (1975).

\textsuperscript{188} MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.45, 242-43, 244 (1985).


In \textit{Weinberger}, the Second Circuit elaborated on the appeal of settlements that include class certification:

The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. Temporary settlement classes have proved to be quite useful in resolving major class action disputes. While their use may still be controversial, most courts have
classes, Newberg recognizes that "[t]here is no doubt that the use of a temporary settlement class tends to short-circuit the class certification process if the class settlement is approved." 190

There is a cogent argument for this short-circuiting since the hard problems that the court would have to confront were the case to go forward as an adjudicated class action can be avoided if the case is settled. Indeed, the possibility that class action status might be denied if the case is not settled can even be urged on the class members as a reason for endorsing the settlement. 191 Certainly it could be that the challenges that a joint trial would pose do not matter at the settlement stage and therefore should not bear on settling the class action. But shortcuts on class certification create a risk that the very disparities in position that create potential conflicts will not receive sufficient attention. Determining whether common questions predominate calls for the court to define what those questions are, and that analysis may reveal that the class should be segregated into subclasses because there are significant differences in the questions raised by claims of the different groups. At bottom the vexing requirements of Rule 23 are meant to be just that; a method that invites the court to overlook these requirements properly raises eyebrows. 192 This is not to say that

---

recognized their utility and have authorized the parties to seek to compromise their differences, including class action issues through this means.

698 F.2d at 72.

190 2 NEWBERG & CONTE, supra note 116, §§11.27 at 11-53.

191 Thus, in the Philadelphia asbestos class action the notice urged the following as a reason favoring the settlement: "the possibility that this class action would not be certified by the Court as a class action for any purpose other than settlement, which would mean that class members would have to bring individual lawsuits to recover from the CCR defendants." Notice of Rule 23(b)(3) Class Certification for Settlement Purposes Only, of Proposed Settlement, and of Hearing on Proposed Settlement at 11, Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993) (No. 93-CV-0215).

192 Judge Reed in Georgine reasoned that "[a]mong the predominant issues in the settlement context is whether a proposed settlement is fair, reasonable and adequate for the class." Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 316 (E.D. Pa. 1994). This seems, with all due respect, to be bootstrapping. The point is whether there are really common questions that unite the class with regard to the claims made. Certainly Rule 23(b)(3)'s predominance requirement calls for substantial attention to this point.

The judge did mention that class members had been exposed to asbestos products and that "all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." Id. at 316; cf. Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) (overturning order consolidating for trial claims of plaintiffs exposed at 40 different power-generating stations). But predominance in the Philadelphia class action was seemingly supplied only by the question of the adequacy of the settlement. Judge Reed's side-stepping of the common questions issue as to the underlying claims invited the court to indulge its substantive preferences about the rights of the parties without focusing on how they might be in conflict.

As this Article went to press, the Third Circuit upheld the idea of a settlement class but insisted that such a class satisfy the requisites for a class action. See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995).
a settlement cannot be negotiated before a full-dress class certification decision, but it does mean that there should be more attention to these problems before a settlement class strategy is adopted.

Among the recent settlements, Judge Parker's mandatory class action under Rule 23(b)(1)(B) with regard to claims against Fibreboard is the most striking instance of an aggressive pursuit of settlement in seeming indifference to class certification requirements. As noted above, it is extremely difficult to understand how the requirements of this provision can be satisfied in mass tort situations. But if they were actually satisfied, there is no conceivable ground on which Rule 23(b)(1)(B) treatment would be appropriate only for settlement purposes; the theory underlying that ground for class certification precludes opting out because class action treatment is mandatory, so predominance of common questions is not required. As a consequence, there seems no plausible argument for a Rule 23(b)(1)(B) "settlement class," and one is tempted to conclude that Judge Parker employed this portion of the rule because the settling parties insisted on denying the right to opt out.

The counterweight to uneasiness about settlement classes is the judicial policy in favor of settlement. This is no place to undertake a full-dress examination of that policy, but in the class action context the policy should be viewed with particular suspicion. Rule 23's starting point regarding settlement is one of great skepticism—that the parties cannot settle without permission from the court and notice to the class. The rule therefore makes it evident that class settlements are different from others. Outside the class action area, the policy in favor of settlement usually looks to encouraging the parties themselves to settle, not appointing proxies to negotiate a settlement in their absence. The very issues that raise questions about adequacy of representation and conflicts—differences among members of the class—also raise doubts about favoring this means of settling these claims. Denying class action status in no way prevents the parties from settling their cases, but they must do it by actual agreement rather than in gross by judicial fiat.

Moreover, as Professor Coffee points out, the settlement class device exerts extreme pressure on class counsel to settle since it gives this lawyer a commission only to settle and not to litigate. Given a world in which plaintiffs' personal injury lawyers, or at least the ones

193 See supra text accompanying notes 102-17.
194 Newberg and Conte write that "[t]he disadvantages accruing if the settlement is disapproved are mostly outweighed, however, by the advantages arising from the general policy of the judicial system to encourage and facilitate amicable settlements of litigation, including class actions." 2 NEWBERG & CONTE, supra note 116, § 11.27, at 11-53.
who specialize in mass tort cases, might be divided into the "settlers" and the "fighters," judges may be tempted to pick pro-settlement lawyers as class representatives in hopes thereby to further increase the likelihood of settlement. A settlement that is a sure thing, made possible by a truncated class certification process, does not serve the purposes of Rule 23.

At least in the securities and antitrust cases in which the settlement class idea arose, a preference for class treatment might be found in the 1966 revisions of Rule 23 and in the furthering of the underlying policies of the federal claims being made. The policy in favor of settlement in mass tort class actions seems linked to the substantive goals of the federal courts in such cases. Settlement is attractive because it caps the defendant's exposure, eliminates punitive damages, and defers claims until serious injury has occurred. But Rule 23 does not invite short cuts to achieve these objectives, and settlement classes in mass tort class actions warrant more, not less, skepticism than in other kinds of cases.

C. Scrutiny of Settlement Terms

The distinguishing feature of class action settlements is that the judge must pass on the merits of a settlement after the participants have negotiated it. Much as judges may influence the content of settlements in other sorts of litigation by facilitating dealmaking by the parties, this plenary veto power over the terms of the settlement is nearly unique. But federal judges' substantive preferences in mass tort litigation may tempt them to be less rigorous at the very time when they should be most demanding.

Proper settlement review has both procedural and substantive aspects. The court should examine the way in which the settlement was negotiated—the information available, the skill of the lawyers and the manner in which the negotiations were conducted—to determine whether the procedure appears calculated to lead to an appropriate settlement. In the mass tort context, unlike the mass accident context, a prime concern should be whether the litigation has become what Professor McGovern labels "mature mass tort litigation." If

---

196 For discussion of assertions that judges may favor Stanley Chesley, a well-known Ohio lawyer, due to his enthusiasm for settling class actions, see Alison Frankel, *Et Tu, Stan?*, *Am. Law.*, Jan./Feb. 1994, at 68.

197 See supra parts I and II.

198 The court has a similar role in regard to settlements of derivative actions for the same reasons. See *Fed. R. Civ. P. 23.1*.

not, claims that the settlement is adequate must be viewed with great skepticism. Consider, for example, a hypothetical proposal for a class action settlement of all future asbestos claims in 1977, when there were some 103 such claims in the federal system. There would be no way for a court to make a comfortable projection of the likely magnitude or value of the claims being asserted. Perhaps similar misgivings should attend projections made now about future silicone gel claims. Certainly the objections made in Silicone Gel on behalf of foreign claimants suggest that, as to them, there was an insufficient information base. In addition, there should be careful scrutiny of any possible conflicts of interest, a topic covered above, in order to minimize the risk that the interests of some are being sacrificed for those of others.

Assuming the procedure is adequate, the court must also find that the settlement itself is "fair, adequate and reasonable." This is a merits review for the court, which is not even required to reject a settlement opposed by a large portion of class members. But the court's judgment should be based on what is fair and reasonable for members of the class in view of the law governing the claims being compromised, not something that strikes the judge as fair and reasonable due to his or her substantive preferences about the underlying law. As the differences in substantive position can be overlooked at the conflict-identification stage, so might they be disregarded by broad-brush treatment at the settlement-review stage. This orientation may be unusually tempting in mass tort litigation.

The correlation between the federal courts' emerging substantive preferences and the terms of recent settlements suggests that such an agenda underlies the fairness review. This suspicion is born out by the

200 That was the time the Judicial Panel on Multidistrict Litigation first refused to transfer asbestos cases to a single district. See In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977).
201 Indeed, while approving the settlement Judge Pointer noted that, although prior cases regarding breast implants afforded a basis for predicting trial time and settlement values, "they do not provide a reliable basis for any statistical extrapolation or prediction as to outcomes of trials in the many different factual and legal settings these claims involve." In re Silicone Gel Breast Implant Prods. Liab. Litig., CV 92-P-10000-S, CV 94-P-11558-S, MDL NO. 926 1994 U.S. Dist. LEXIS 12521, at *4 (N.D. Ala. Sept. 1, 1994).
202 Id. at *8. Similar concerns might apply to a reported settlement of a class action brought by hemophiliacs who contracted AIDS from blood transfusions. The settlement would create a fund providing modest compensation for an undetermined number of members of the class. Newspaper reports indicate no "track record" upon which the amount of the fund was based. Thomas M. Burton & G. Pascal Zachary, Pact Reached in Hemophiliac AIDS Suits, WALL ST. J., Aug. 3, 1994, at B7.
203 See supra text accompanying notes 177-84.
204 Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).
205 See TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462-63 (2d Cir. 1982) (majority rule not "litmus test" but "significant," particularly where dispute centers on sufficiency of settlement fund).
treatment of pleural claims, which the asbestos settlement prohibited except in instances of considerable impairment, even though class members without such impairment may have had highly valuable claims under the law of some states. Rather than confine the inquiry to arguments about a trade-off of uncertain current recoveries for pleural claimants in return for future compensation should the condition worsen, and confront the serious problems these class members might face if they were at the back of a very long queue,\textsuperscript{206} the judge treated the sacrifice of their claims as sensible in the context of an overall package that was "fair" to all.\textsuperscript{207} In part, this reflects the failure to identify these class members' position as sufficiently separate to justify subclassing. But beyond that, the judge's views appear driven by the widely-shared (and extremely plausible) view that claims by others who had sustained more serious injury should take priority over pleural claims, regardless of the applicable tort law.\textsuperscript{208} For the judge to approve the dilution of the legal rights of certain class members be-

\textsuperscript{206} The judge did address these items:

This Court finds that the group of benefits offered to non-impaired class members has significant value. Non-impaired class members will no longer be forced to file premature lawsuits or risk their claims being time-barred. Second, if and when class members do become sick, they will not have to suffer the uncertainties, long delays, and high transaction costs of the tort system. Third, the waiver of defenses under the Stipulation is a significant benefit because there are approximately a dozen CCR defendants who, to date, been held not liable under negligence or strict liability principles in an asbestos case. . . . Finally, under the Stipulation, qualifying claimants with a non-malignant condition do not have to chose between filing now or waiting to see if they develop a more serious malignant condition. This is in marked contrast to the current tort system, where non-impaired claimants usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer.

\textsuperscript{207} He explained that he "considered this issue in the context of the overall fairness and reasonableness of the compromise struck by the Settling Parties in the agreement." Georgine, 157 F.R.D. at 272. In this context, he based the conclusion in part on a finding that pleural changes "will in the vast majority of cases cause no symptoms" and "will not have any effect on the individual's life span." \textit{Id.} at 273. But that is not the question, since if these people have substantial claims under state law the court should not reject them as a bad idea. This is the \textit{Erie} problem. It also seems that the court's treatment of these claims, quoted above, is hard to square with a different finding:

The Objectors have also argued that the benefits offered non-impaired claimants under the Stipulation are not meaningful because few, if any, of these claimants will become sick and qualify for cash compensation. The Court credits the uncontradicted testimony of two medical experts in finding that currently non-impaired claimants are likely to develop more serious asbestos-related medical conditions, such as lung cancer or mesothelioma.

\textit{Id.} at 293. This finding seems to hold the germ of a basis for finding the settlement fair to these claimants because it assures them of a remedy if they do become seriously ill.

\textsuperscript{208} See Peter H. Schuck, \textit{The Worst Should Go First: Deferral Registries in Asbestos Litigation}, 15 Harv. J.L. & Pub. Pol'y 541 (1992) (arguing for creation of registry and allowing suits to go on docket only when actual impairment is shown).
cause he disfavors those rights in comparison to the rights of others undermines the substantive review of the settlement package. Yet with tort reform as a seeming goal, this may be an irresistible temptation.

V

SOME POSITIVE REFLECTIONS ON CLASS ACTION TORT REFORM

Nearly twenty years ago, Professor Chayes concluded his examination of judges' behavior in public law litigation with a "first appraisal" that was sympathetic despite the difficulties of fitting these cases into accepted doctrines of judicial behavior.209 In 1987, I concluded from a review of the Agent Orange class action that it raised a specter of a "procedural apocalypse."210 Although there are multiple reasons for fearing that these cases show that this apocalypse is upon us, in fairness there are also reasons to adopt a more charitable attitude like that of Professor Chayes.

First, the recent settlements, particularly the asbestos cases, are hardly business as usual for the federal courts.211 They address a serious problem of judicial overload and litigant delay that has plagued judges and plaintiffs for some time. Assurances that the problem at hand is unique212 must be taken with a grain of salt. Nevertheless, it is reassuring that the innovators are not saying that they can supplant the conventional tort system more generally or that class actions should routinely be used to intercept prospective mass tort litigation outbreaks. Accordingly, the systemic concerns that underlie the Erie-based objection may be largely academic. Indeed, even state courts have expressed frustration at their own inability to solve the punitive damages problem in asbestos litigation. Thus, the New Jersey Supreme Court observed that "[a]t the state court level we are powerless to implement solutions to the nationwide problems created by asbestos exposure and litigation arising from that exposure."213 The federal solution may be welcomed by many, if not all, state benches.

211 This does not mean that they could not become commonplace. Indeed, Professor Coffee's examples of other recent class action settlements suggest just such a risk, although mostly in state courts. See Coffee, supra note 195. For the state courts to undertake such enterprises raises obstacles that do not attend an effort by a federal court.
212 E.g., Dunn v. Hovic, 1 F.3d 1371, 1393 (3d Cir. 1993) (Weis, J., dissenting) ("Asbestos litigation is unique.").
213 Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986). In a similar vein, the Supreme Court of West Virginia recognized that "because asbestos trials are held nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions." Davis v. Celotex Corp., 420 S.E.2d 557, 566 (W. Va. 1992).
Second, despite some strident objections to the settlements, there is some ground for hope that the new regimes will prove to be a boon for many claimants.\textsuperscript{214} During the opt-out period in the \textit{Silicone Gel} litigation, a new study was published indicating that there is no link between implants and diseases.\textsuperscript{215} Accordingly, those claimants who exhibit conditions entitling them to substantial compensation under the settlement may be considerably better off than they would be pursuing tort suits. Indeed, Judge Pointer was able to observe, in approving the settlement in that case, that "virtually all domestic class members . . . want the settlement to be approved, and without delay."\textsuperscript{216} Moreover, the gadfly involvement of victims' support groups, particularly in the \textit{Silicone Gel} litigation,\textsuperscript{217} may have helped keep the process honest. The reported willingness of a large proportion of \textit{Silicone Gel} class members with suits on file to remain in the class\textsuperscript{218} also showed that this alternative to the conventional tort system did have significant appeal to claimants most likely to be familiar with the ac-

\textsuperscript{214} A related concern, not explored here, is that inherently weak claims might, through the class action, acquire substantial settlement value. For example, as pointed out \textit{infra} note 215, it may be that the silicone gel claims ultimately do not have much merit. For the courts to create a device by which the defendants pay billions for nearly worthless claims would be dubious, to put it mildly. At least in the securities fraud area, there is some reason to fear that has happened. \textit{See} Janet Cooper Alexander, \textit{Do the Merits Matter? A Study of Settlements in Securities Class Actions}, 43 STAN. L. REV. 497 (1991). But there are also grounds for doubting the problem is widespread. \textit{See} Joel Seligman, \textit{The Merits Do Matter}, 108 HARV. L. REV. 438 (1994) (questioning Alexander's methodology and conclusions).

\textsuperscript{215} \textit{See} Gina Kolata, \textit{Study Finds No Implant-Disease Links}, N.Y. TIMES, June 16, 1994, at A8 (describing study by doctor at Mayo Clinic published in \textit{New England Journal of Medicine}). Particularly given the timing, this study was received with considerable skepticism by some plaintiffs' attorneys. One Texas lawyer sought to depose the executive editor of the \textit{New England Journal of Medicine} to investigate the possibility that the timing of the publication was designed to frighten women into remaining in the class. \textit{See} Mike McKee, \textit{Timing is Everything}, RECORDER, July 8, 1994, at 1. For reports of later studies finding no association between silicone gel implants and certain disorders, see Philip J. Hills, \textit{Two Studies Find No Breast-Implant Tie to Connective-Tissue Illness}, N.Y. TIMES, Oct. 29, 1994, at A23.


\textsuperscript{217} \textit{See} Nina Martin, \textit{As Constituents Charge Exclusivity, It's Clear Leaders Aren't Always Loved}, S.F. DAILY J., May 19, 1994, at 1 (describing Command Trust Network, which not only attended court hearings but also meetings of plaintiffs' steering committee, and reporting that the group helped to persuade Judge Sam Pointer to alter provisions of the compensation program).

\textsuperscript{218} In the California state court system, "[t]he vast majority of Superior Court plaintiffs—there were nearly 3,000 cases filed—opted to participate in a global settlement." Lauren Blau, \textit{Implant Maker Knew of Risk of Silicone, Sufferer Contends}, S.F. DAILY J., July 29, 1994, at 3. Another article reported that plaintiffs in all but 250 cases chose to accept the settlement's program and described the reaction of one plaintiffs' attorney:
tual operation of the judicial system. We must not forget that the reality for many tort litigants bears only a faint resemblance to the ideal that we endorse in theory, particularly in mass tort litigation. For many, the settlements have opened up an attractive new avenue for recourse. At the same time, the number of opt outs, while raising concerns about the adequacy of the settlement package, also suggests that the notice programs were not entirely ineffective. At least a significant number of those who preferred to preserve the right to sue will be able to do so.

Third, precluding use of class actions would not end procedural innovation, and attendant possible impact on substantive rights, in mass tort litigation. Consolidation and other techniques frequently result in the streamlining of mass tort litigation. Indeed, the American Law Institute's Complex Litigation Project eventually decided not to emphasize class actions but rather to focus on consolidation in their proposal for dealing with mass tort cases and focused instead on consolidation.

Fourth, the settlements afford an opportunity to observe experimental uses of various potential features of tort reform, providing experience from which to evaluate pending proposals for broader alternatives to tort litigation. The creation of a matrix for compensation based on results of litigated and settled cases, although not unprecedented, offers one model on how simplified compensation

[The attorney] was originally skeptical of the settlement's worth in terms of providing fair compensation for his clients, but ultimately saw all but 20 of his 130 clients register to join.

"Why did my clients register?" he said. "A lot of them do not want to have to go through the rigors of discovery and deposition—maintaining privacy is important to them. Others are intimidated by the legal system. Some are just pragmatic and think that if the global settlement pays off near where it's supposed to, that's the best way to go."


Some 235,000 people reportedly opted out of the Philadelphia asbestos litigation. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 325 (E.D. Pa. 1994). This represents approximately as many people as have filed asbestos personal injury suits over the past decade. Concerned that many of these class members were stampeded into opting out by attorneys who objected to the settlement, the court invalidated the opt outs and allowed a new opt-out period. Georgine v. Amchem Prods., Inc., Civ. A. No. 93-0215, 1995 WL 90157 (E.D. Pa. Mar. 1, 1995). In the breast implant litigation, approximately 15,000 opt outs were received. See Surprising Number Reject Breast Implant Settlement, S.F. CHRON., July 29, 1994, at A7.

E.g., In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (consolidated trial of claims of over 1,100 plaintiffs applying Ohio law pursuant to stipulation of parties), cert. denied, 488 U.S. 1006 (1989).

See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT Chapters 3, 4, & 5 (1994) (proposing consolidation to deal with mass tort litigation).
schemes might be developed. The development of an extraordinary claim procedure to deviate from the matrix in exceptional cases might be a desirable feature if administratively feasible. "Choice of law" provisions that tailor the compensation with an eye to governing state law may offer a method for fair national solutions. Compensation criteria that mimic tort standards similarly may offer reassurance to those concerned about the draconian effect of such compensation schemes. The inclusion of opportunities to go to court later—a sort of rear-end opt-out opportunity—also might prove a desirable innovation. The effectiveness of the differing methods of ensuring the fiscal health of the compensation funds may provide useful insights into how compensation schemes could be fairly and prudently financed. If *Erie* enables the states to serve as laboratories for experimentation in new legal regimes, these settlements might provide an experiment from which the states (and Congress) might learn.

**Conclusion**

Perhaps the class action is, after all, a Phoenix rather than a dinosaur. Before we embrace it as the *deus ex machina* for the mass tort problem, however, a number of serious obstacles must be surmounted. If this Article is right, it is not categorically forbidden to try to accomplish the sorts of objectives these settlements seek. But Rule 23 is not a warrant for tort reform in federal court to cure "defects" in state tort law, and the substitution of a new compensation regime should depend on notice and an opportunity to opt out that truly affords class members a chance to vote. Circumventing that by invoking "equitable jurisdiction" or relying on mandatory class action treatment should not fill the void in judicial authority. Accordingly, some of the recent settlements appear subject to serious criticism for failing adequately to ensure a real opportunity to choose whether to accept the negotiated solution. So also do some seem to gloss over serious conflicts, weaken class certification requirements by use of the "settlement class" technique, and shirk the hard review that should follow from acceptance and evaluation of the substantial rights of the class members.

The explanation for these short cuts is that federal judges understandably react with impatience to the shortcomings of state tort law in mass tort litigation, and perceive that no other governmental institution is capably dealing with these problems. Although there may be extraordinary situations warranting judicial action to solve such impasses in the other branches, it is hard to believe that this is a com-

---


parable situation. For the courts to generalize from the experience in the asbestos and silicone gel cases to justify broader-gauged "improvement" on state law could indeed have apocalyptic consequences. But that probably will not happen, and the recent settlements may be applauded if their handiwork survives appellate review.