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Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution

Georgene M. Vairo

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GEORGINE,¹ THE DALKON SHIELD CLAIMANTS TRUST, AND THE RHETORIC OF MASS TORT CLAIMS RESOLUTION

*Georgene M. Vairo**

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1. *Georgine* is the name commonly used to refer to the massive asbestos class action suit certified by the Eastern District of Pennsylvania, vacated by the Third Circuit Court of Appeals, which decision was affirmed by the United States Supreme Court in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

* Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles. The author has served as a Trustee of the Dalkon Shield Claimants Trust since 1988 and, since 1989, as its Chairperson. I am very appreciative of the research assistance I have received from Jeffrey Wolf, Loyola Law School, Los Angeles, Class of 1999, and Josh Orlinky, Fordham Law School, Class of 1998. I am also indebted to Jeff Mabrey, Director of Programming for the Dalkon Shield Claimants Trust, and Patti Powis and Susan Manardo, Assistant Counsel at the Trust.

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I. INTRODUCTION

A litany of mass tort litigation has dominated the civil litigation landscape for several decades.² From asbestos, Agent Orange and

2. See Kenneth S. Abraham, *Individual Action and Collective Responsibility*:

breast implants to Bendectin, the Dalkon Shield and tobacco, to name only a few, state and federal courts have had to cope with the myriad problems these complex cases have raised. Putting aside the critical question of when litigation over a particular product, drug or substance becomes a mass tort,³ courts lack consistent guidance as to how to resolve such cases efficiently once hundreds or thousands of them are initiated.⁴

Now is a time of great uncertainty, complexity, and ferment in the area of mass torts. Mass tort litigation involves injuries, real and imagined, current and future, serious and minor, to hundreds of thousands, if not millions, of people. The courts have had decidedly mixed results in handling mass tort litigation.⁵ When such litigation presents itself, how to pay all claimants fairly and efficiently becomes the obvious question and key practical consideration. This practical consideration, in turn, raises the leading question of many academics: When, if ever, is an aggregated resolution of mass tort claims proper, given the restraint on individual autonomy, and possible restraint on due process rights, that such a resolution may entail?⁶ During the

The Dilemma of Mass Tort Reform, 73 VA. L. REV. 845, 845-46 (1987); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 8 (1983); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 961-62 (1993) [hereinafter Hensler & Peterson]; Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829-30 (1993).

3. See Shiela Birnbaum, *Class Certification—The Exception, Not the Rule*, 41 N.Y.L. SCH. L. REV. 347, 348-49 (1997) (noting the problem of premature mass tort class action filings; for example, in the Felbatol litigation, a class action was filed before any individual lawsuits were); Hensler & Peterson, *supra* note 2, at 1019-30; Georgene M. Vairo, *Reinventing Civil Procedure: Will the New Procedural Regime Help Resolve Mass Torts?*, 59 BROOK. L. REV. 1065, 1079-87 (1993) [hereinafter Vairo, *Reinventing Civil Procedure*].

4. This is not to say that there are no sources of information. For example, the *Manual for Complex Litigation, Third Edition* provides a plethora of information on a wide variety of complex litigation management issues, such as discovery. See MANUAL FOR COMPLEX LITIGATION (3d ed. 1995). What is less clear is the extent to which courts may use aggregation techniques, such as class actions, to assist them in achieving a relatively quick, fair, and efficient resolution of a class action. See, e.g., Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 CORNELL L. REV. 837 (1995).

5. See Hensler & Peterson, *supra* note 2, at 962-63; Vairo, *Reinventing Civil Procedure*, *supra* note 3, at 1067.

6. See Abraham, *supra* note 2, at 846-47; Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler*, A Glass Half Full, a

early days of mass tort litigation, courts largely sided with the arguably predominant academic view that mass tort claims should be decided individually.⁷ Then, perhaps propelled by the need to deal with the mammoth asbestos litigation, the Judicial Panel on Multidistrict Litigation⁸ ("MDL Panel") began to appreciate the utility of transferring mass tort cases for pretrial purposes,⁹ and federal district courts began to certify some mass tort classes.¹⁰ After courts of appeals affirmed some of these classes,¹¹ both federal district courts and, increasingly, state courts were emboldened to certify classes that were unthinkable only a few years before.¹² However, most of these

Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 TEX. L. REV. 1627, 1627-28 (1995); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1791-1800 (1992); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74-76; Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 43-44. *But see* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 104; David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 581-82 (1986-87).

7. *See, e.g., In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (vacating class certification in Bendectin litigation); *Abed v. A.H. Robins Co. (In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.)*, 693 F.2d 847 (9th Cir. 1982) (vacating class certification in Dalkon Shield litigation); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258 (S.D. Cal. 1988) (denying class certification in flea and tick spray litigation); *Mertens v. Abbott Lab.*, 99 F.R.D. 38 (D.N.H. 1983) (denying Rule 23(b)(3) class certification in DES litigation); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (denying class certification in asbestos litigation).

8. The Judicial Panel on Multidistrict Litigation was established pursuant to 28 U.S.C. § 1407, which empowers the MDL Panel to transfer related federal cases to a single federal district court for pretrial purposes. *See* MANUAL FOR COMPLEX LITIGATION § 31.13 (3d ed. 1995).

9. *See infra* Part II.A.

10. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) [hereinafter *Robins II*] (affirming Rule 23(b)(1) class certification in Dalkon Shield litigation); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987) (affirming Rule 23(b)(1) class certification in Agent Orange litigation); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (affirming asbestos property damage Rule 23(b)(3) class); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (affirming Texas class in asbestos personal injury litigation).

11. *See* cases cited *supra* note 10.

12. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court order certifying nationwide cigarette litigation class action); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (reversing district court order certifying asbestos settlement class action); *In re American Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996) (vacating the district court's order certifying penile prostheses class action); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) (reversing district court order certifying class action in hemophilic/HIV contamination litigation), *cert. denied sub nom.* 116 S. Ct. 184 (1995); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 23.01-23.87

later classes did not make it through the appeals process,¹³ including the massive *Georgine* asbestos future claim settlement class rejected by the United States Supreme Court in June of 1997.¹⁴ As we will see, the rhetoric employed by the courts over the past twenty-five years largely explains the shifting results in these cases.

Amid this sea of uncertainty, the Dalkon Shield Claimants Trust is nearing the end of its mission. The Trust was set up to provide an aggregated solution to the hundreds of thousands of Dalkon Shield claims filed against the A.H. Robins Company.¹⁵ As perhaps the first truly successful mass tort claims resolution facility to complete its mission,¹⁶ it is a fortuitous time to look at how the Trust has performed. This Article updates my 1992 article on the Dalkon Shield Claimants Trust¹⁷ and discusses the Trust's performance in light of the apparent anti-aggregation bias implicit in the Supreme Court's June 1997 opinion in *Amchem Products, Inc. v. Windsor*,¹⁸ the asbestos litigation, the case known as *Georgine* in the lower courts, as well as the courts of appeals' opinions handed down in the year or so before the Supreme Court's recent decision.¹⁹

In *Amchem*, the Supreme Court seemed to question whether aggregated solutions can be fair to all claimants.²⁰ At the same time, however, the Court cited extensively to the Advisory Committee's note accompanying the 1966 amendments to Rule 23 which recognized that "theoretic" individual autonomy concerns did not always outweigh the practical interest in achieving a more sensible litigation unit.²¹ The Trust's performance, I will argue, demonstrates that aggregated solutions present the best hope for solving the practical problems presented by mass torts by insuring fairness to claimants as

(Matthew Bender 3d ed. 1997).

13. See *supra* note 12.

14. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

15. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) [hereinafter Vairo, *Paradigm Lost*].

16. See e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 280-81 n.88 (1995) ("Some trust mechanisms have functioned very well. The Dalkon Shield Claimants Trust has been, on the whole, a success."); Richard B. Schmitt, *Tobacco-Suit Pacts May Become Tougher*, WALL ST. J., Apr. 23, 1997, at B9 (The Dalkon Shield Claimants Trust was "set up to distribute funds to injured women that even some plaintiffs' lawyers say is a model of efficient operation.").

17. See Vairo, *Paradigm Lost*, *supra* note 15.

18. 117 S. Ct. 2231 (1997).

19. See cases cited *supra* note 12.

20. See *Amchem*, 117 S. Ct. at 2231-52.

21. See *id.* at 2246.

a group, as well as by minimizing transaction costs. Equally important, when properly constructed and managed, aggregation can protect, and indeed promote the values underlying the due process rights of individuals.²²

Part II of this Article presents a brief history of the use of class actions by federal courts in mass tort litigation to illustrate how the rhetoric of class actions has evolved over the last few decades. It concludes with a discussion of the Supreme Court's recent asbestos opinion. Part III describes the Dalkon Shield Claimants Trust and summarizes its genesis. This third part discusses the important policies of the Trust which are relevant to an aggregated resolution of mass tort claims and evaluates the Trust's performance. Unfortunately, a valid empirical examination of the claimants' satisfaction must await the actual termination of the Trust. Nonetheless, anecdotal evidence reveals a relatively high level of satisfaction. This discussion will show that the bias against aggregated resolutions of mass torts is unjustified.

Part IV looks at the proposed tobacco settlement in summary form and argues that whether it is Congress or the courts which ultimately bless the settlement, the settlement is seriously defective in its failure to provide for an adequate claims resolution system. The tobacco companies may be buying peace in terms of the absolute amount of money they will be required to pay. As most observers fear, however, the individualized nature of smokers' recoveries may perhaps result in due process in form but certainly not in substance. This Article concludes by arguing that mechanisms exist to satisfy the Supreme Court's concerns about the fairness of mass tort settlements.

II. WHAT THE COURTS HAVE WROUGHT

I have made my bias clear in past writings but will repeat it here. My experience as chairperson of the Dalkon Shield Claimants Trust suggests that aggregated solutions to mass tort cases are the preferred alternative to traditional one-on-one litigation.²³ The Trust was set up pursuant to a reorganization plan under the United States Bankruptcy Code and not as a class action.²⁴ Nonetheless, in most

22. For a more extensive discussion of the history of the Dalkon Shield litigation and the operation of the Trust, see Vairo, *Paradigm Lost*, *supra* note 15.

23. See Vairo, *Paradigm Lost*, *supra* note 15, at 618, 654-58; Vairo, *Reinventing Civil Procedure*, *supra* note 3, at 1093-94.

24. See discussion *infra* Part III.

important respects, the use of a class action and a Chapter 11 reorganization plan may be functional equivalents because they both have the potential to provide for the resolution of all, or most, claims of a particular type.²⁵ Notably, attempts at class certification as a vehicle for obtaining a global resolution of tort claims almost invariably precede a Chapter 11 filing.²⁶ Indeed, had courts certified classes in some of those cases, there may have been no need for the defendants to seek Chapter 11 protection, at least as a procedural matter.²⁷ The irony here is that scholarly and judicial concerns regarding the loss of individual autonomy in the class action context cannot be raised in the bankruptcy context. A damages class action pursuant to Rule 23(b)(3), through its opt-out rights, compels a higher degree of individual autonomy than is required by the bankruptcy laws.

Congress by statute and the Supreme Court by way of the Federal Rules of Civil Procedure have provided the federal judicial system with an arsenal of potentially powerful aggregation tools to assist the courts in resolving complex cases involving the same or similar issues. Key among these tools are: 28 U.S.C. § 1407, the Multidistrict Litigation statute, which allows the Multidistrict Litigation Panel to transfer related cases to one district court for pretrial purposes;²⁸

25. In other words, a claims resolution facility could be provided for as a result of class certification under Rule 23, as in the *Agent Orange* case, see *infra* Part II.B.1.b., or as a part of a Chapter 11 Plan of Reorganization, as in the Dalkon Shield litigation, see *infra* Part III.A.

26. For example, in the Dalkon Shield litigation, before A.H. Robins filed its Chapter 11 petition, the Ninth Circuit refused to certify a class. See *infra* notes 49-50 and accompanying text. Similarly, in the silicone breast implant litigation, the unraveling of a class action settlement led Dow Corning to file a Chapter 11 petition. See *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996) *cert. denied* 117 S. Ct. 718 (1997).

27. Only after the court ultimately denied class certification and the number of cases continued to grow in the Dalkon Shield litigation did A.H. Robins seek Chapter 11 protection. In the silicone breast implant litigation, the court conditionally certified a Rule 23(b)(3) class to provide a vehicle for settling all or most breast implant claims. See *In re Dow Corning Corp.*, 86 F.3d at 485. The settlement provided for relatively large payments for the various injuries alleged. See *id.* However, the number of claimants—about 440,000—who indicated their desire to participate in the settlement process far exceeded the fund of approximately \$4.25 billion that the several manufacturers of silicone breast implants had offered to pay. See *id.* at 485-86. In addition, several thousand other claimants opted out of the settlement. See *id.* at 485. Thus, when Dow Corning realized that it was not buying the peace it had hoped for, it sought Chapter 11 protection. See *id.* at 486. As a result of Dow Corning's filing, the court stayed all actions against it pursuant to 11 U.S.C. § 362(a). See *id.*

28. See 28 U.S.C. § 1407 (1994).

Federal Rule of Civil Procedure 23, which permits representative class action litigation in appropriate cases;²⁹ and Federal Rule of Civil Procedure 42, which provides for the consolidation of related cases within a district court.³⁰ In the bankruptcy context, 28 U.S.C. § 1334, which vests the federal district courts with subject matter jurisdiction over cases "related to" a bankruptcy case, may be used to support removal of state cases and, ultimately, their aggregated treatment in a federal court.³¹ In addition to these aggregation rules, courts may in-

29. See FED. R. CIV. P. 23.

30. See FED. R. CIV. P. 42.

31. See 28 U.S.C. § 1334(b) (1994). Section 1334 provides for original and exclusive jurisdiction over all cases under Title 11 (the Bankruptcy Code), and further provides in relevant part: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . arising in or related to cases under title 11." Section 1334 "related to jurisdiction" has been used in a number of mass tort cases to effect consolidation. Perhaps the broadest use of such jurisdiction occurred in the silicone breast implant litigation. There, after Dow Corning sought Chapter 11 protection, other manufacturers and suppliers of silicone breast implants as well as Dow Corning's corporate parents, Dow Chemical Co. and Corning Inc., who were co-defendants in the lawsuits against Dow Corning, sought to have the state cases filed against them removed to federal court and consolidated with the Dow Corning Chapter 11 proceeding pursuant to 28 U.S.C. § 1334 (providing federal jurisdiction) and 11 U.S.C. § 157(b)(5) (allowing consolidation). See *In re Dow Corning Corp.*, 86 F.3d at 486-87. The district court rejected the attempt but the Sixth Circuit reversed and remanded. See *id.* at 485. Citing the "primary goal" of establishing "a mechanism for resolving the claims at issue in the most fair and equitable manner possible," the Sixth Circuit adopted an expansive definition of "related to" jurisdiction. See *id.* at 487, 489. The court found that the tort claims against the non-debtors were sufficiently related to the tort claims against Dow Corning, which were stayed pursuant to 11 U.S.C. § 362(a)(1), because the former could give rise to contribution or indemnification claims among the non-debtors which could have an impact on the debtor's estate. See *id.* at 493-94. Thus, according to the court, the "unusual circumstances" necessary to invoke 28 U.S.C. § 1334 "related to" jurisdiction were present. *Id.* at 493 (quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)). The court also found that 11 U.S.C. § 157(b)(5) granted the district court handling the Dow Corning bankruptcy the power to transfer all the cases to itself. See *id.* at 496. The Sixth Circuit relied heavily on the decision of the Fourth Circuit in the Dalkon Shield litigation. See *id.* The Fourth Circuit had held that there was "related to" jurisdiction over claims against doctors and A.H. Robins's insurance company. See *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986).

Upon remand, the district court, invoking 28 U.S.C. § 1334(c)(2), held that the actions against the non-debtors were subject to mandatory abstention. See *In re Dow Corning Corp.*, No. 95-CV-72397-DT, 1996 U.S. Dist. LEXIS 16754, at *20-21 (E.D. Mich. July 30, 1996). Section 1334(c)(2) provides for mandatory abstention "if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334(c)(2) (1994). The Sixth Circuit granted mandamus in favor of the non-debtors, holding that an individualized determination must be made in each case to determine the impact of

voke the court-made preclusion doctrine to bar relitigation of the same issues³² and issue injunctions against state court litigation which raise the same claims as those in federal court.³³

A brief summary of the use of two of the most important aggregation techniques, the Multidistrict Litigation statute and Rule 23, in the context of some of the most notorious mass tort cases shows an ambivalence at best, especially at the appellate level, toward the use of these techniques in mass tort cases.³⁴ While the timelines may not be neat, one can observe through the rhetoric used in these cases the ebb and flow of judicial attitudes towards mass tort class actions.

A. *The Early Cases*

Without the 1966 amendments to Rule 23, class actions in mass tort cases would have been unthinkable.³⁵ The key 1966 amendment

the case on the debtor's estate. See *Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 569, 572 (6th Cir. 1997). In addition, the Sixth Circuit found that discretionary abstention under 28 U.S.C. § 1334(c)(1) was also "wholly inappropriate" given the court's prior acknowledgment of the "significant impact that our resolution of these issues will have on the future course of [bankruptcy] litigation." *Id.* at 571. Thus, the filing of bankruptcy, together with the broad reach of the "related to" jurisdictional provision and the transfer power, provides a very potent tool for aggregation and global resolution.

32. See Vairo, *Reinventing Civil Procedure*, *supra* note 3, at 1073 & n.40.

33. See Georgene M. Vairo, *Problems in Federal Subject Matter Jurisdiction: Supplemental Jurisdiction; Removal; Preemption, Abstention and Diversity*, at 48-59, reprinted in *NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE*, Q247 ALI-ABA 47-58 (1996).

34. This group of author-selected class action cases can be criticized for ignoring the hundreds of other decisions granting or denying class actions in other mass torts or product liability actions which, if reviewed and analyzed, may paint a different picture of the history of the use of mass tort class actions. However, because these are among the most notorious and publicly known mass torts, they provide a better sense of the rhetoric underlying judicial philosophy at different points of time than the more routine cases.

35. Prior to the 1966 amendments to Rule 23, the class action rule had an equity orientation and thus was not conceived as being available in a common law tort case. See FED. R. CIV. P. 23 advisory committee's note to 1937 adoption; FED. R. CIV. P. 23 advisory committee's note to 1966 amendment. However, practice with the rule showed that the rule was fraught with difficulties. As the 1966 Advisory Committee's note explains:

The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res

for our purposes is the provision for compensatory damage classes under Rule 23(b)(3). The Advisory Committee's note to the 1966 amendments makes clear that one purpose of the revision was to permit the use of damages class actions where the interests of individuals in prosecuting their actions "may be theoretic rather than practical."³⁶ Although the Advisory Committee had in mind cases where an individual's economic stake was so small that one-on-one litigation would be impracticable,³⁷ the idea that it might be appropriate to use class actions to resolve damages cases was legitimized.

Nevertheless, the Advisory Committee's note makes clear that it did not envision the routine use of class actions in mass tort litigation. Even though the concept of mass tort litigation was relatively unknown at the time, the problem of a mass accident, such as a plane crash, was well-known.³⁸ The Advisory Committee's note to the 1966 amendments made clear that even such mass accident cases "ordinarily" would not be "appropriate" for class action treatment.³⁹ The Advisory Committee's note became the mantra of the courts in the late 1970s and early 1980s as they denied class action treatment in

judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. The courts had considerable difficulty with these terms.

FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (citations omitted).

36. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment; *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967) (the interest in controlling a litigation "may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.").

37. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment. The Supreme Court quoted extensively from this note in the asbestos litigation class action case. *See* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246-47 (1997).

38. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment; Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960).

39. FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment. The Advisory Committee's note to the 1966 revision of Rule 23(b)(3) states:

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

Id.

a variety of mass tort cases. Typically, these courts simply relied on the Advisory Committee's note rather than engaging in a detailed analysis of whether the requirements of Rule 23 were satisfied. The Dalkon Shield litigation provides a good example.

In the late 1960s, due to alarm about the side effects of the birth control pill, the intrauterine device ("IUD") became a popular alternative.⁴⁰ In 1970 the A.H. Robins Company acquired the rights to the Dalkon Shield IUD⁴¹ and began marketing it in January of 1971. By the time the company withdrew the product from the United States market, Robins had distributed approximately 2.8 million Dalkon Shields in the United States and 1.7 million overseas.⁴² Approximately 3.6 million women worldwide actually used the Dalkon Shield.⁴³

Almost immediately upon distribution of the Dalkon Shield, doctors began reporting various problems with the product, and women started filing lawsuits in both state and federal courts, alleging a variety of injuries linked to the Dalkon Shield.⁴⁴ The litigation then unfolded in what became the typical mass tort scenario. Within a couple of years, aided by publicity generated by the FDA's involvement, the Dalkon Shield lawsuits developed into a mass tort.⁴⁵ In 1975 the MDL Panel transferred the federal Dalkon Shield cases to the district court of Kansas for pretrial proceedings under 28

40. See RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 1* (1991).

41. A doctor and an engineer developed the Dalkon Shield and claimed that it had a very high rate of preventing unwanted pregnancies. See *id.*; see also The Company 16, *In re A.H. Robins Co.* (No. 85-01307-R), in Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter Company].

42. See Company, *supra* note 41, at 16.

43. See *id.*

44. Injuries included: unwanted pregnancies, ectopic pregnancies, septic abortions, miscarriages, and birth defects allegedly caused to fetuses when conception took place with the Dalkon Shield in the woman's uterus. There also were complaints about excessive bleeding and cramping, Pelvic Inflammatory Disease ("PID"), and complications arising from PID, including sterilization and infertility. Many young women, who had not yet had children, were injured. For obvious reasons, many of these cases had high emotional value. In some instances, infections were so serious that Dalkon Shield users died. See SOBOL, *supra* note 40, at 9.

45. As Professor Hensler has demonstrated, once the FDA becomes involved in a potentially high volume litigation, and the press begins to report on the debate about the safety of a product, what otherwise may have been high volume but relatively routine litigation will become a mass tort. See Hensler & Peterson, *supra* note 2, at 968-69, 1021-22 (discussing breast implant litigation, Dalkon Shield litigation, and other mass torts).

U.S.C. § 1407.⁴⁶ By the end of 1979, with thousands of cases pending nationwide, the courts remanded many of the MDL cases to their respective transferee courts for trial.⁴⁷

The district court in California tried to deal with the cases remanded to it with what at that time was a novel approach. After realizing that each Dalkon Shield case would take at least a week to try, and realizing the potentially huge exposure—estimated by the court to be well over A.H. Robins's net worth because of the claims for punitive damages—the court certified a nationwide class under Rule 23(b)(1) of the Federal Rules of Civil Procedure on the issue of punitive damages. It also certified a California class under Rule 23(b)(3) on the issues of liability and compensatory damages.⁴⁸ The Ninth Circuit, however, reversed.⁴⁹ The idea of individual autonomy loomed large as the Ninth Circuit cited the 1966 Advisory Committee's note that mass tort cases ordinarily are not appropriate for class action treatment.⁵⁰ This opinion assured that Dalkon Shield cases would ordinarily be tried as individual lawsuits.

In another trait typical of mass tort litigation, Robins won jury verdicts in many of the early cases.⁵¹ Thus, there did not seem to be any immediate pressure on Robins to resolve the claims against it globally. With the discovery of certain sensitive documents, however, plaintiffs began to win huge compensatory and punitive awards.⁵² For

46. See *In re A.H. Robins Co.*, 406 F. Supp. 540, 541 (J.P.M.L. 1975).

47. See Vairo, *Paradigm Lost*, *supra* note 15, at 625; see also *In re A.H. Robins*, 610 F. Supp. 1099, 1100 (J.P.M.L. 1985) (discussing pending Dalkon Shield actions).

48. See *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 896 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982).

49. See *id.* at 856.

50. See *id.* at 852; *supra* note 39.

51. See SOBOL, *supra* note 40, at 15; Vairo, *Reinventing Civil Procedure*, *supra* note 3, at 1073.

52. See, e.g., *Official Dalkon Shield Claimants' Committee v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 769 (4th Cir. 1989) [hereinafter *Robins III*]. To date, the tobacco industry has not paid a dime in damages to an individual tort plaintiff. In two cases juries rendered verdicts for plaintiffs. However, in the first case, Rose Cippilone's family eventually dropped the case after the \$400,000 verdict was successfully appealed. See *Cippilone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990) (reversing \$400,000 verdict), *aff'd in relevant part, rev'd in part*, 505 U.S. 504 (1992). In July 1996 a Florida jury awarded a lung cancer victim \$750,000 in damages from Brown & Williamson. See Nancy Rivera Brooks, *Tobacco Firms Not Culpable for Death, Jury Rules*, L.A. TIMES, Aug. 24, 1996, at D1. However that verdict will be appealed on preemption grounds. See *Brown & Williamson Tobacco Corp. v. Carter*, 680 So. 2d 546 (Fla. Dist. Ct. App. 1996). It was not until damaging documents began to appear, and former industry employees began to testify against the interests of the industry, that settlement lev-

instance, on May 3, 1985, a jury in the *Tetuan* case in Kansas awarded compensatory damages of \$1.75 million and punitive damages of \$7.5 million.⁵³

At this point, Robins and its insurer, Aetna, had disposed of about 9,500 suits, and had paid out approximately \$530 million.⁵⁴ Yet, approximately 6,000 cases were still pending, with more filed every day.⁵⁵ The multidistrict litigation in the District of Kansas had been pending for about ten years. Common discovery was largely completed and most of the individual actions had been remanded to their respective transferor district courts.⁵⁶

Now seeking to achieve a global resolution of all claims against it, Robins filed before the MDL Panel another motion seeking transfer of more than 1,700 of the federal cases against it to the Eastern District of Virginia.⁵⁷ The Panel denied Robins's motion largely because common discovery, the essential purpose of the MDL transfer, was already complete.⁵⁸ The Panel made clear that the MDL procedure was not a universal settlement device:

Robins has been candid in stating to the Panel that it seeks transfer of these actions under Section 1407 to the Eastern District of Virginia (a district other than the original MDL-211 transferee district, and also the district in which Robins

erage began to turn in favor of plaintiffs. Only after pressure was brought to bear by the state attorney general Medicaid reimbursement lawsuits did the industry consider a global settlement. See discussion *infra* Part IV. The industry has now settled two of these suits. See *Florida Settles Lawsuit Against Tobacco Industry*, L.A. DAILY J., Aug. 26, 1997, at 4; Henry Weinstein, *Mississippi Settles Its Tobacco Industry Suit*, L.A. TIMES, July 4, 1997, at A1. In addition, the flight attendant class action suit has been settled. However, none of the \$300 million settlement will be awarded to the plaintiffs. Rather, it will be used to support research. An additional \$49 million will be paid to the class's lawyers. The agreement also provides for the possible continuation of individual flight attendant suits, but no class actions, and, in the individual suits, the cigarette companies will bear the burden of proof on the issue of whether second hand smoke causes the injuries alleged by the flight attendants. The attendants, nonetheless, will be required to prove that their own injuries were caused by second hand smoke, and will not be entitled to sue for punitive damages. See Neil A. Lewis, *First Thing We Do, Let's Pay All the Lawyers*, N.Y. TIMES, Oct. 11, 1997, at A8; Mireya Navarro, *Cigarette Makers Reach Settlement in Nonsmoker Suit*, N.Y. TIMES, October 11, 1997, at A1.

53. See *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1210 (Kan. 1987).

54. See *Company*, *supra* note 41, at 16.

55. See *id.*

56. See *In re A.H. Robins Co.*, "Dalkon Shield" Ind. Prods. Liab. Litig. 610 F. Supp. 1099, 1100 (J.P.M.L. 1985).

57. See *id.* at 1099-1100.

58. See *id.* at 1100.

is headquartered) as part of an overall effort to secure a universal resolution of all Dalkon Shield actions. Such a goal is certainly not inimical to the principles underlying Section 1407, but Section 1407 transfer can only be a tool in such an effort if the statutory criteria for transfer under Section 1407 have been satisfied. This simply has not been done in regard to the Robins motion.⁵⁹

Three months after *Tetuan*, having failed in its last effort before the MDL Panel to force a final resolution of the claims against it, Robins filed for reorganization relief under Chapter 11 of the Bankruptcy Code.⁶⁰

Attempts to certify classes or to push the limits of the multidistrict litigation procedure fared no better in the early phase of asbestos litigation. For example, in 1974 in *Yandle v. PPG Industries, Inc.*, a district court in Texas refused to certify a Rule 23(b)(3) class on the issue of liability.⁶¹ The court characterized the case as "a massive tort action" because it involved all former employees and their successors at the defendant's plant in Texas.⁶² The plaintiffs conceded that class treatment on the question of damages would be inappropriate because of the individual nature of each class member's claims.⁶³ Nonetheless, the district court, largely relying on the Advisory Committee's note and the value of individual autonomy upon which it is predicated, refused to certify a class limited to the issue of liability.⁶⁴

The court primarily invoked policy reasons,⁶⁵ rather than the substance of Rule 23,⁶⁶ for its refusal to certify. The court did improve upon the Advisory Committee's note somewhat by distinguish-

59. *See id.*

60. *See* 11 U.S.C. §§ 101-1330 (1994 & Supp. II 1995). Robins's bankruptcy resulted from the "avalanche of actions filed in various state and federal courts throughout the United States . . . seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir. 1986).

61. *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974).

62. *Id.* at 567.

63. *See id.* at 568.

64. *See id.* at 572.

65. The court stated: "First of all there is the general feeling that when personal injuries are involved that each person should have the right to prosecute his own claim and be represented by the lawyer of his choice. Secondly, that the use of this procedure may encourage solicitation of business by attorneys." *Id.* at 569.

66. The court continued: "And finally that individual issues may predominate because the tortfeasor's defenses may depend on facts peculiar to each plaintiff." *Id.*

ing the case of mass torts from mass accidents. By the time of the *Yandle* decision in 1974, use of class actions had become routine in mass accident cases.⁶⁷ But these cases were of no help in the mass tort context:

This case is very different from the single mass accident cases that have in the past allowed a class action to proceed on the liability issues Usually, one set of operative facts will establish liability. Here we have two lawsuits covering a ten year span of time in which the nine defendants acted differently at different times.⁶⁸

The court refused to see the distinction between global and specific causation as a predominant issue: more specifically, whether there was exposure to asbestos at all, and whether asbestos could cause the complained of injuries. Rather, the court made the true but rather irrelevant statement that it was "in agreement with the defendant that there is not a single act of negligence or proximate cause which would apply to each potential class member and each defendant in this case."⁶⁹ Moreover, the court found that the "superior method for adjudication of this case is to continue allowing intervention freely for those who wish to join and to maintain firm control over this litigation by utilizing the tools set forth in the Manual for Complex and Multidistrict Litigation."⁷⁰

Perhaps more surprising than the courts' reluctance to certify mass tort class actions during this time period was the MDL Panel's refusal to invoke the pretrial transfer provision of 28 U.S.C. § 1407 in the asbestos litigation.⁷¹

While no mechanisms authorize the formal consolidation of state court cases filed in different states or coordination of related state and federal litigation,⁷² Congress enacted a statutory scheme, 28

67. See MANUAL FOR COMPLEX LITIGATION § 33.2 (3d ed. 1995). See generally Frances E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) (discussing a functional approach to managing complex litigation).

68. *Yandle*, 65 F.R.D. at 571.

69. *Id.*

70. *Id.* at 572.

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

72. Although there is no legislation authorizing transfer, consolidation and coordination of related state and federal litigation, there have been various proposals for more effectively handling complex litigation pending in state and federal courts. For example, the American Law Institute has proposed a variety of procedural solutions for dealing with such litigation, including the following: ex-

U.S.C. § 1407, for consolidating and coordinating related cases filed in different federal district courts.⁷³

Product liability cases, one example of cases commonly cited as appropriate for transfer under 28 U.S.C. § 1407,⁷⁴ and often the foundation for mass tort litigation, actually have caused some difficulty for the Panel. Although numerous product liability cases have been transferred, the routine use of 28 U.S.C. § 1407 transfers in mass tort cases is of relatively recent vintage.⁷⁵ For example, in 1977 the MDL Panel declined to transfer the pending asbestos cases because it was not convinced that such cases raised sufficient common questions of fact.⁷⁶ At the time, 103 cases were pending in 19 different district courts. The Panel denied transfer again in 1980, 1985, 1986, and 1987.⁷⁷ By 1991 the number of asbestos cases in the federal courts reached over 26,000. At that time, the MDL Panel, citing the changed circumstances, decided that transfer of the asbestos cases under 28 U.S.C. § 1407 was appropriate.⁷⁸

panded federal diversity subject matter jurisdiction to provide a federal forum alternative in a broader range of cases; reverse removal to permit federal cases to be handled in the state courts where appropriate; expanded powers for a new Complex Litigation Panel which would take the place of the MDL Panel; federalizing choice of law rules; and new rules pertaining to personal jurisdiction and preclusion. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994). These proposals raise difficult federalism issues and therefore adoption is unlikely. Nonetheless, in recent years, federal district and state court judges have worked closely and cooperatively on a voluntary basis in a number of complex cases to achieve a high degree of efficiency. See William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

73. 28 U.S.C. § 1407 (1994).

74. Many types of disputes, ranging from antitrust, securities, and product liability cases to mass disaster and mass tort cases, result in the filing of related cases in different district courts throughout the United States. When fashioning § 1407, the multidistrict litigation statute, Congress cited these and other types of cases, such as patent and trademark suits, as the types "in which massive filings of multidistrict litigation are reasonably certain to occur." H.R. REP. NO. 90-1130, at 3 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900; see also S. REP. NO. 90-454, at 7 (1967) (suggesting that product liability, as well as antitrust, securities and mass accident cases, would be particularly susceptible to transfer).

75. Compare *In re Ortho Pharm. "Lippes Loop" Prods. Liab. Litig.*, 447 F. Supp. 1073 (J.P.M.L. 1978) (denying multidistrict litigation transfer) with *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (granting multidistrict litigation transfer).

76. See *In re Asbestos*, 431 F. Supp. at 910.

77. See *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 417 (J.P.M.L. 1991) (discussing history of asbestos litigation).

78. See *id.*

B. High Tide for Mass Tort Aggregation

Invoking changed and unique circumstances became the hallmark of the next phase of mass tort aggregation decisions. Considerations shifted away from concerns of individual autonomy to the practicalities of handling and resolving through settlement hundreds and thousands of pending cases.

Asbestos litigation is a dramatic example of the development of mass tort aggregation. As discussed above, the MDL Panel rejected five attempts to invoke 28 U.S.C. § 1407. Moreover, in late 1990, in *In re Allied Signal Inc.*,⁷⁹ the Sixth Circuit rejected the efforts of a small group of federal judges who worked together to certify a nationwide asbestos litigation class action.⁸⁰ Yet, only about six months later in early 1991, the MDL Panel transferred all 26,639 asbestos cases pending nationwide to the Eastern District of Pennsylvania.⁸¹ Five years later, the number of tag-along and other cases pending in the Eastern District had more than doubled.⁸²

The MDL Panel's 1991 opinion did not suggest that its previous decisions not to transfer asbestos cases in 1977 and the 1980s were wrong. Instead, the Panel noted that changed circumstances—the thousands of pending cases—persuaded it “that th[e] litigation ha[d] reached a magnitude, not contemplated in the record before [them] in 1977, that threaten[ed] the administration of justice and that require[d] a new, streamlined approach.”⁸³

In a nod to the individual autonomy concerns of some litigants who believed the transfer would “result in their actions entering some black hole, never to be seen again,”⁸⁴ the Panel nonetheless authorized the transfer of asbestos cases to the Eastern District of Pennsylvania; however, it then catalogued a number of devices that the district court could use to protect individual interests.⁸⁵

79. 915 F.2d 190 (6th Cir. 1990).

80. *See id.* at 191. Of course, the Sixth Circuit's decision was not surprising because the group of judges, notwithstanding their good intentions, in effect constituted themselves as an ad hoc court without any constitutional or congressional authority for doing so.

81. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 416-17.

82. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 U.S. Dist. LEXIS 6199, at *6 (E.D. Pa. 1996) (“The size of MDL 875 has now grown from 26,639 to 58,478.”).

83. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 418.

84. *Id.* at 423 n.10.

85. *See id.* at 420-23. Although the Panel stated that it did not have the power to direct the transferee court in the exercise of its power and discretion, it noted a number of issues to be considered by the transferee court in order to

In 1977, the Panel took the orthodox approach consistent with the anti-aggregation/pro-litigant autonomy approach taken by the courts in deciding whether to certify product liability actions for class action treatment under Rule 23(b)(3).⁸⁶ Until the mid-1980s the prevailing view was that individual liability issues generally outweighed any common issues that such litigation presented in order to protect the "general assumption" that each product liability plaintiff has a right to his or her own lawsuit and attorney of choice.⁸⁷ Later, paralleling the greater willingness to transfer cases under 28 U.S.C. § 1407,⁸⁸ district courts began to show a willingness, often with approval from the courts of appeals, to certify mass tort class actions of various kinds.⁸⁹

The most notorious of those cases involved asbestos,⁹⁰ Agent Orange,⁹¹ the Dalkon Shield,⁹² breast implants,⁹³ and tobacco.⁹⁴ Of

streamline the litigation such as: a single national class action trial on a number of discrete issues, such as product defect, the state of the art defense, or punitive damages; a deferral program for plaintiffs who were not presently seriously ill, such as a pleural registry; limited fund class action determinations; and, perhaps most importantly, global settlement. *See id.* at 420-21. Although the transferee court took heed, consistent with the emerging trend at the time, and approved a class action settlement, the Third Circuit reversed the class certification. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996). The Supreme Court agreed that the settlement class was inappropriate. *See Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

86. *See supra* notes 35-70 and accompanying text.

87. *See supra* note 65 and accompanying text; *see also* *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979) (certifying Rule 23(b)(3) plaintiffs class in DES litigation), *vacated*, 100 F.R.D. 336 (D. Mass. 1983) (vacating class certification in light of the Massachusetts Supreme Judicial Court's decision to unequivocally reject the theory of a classwide imposition of enterprise liability for those class members who could not identify the source of the DES which allegedly affected them, so that questions of law and fact common to the class no longer predominated over questions affecting only individual class members).

88. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 749-50 (E.D.N.Y. 1984) ("Some 600 separate cases have been sent to this district from all over the country with an estimated fifteen thousand named plaintiffs."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 1988 U.S. Dist. LEXIS 17332 (D.P.R. 1988) (275 actions); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 844 F. Supp. 1553 (J.P.M.L. 1994) (173 actions).

89. *See infra* notes 90-162 and accompanying text.

90. *See In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (certifying mandatory class in Texas asbestos litigation), *cert. granted and judgment vacated*, 117 S. Ct. 2503 (1997) (judgment vacated and case remanded to Fifth Circuit Court of Appeals for further consideration in light of *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997)); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Jenkins v. Raymark Indus.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) (affirming district court order certifying class in Texas asbestos litigation).

91. *See discussion infra* Part II.B.1.b.; *see also In re "Agent Orange" Prod.*

course not all attempts at certification were successful at the courts of appeals.⁹⁵ There is no question, however, that district courts were willing to use class actions as vehicles for managing or settling mass torts cases, and that in extraordinary cases courts of appeals would affirm. For example, in 1986, “despite misgivings,” the Third Circuit affirmed a Rule 23(b)(3) class in the asbestos property damage case, and commented that “the trend has been for courts to be more receptive to use of the class action in mass tort litigation.”⁹⁶

To illustrate the difference in rhetoric, I will review several cases in which the court of appeals affirmed district court orders certifying a class.

1. The real world of dispute resolution conquers the theoretics of individual autonomy

The histories of asbestos litigation and the *Agent Orange* case illustrate how the courts moved away from relatively ephemeral concerns about individual autonomy to the practicality of trying to

Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (affirming district court order certifying Rule 23(b)(3) class in Agent Orange litigation).

92. See *infra* Part III; see also *Robins II*, *supra* note 10, 880 F.2d 709 (4th Cir. 1989) (affirming mandatory class action against Dalkon Shield product liability insurer in litigation related to A.H. Robins Chapter 11 proceeding).

93. See *In re Silicone Gel Breast Implants Prods.* Liab. Litig., 887 F. Supp. 1469 (N.D. Ala. 1995) (certifying class against breast implant manufacturers).

94. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995) (certifying nationwide Rule 23(b)(3) class in tobacco litigation on addiction theory), *rev'd*, 84 F.3d 734 (5th Cir. 1996); *Broin v. Phillip Morris Cos.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994), *reh'g denied*, *Phillip Morris Inc. v. Broin*, 654 So. 2d 919 (Fla. 1995) (Table No. 84,547).

95. See, e.g., *In re Joint E. and S. Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (reversing mandatory class certification in asbestos litigation insurance dispute); *In re Federal Skywalk Classes*, 93 F.R.D. 415 (1982), *rev'd*, 680 F.2d 1175 (6th Cir. 1982) (reversing mandatory class certification in accident case). Perhaps the result in these cases may be seen as demonstrating judicial reluctance to use mandatory, limited fund, class action theories in mass tort cases, especially where the federal court class certification would have the practical effect of enjoining related state court proceedings. See *In re Federal Skywalk Classes*, 680 F.2d 1175, 1182 (6th Cir. 1982). The district court certified the class in part to prevent competing actions which might frustrate the federal court's attempts at settlement. The Sixth Circuit reversed because the mandatory class had the effect of an injunction and because the Anti-Injunction Act, 28 U.S.C. § 2283, forbids the federal courts from enjoining state court proceedings unless one of three narrow exceptions, none of which the court found to be present in the litigation, were satisfied. See *id.* at 1181-82. However, by the mid-1990s, courts of appeals also would overturn class certifications in damages class actions under Rule 23(b)(3). See *infra* Part II.C.2.

96. *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986) (citations omitted).

provide recoveries on a more rational, fair, and less costly basis. First, we will look at the Texas asbestos cases and then *Agent Orange* to see how Judge Robert M. Parker and Judge Jack B. Weinstein, federal district court judges who became well-known for their innovation in the area of mass torts,⁹⁷ pushed the envelope away from traditional thinking about mass torts and class actions and provided a basis for facilitating an affirmance by the court of appeals.

a. the Texas asbestos cases

Experts have estimated that over 21 million American workers have suffered exposure to significant amounts of asbestos at the workplace since 1940, and that environmental contact or contact with relatives who have worked with the products exposed millions of others.⁹⁸

Through his federal district court appointment, Judge Parker might have expected a varied caseload. Unfortunately for him he was appointed to the Eastern District of Texas.⁹⁹ Nearly 900 asbestos-related personal injury cases, involving over 1000 plaintiffs, were pending in Judge Parker's court.¹⁰⁰ Some plaintiffs had been waiting since 1979 for a trial, and new cases were being filed every day.¹⁰¹ The court predicted filings to continue at a steady rate into the millennium.¹⁰²

Ten of these plaintiffs moved to certify a class of all plaintiffs with asbestos-related personal injury actions pending in the Eastern District of Texas on December 31, 1984.¹⁰³ Judge Parker, "[f]inding a

97. Professor Linda Mullenix has written extensively about Judge Parker, who handled the asbestos cases. See, e.g., Linda S. Mullenix, *Beyond Consolidation: Post-Aggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 482-95 (1991) (highlighting Judge Parker's career as a highly progressive and innovative judge in mass torts litigation) [hereinafter Mullenix, *Beyond Consolidation*]. Judge Jack B. Weinstein's role in mass tort litigation has also been written about. See, e.g., PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986). Judge Weinstein has also written extensively about mass torts. See, e.g., WEINSTEIN, *supra* note 16.

98. See Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 37 n.1 (1983); Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1301 n.15 (1983).

99. See Mullenix, *Beyond Consolidation*, *supra* note 97, at 488-89.

100. See *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986).

101. See *id.*

102. See *id.*

103. See *id.*

'limited fund' theory too speculative, . . . refused to certify the class under Rule 23(b)(1)."¹⁰⁴ Based on his past experience, however, he concluded that evidence concerning the "state of the art" defense, a central issue in asbestos cases, would vary little as to individual plaintiffs even though introduction of evidence on this issue would consume a major part of the time required for their trials.¹⁰⁵ Judge Parker, upon analysis of the elements of Rule 23, concluded that certification of a Rule 23(b)(3) class on this issue was proper.¹⁰⁶ By conducting one class trial on the state of the art defense as well as other defense-related issues such as product identification and defectiveness, gross negligence and damages, both the litigants and the court would save considerable time and resources.

The Court of Appeals for the Fifth Circuit affirmed.¹⁰⁷ Rather than invoking the 1966 Advisory Committee's note as courts in the earlier cases did, the Fifth Circuit began by cataloguing the concerns raised in its earlier asbestos cases, including its "concern about the mounting backlog of cases and inevitable, lengthy trial delays."¹⁰⁸ It then noted that courts generally refused to certify mass tort cases because differences between individual plaintiffs on issues of liability, defenses of liability, and damages were thought to overshadow the common issues.¹⁰⁹ Summarizing the new approach to thinking about mass torts, the Fifth Circuit stated:

The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past. Be that as time will tell, the decision at hand is driven in one direction by all the circumstances. Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, "days of the same witnesses, exhibits and issues from trial to trial."

104. *See id.*

105. *See id.* at 470-71.

106. *See id.* at 472-73.

107. *See id.* at 471-75.

108. *Id.* at 470 (citations omitted).

109. *See Jenkins*, 782 F.2d at 473 (citing FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment).

This assumes plaintiffs win on the critical issues of the class trial. To the extent defendants win, the elimination of issues and docket will mean a far greater saving of judicial resources. Furthermore, attorneys' fees for all parties will be greatly reduced under this plan, not only because of the elimination of so much trial time but also because the fees collected from all members of the plaintiff class will be controlled by the judge. From our view 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. That counsel for plaintiffs would urge the class action under these circumstances is significant support for the district judge's decision. Necessity moves us to change and invent.¹¹⁰

It is important to note the themes highlighted by the court here: (1) the centrality of a common issue; (2) the need to save judicial resources; (3) the need to control transaction costs, thereby reducing attorneys' fees by eliminating the need to retry these issues; and (4) the need for courts to be innovative in the face of legislative inaction. Notably absent in the court's analysis was the concern for preserving individual autonomy which had motivated the earlier decisions.

b. Agent Orange

Similar efficiency considerations, as well as a central common issue, motivated the decision to certify a Rule 23(b)(3) class in the *Agent Orange* litigation. Plaintiffs, Vietnam War veterans and members of their families, claimed to have suffered damages as a result of the veterans' exposure to herbicides produced by the defendants.¹¹¹ Judge George Pratt, to whom the MDL Panel had assigned the *Agent Orange* cases that were pending throughout the federal district courts, decided that the case should proceed as a class action.¹¹² After analyzing different methods for case management and the elements of Rule 23, Judge Pratt concluded:

With respect to the difficulties likely to be encountered in the management of a class action, the court has carefully and humbly considered the management problems presented by an action of this magnitude and complexity, and

110. *Id.* at 473.

111. *See In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 768 (E.D.N.Y. 1980).

112. *See id.* at 785, 798.

concluded that great as they are, the difficulties likely to be encountered by managing these actions as a class action are significantly outweighed by the truly overwhelming problems that would attend any other management device chosen. While the burdens on this court might be lessened by denying class certification, those imposed collectively on the transferor courts after remand of the multidistrict cases would be increased many times.¹¹³

Several years later, the case was before Judge Jack B. Weinstein. Judge Weinstein noted that no class certification order was entered. He referred to Judge Pratt's statement regarding the later stages of the litigation, that proceeding as a class "may require reconsideration" of the certification.¹¹⁴ Judge Weinstein decided to enter an order certifying the class for all issues under Rule 23(b)(3) and for the issue of punitive damages under Rule 23(b)(1)(B).¹¹⁵

Judge Weinstein's analysis is important because, like the Texas asbestos decisions just discussed, it did not reject certification outright by citing the 1966 Advisory Committee's note, which previously led to a slavish interpretation of Rule 23 in mass tort class actions.¹¹⁶ Rather, Judge Weinstein invoked policy arguments in favor of class certification and aggregation as his guide in applying Rule 23.¹¹⁷ He began by acknowledging the importance of the commonality requirement but noted: "Nevertheless, it is not conclusive. In deciding whether common questions predominate, a pragmatic evaluation of the interest of the class members is given great weight."¹¹⁸ As in the

113. *See id.* at 791.

114. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 720 (E.D.N.Y. 1983) (citing *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. at 790).

115. *See id.*

116. *See id.* at 721-22.

117. *See id.* at 720-21.

118. *Id.* at 722. Judge Weinstein quotes:

As Professors Wright and Miller put it: "In general, a Rule 23(b)(3) action is appropriate whenever the actual interests of the parties can be served best by a single action [T]he proper standard under Rule 23(b)(3) is a pragmatic one, which is in keeping with the basic objectives of the Rule 23(b)(3) class action. Thus, when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis."

Id. at 722 (alteration in original) (quoting 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1777, 1778 (1972)).

"Litigation economies are also relevant. One commentator has gone so

asbestos context, Judge Weinstein looked to the practicality of getting claims resolved rather than the theoretics¹¹⁹ of individual autonomy.

Judge Weinstein distinguished the early cases involving DES, the Dalkon Shield and asbestos which rejected class certification. In contrast to those cases where the courts found that individual issues would predominate, Judge Weinstein concluded that in the *Agent Orange* case, "the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole,"¹²⁰ such as general causation and the government contractors' defense. Moreover, resolution of these issues "would do much to resolve the individual claims of the class members."¹²¹

Judge Weinstein articulated the primary and practical reason why an aggregated approach to the resolution of mass tort cases is preferable: the enhanced possibility of settlement without the need for hundreds of trials, or even one massive trial. He stated:

Finally, the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.¹²²

Obviously, a classwide finding in favor of plaintiffs would greatly enhance their bargaining power vis-à-vis the defendants. As a result of their knowledge of the possible shift in the balance of bargaining power, defendants would be more likely to offer a more attractive settlement to avoid an even more dramatic shift in case a "bet your company" strategy failed.¹²³ As discussed in the next section, later

far as to suggest that 'the chief purpose of the predominance inquiry is not to measure the compatibility of class action procedures with substantive law but to determine whether a class action will in fact realize any litigation economies.'" *Id.* at 723 (quoting Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1505 (1976)).

119. As discussed below, the Court cited the Advisory Committee's note to the 1966 amendment, which analyzed the practical purpose of a Rule 23(b)(3) class action in appropriate cases in contrast to the "theoretic" interest individuals may have in conducting separate lawsuits. See *infra* notes 125-30 and accompanying text.

120. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 723.

121. *Id.*

122. *Id.*

123. See Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1780-82 (1994).

decisions vacating class action certifications object to this alteration of the balance of bargaining power.¹²⁴

Turning to the mandatory class on the issue of punitive damages, Judge Weinstein noted that the rationale for using a Rule 23(b)(1)(B) class in mass tort litigation is the "limited fund" theory.¹²⁵ In limited fund cases, individual cases should be "converted into a class action so that the limited fund can be equitably distributed among all members of that class."¹²⁶

The limited fund, which includes relevant insurance, could be considered to be the assets of the defendants.¹²⁷ Alternatively, particularly in the case of mass tort litigation, the fund could have a more limited meaning, such as "where the first judgments may take all of a limited punitive damage award. If earlier claimants proceed on an individual basis, it is urged, they will deplete the defendants' assets and leave nothing for later claimants."¹²⁸ In the context of the *Agent Orange* litigation, he found that a limited fund class on the issue of punitive damages should be certified.¹²⁹ Finding that there was

a substantial probability that limited punitive damages may be allowed, . . . it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule 23(b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.¹³⁰

Several years later, after Judge Weinstein approved a class action settlement, the Second Circuit affirmed the aspect of the order certifying a Rule 23(b)(3) class.¹³¹ In affirming the order, the Second

124. See *infra* Part II.C.

125. See *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 725.

126. ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 45 (2d ed. 1977) ("The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for the late-comers.").

127. See 100 F.R.D. at 725.

128. *Id.* (citing Deborah Dietsch-Perez, Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions under Rule 23*, 49 BROOK. L. REV. 517 (1983); Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787 (1983); Note, *Class Certification in Mass Accident Cases under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1982-83)).

129. 100 F.R.D. at 727.

130. *Id.* at 728.

131. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir.

Circuit's language was far less bold than that used by Judge Weinstein. Nonetheless, it served to confirm that courts of appeals would affirm classes when appropriate extraordinary circumstances were present.¹³² Indeed, the court began by noting that *Agent Orange* was "an extraordinary piece of litigation."¹³³ It then noted the nationwide interest in the case, and that the plaintiffs, Vietnam War veterans, were seeking "emotional compensation" for their sufferings, as well as compensatory damages.¹³⁴

Looking at the legal standards to be employed, however, the court expressed great skepticism over the use of class actions in mass tort cases generally.¹³⁵ It discussed the 1966 Advisory Committee's note but decided that certification was warranted because of the "centrality of the military contractor defense."¹³⁶ It is important to note, however, that the court did much more than invoke the 1966 Advisory Committee's note to support its skepticism. Rather, it looked beneath the claim that global causation is a sufficient and predominant issue to support certification. In that respect, the Second Circuit's opinion, despite its skepticism, shows how far the tide has turned. Invoking the mantra of the 1966 Advisory Committee's note no longer would suffice to defeat class certification. Instead, careful analysis of the requirements of Rule 23 must be undertaken.

Rule 23(b)(3) requires that common issues predominate over individual issues.¹³⁷ Global or generic causation is an appealing basis for invoking class treatment on the theory that such an issue predominates, and is, in fact, a threshold issue in any individual case. However, closer analysis of most mass tort cases, like *Agent Orange*, reveals that the issue might not be as generic as one would hope. As the Second Circuit put it, a trial on the question of whether *Agent Orange* generically causes injury could result in one of three outcomes: (1) exposure to *Agent Orange* always causes injury; (2) exposure never causes injury; or (3) exposure may or may not cause injury

1987). The court did not address the propriety of the limited fund mandatory class on the issue of punitive damages because the settlement it ultimately approved precluded punitive damages. *See id.* at 167.

132. *See id.* at 163-67.

133. *Id.* at 148.

134. *Id.* (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 747 (E.D.N.Y. 1984)).

135. *See id.* at 151, 164-66.

136. *Id.* at 151, 166.

137. FED. R. CIV. P. 23(b)(3).

depending on the kind or amount of exposure, or other factors particular to the person claiming injury.¹³⁸

Experience with mass tort cases shows that there are very few products that cause the kind of "signature injuries" which justify the first outcome. For example, mesothelioma is a signature injury that can be caused only by exposure to asbestos.¹³⁹ Nonetheless, even in the asbestos cases, most of the injuries claimed are not signature injuries.¹⁴⁰ The second outcome, that a product does not cause injury, may justify a class on that issue. The defendants in the breast implant case could pursue such a theory in the cases involving claims for damages due to autoimmune diseases because all epidemiological studies to date indicate little to no likelihood that silicone causes breast cancer.¹⁴¹ Even in the breast implant cases, however, defendants

138. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 164-65.

139. See *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 633 (3d Cir. 1996).

The causal link between exposure to asbestos and mesothelioma has been demonstrated to such a high degree of probability, while at the same time few if any other possible causes have been identified, that if *A* is diagnosed as having mesothelioma and *A* was exposed to asbestos, *A*'s exposure to asbestos is recognized to be the cause of *A*'s mesothelioma.

In re Joint E. & S. Dist. Asbestos Litig., 827 F. Supp. 1014, 1026 (S.D.N.Y. 1993).

Research "shows that certain cancers do 'wear labels' in the form of DNA adducts and mutational spectra." REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 205 (1994); see also Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219 (1987).

Proof that a toxic substance is harmful often involves evidence on the frontiers of science. In many cases, the most that can be said is that exposure to a substance increased the risk that the plaintiff would contract a disease. Epidemiological evidence often can indicate only the probability that the plaintiff's injury was caused by the defendant.

Id. at 1220.

140. See *In re Joint E. & S. Dist. Asbestos Litig.*, 827 F. Supp. at 1042 (noting the insufficient evidence that asbestos exposure caused colorectal cancer). "In most instances, cancers and other diseases do not wear labels documenting their causation." REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 205 (1994); see also Farber, *supra* note 139.

141. In his opinion certifying a Rule 23(b)(3) settlement class in the MDL breast implant litigation, Judge Pointer did not provide an analysis of the requirements under Rule 23. If he had, the question of general or global causation with respect to autoimmune diseases certainly would have satisfied the predominance requirement. See *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, Master File No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (final approval of \$4.225 billion settlement after fairness hearing).

are using other tools, such as summary judgment motions and science trials, to seek exclusion of plaintiffs' evidence under *Daubert*.¹⁴²

The possibility of the third outcome, which is the most common one in mass tort litigation, may not support class certification because the question of generic causation and individual causation may be hopelessly intertwined.¹⁴³ Those applying a literalist approach to Rule 23, as opposed to the policy-oriented approach used by Judge Weinstein, could doom class certification in all but the most extraordinary cases. As we will see, even a litigation as extraordinary as asbestos may not, in itself, support class certification.

2. Settlement transcendent

Explicit in Judge Weinstein's *Agent Orange* opinion was the notion that certifying the class would facilitate settlement.¹⁴⁴ The court of appeals affirmed Judge Weinstein's Rule 23(b)(3) class.¹⁴⁵ Later, in the Dalkon Shield litigation, the Court of Appeals for the Fourth Circuit pushed the envelope further and affirmed a mandatory settlement class in connection with the Dalkon Shield Chapter 11

142. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1397 (D. Or. 1996) (ruling plaintiffs' evidence on causal relationship to be inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which requires that evidence have both a reliable scientific foundation and relevance to be admissible).

143. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 205 (1994). Determining specific causation requires:

an assessment of the individual's exposure, including the amount, the temporal relationship between the exposure and the disease, and exposure to other disease-causing factors. This information is then compared to research data on the relationship between exposure and disease. The certainty of the expert's opinion depends on the strength of the research data demonstrating a relationship between exposure and the disease at the dose in question and the absence of other disease-causing factors.

Id. See generally Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation*, 73 CORNELL L. REV. 469 (1988) (discussing causation issues in tort claims based on toxic substance injuries). In toxic tort and product liability actions, the issue often arises in the context of the proffered plaintiff expert witnesses' summary judgment submission regarding the causal link between the plaintiff's claimed injuries and his or her exposure to the allegedly defective product or toxic substances. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (requiring trial judge to act as gatekeeper in determining whether proposed expert testimony is admissible under the Federal Rules of Evidence).

144. See *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

145. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987).

reorganization.¹⁴⁶ Like the Second Circuit's decision in *Agent Orange*, the Fourth Circuit's decision can also be predicated on extraordinary circumstances. Of course, at least superficially, because it was approved as an essential part of the overall settlement of the Dalkon Shield Chapter 11 bankruptcy case, it had an obvious "limited fund" aspect.¹⁴⁷ More significantly, by 1989, when the case was decided, the court could cite to academic commentary¹⁴⁸ as well as the "[r]ecent court decisions [that] have also spoken approvingly of the class certification of mass-tort actions for purposes of settlement" to support its opinion.¹⁴⁹

As discussed in Part III, the A.H. Robins plan of reorganization was acceptable to all parties because it achieved global peace. Affirming the settlement class was essential to the confirmation and consummation of the Plan. The Fourth Circuit stated in a related *A.H. Robins* case, affirming the injunctions against litigation that were also employed to achieve global peace:

We think the ancient but very much alive doctrine of marshalling of assets is analogous here. A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors. Here, the carefully designed reorganization of Robins, in conjunction with the settlement in *Breland*, provided for satisfaction of the class B claimants. However, some chose to opt out of the settlement in order to pursue recovery for their injuries from Aetna or from medical providers for malpractice. It is essential to the reorganization that these opt out plaintiffs either resort to the source of funds provided for them in the Plan and *Breland* settlement or not be permitted to interfere with the reorganization and thus with all the other creditors.¹⁵⁰

146. See *Robins II*, *supra* note 10, 880 F.2d 709, 752 (4th Cir. 1989).

147. See *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989) [hereinafter *Robins I*]. The court noted:

The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors. Here, the carefully designed reorganization of Robins, in conjunction with the settlement in *Breland*, provided for satisfaction of the class B claimants.

Id. (citations omitted).

148. See *Robins II*, *supra* note 10, 880 F.2d at 738.

149. *Id.*

150. *Robins I*, *supra* note 147, 880 F.2d at 701-02 (citation omitted).

Therefore, *A.H. Robins* represents the highest degree of practicality. There was a need to facilitate a settlement in a complex case involving a debtor in Chapter 11, multiple other tort defendants, and hundreds of thousands of tort claimants. Again, notably absent from the Fourth Circuit's opinion was reliance on the 1966 Advisory Committee's note. Rather, the court criticized the note's admonition as "unworkable" and "increasingly disregarded."¹⁵¹ The court detailed prior cases in which settlement classes had been upheld—only one of which was a mass tort case—and argued that the prevailing academic and judicial view was such that using class actions to facilitate settlements supported affirming the mandatory class before it.¹⁵²

The Fourth Circuit's language is an ode to the use of class actions in mass tort cases:

In summary, we take it as the lessons to be gleaned from the authorities already cited and discussed to be (a) that the "trend" is once again to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case "best serve the ends of justice for the affected parties and . . . promote judicial efficiency"; (b) that the Advisory Committee's Note suggestion that suit for damages is "not appropriate" for class certification has proved unworkable and is now increasingly disregarded; (c) that the theory that the Rule should be constrained by establishing judicially, without support in the Rule itself, limitations on its use such as were stated in *La Mar, Green* and *McDonnell Douglas* have been outdated by the increasing phenomenon of the mass products tort action and by the growing body of recent class action decisions and comments favoring class actions in the mass tort context; (d) that, in order to promote the use of the class device and to reduce the range of disputed issues, courts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case and, if such separate issues predominate sufficiently (*i.e.*, is the central issue), to certify the entire controversy as in *Agent Orange*; and (e) that it is "proper" in determining certification to consider whether such certification will foster settlement of the case with advantage to the parties

151. *Robins II*, *supra* note 10, 880 F.2d at 740.

152. *See id.* at 738-40.

and with great saving in judicial time and services; and (f) that the mass tort action for damages may in a proper case be appropriate for class action, either partially or in whole.¹⁵³

Another example of the new rhetoric was the language the court quoted from the Third Circuit's asbestos property damage class action:

Concentration of individual damage suits in one forum can lead to formidable problems, but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.¹⁵⁴

No court of appeals would have used such language ten years earlier. Together with the cases discussed above, the use of class actions in general, and settlement classes in particular, became *de rigeur*.

This authority was obviously of great importance to the district court judges who continued to be confronted with new and old mass torts, and who perhaps looked forward to someday not being preoccupied with such a crushing judicial burden. Accordingly, a settlement class was approved by Judge Sam Pointer in the breast implant litigation when all the federal breast implant cases were transferred to him.¹⁵⁵ A very controversial¹⁵⁶ settlement class was approved by the district court in the asbestos multidistrict litigation.¹⁵⁷ In addition, a

153. *Id.* at 740.

154. *Id.* at 739 (quoting *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986)).

155. See *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *1 (N.D. Ala. Sept. 1, 1994) (approving settlement in breast implant class action litigation); see also discussion *infra* notes 160-161 and accompanying text.

156. An amazing number of law review articles and law review symposia have been devoted to the analysis of the settlement class in *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994). For example, a 425-page symposium in the *Cornell Law Review* was devoted largely to the ethical and other issues the *Georgine* class action generated. See Symposium, *Mass Torts: Serving up Just Desserts*, 80 CORNELL L. REV. 811, 811-1235 (1995). A Westlaw search of the Law Journal library reveals that over 150 law review articles discuss, to some degree, the *Georgine* settlement class.

157. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 336 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

class action in which tobacco plaintiffs asserted the then novel theory of addiction was approved by the district court in Louisiana.¹⁵⁸ The class in the breast implant case technically fell apart, due in part to the extraordinarily large number of claimants who indicated their desire to be part of the settlement.¹⁵⁹ This led the major defendant, Dow Corning, to file for bankruptcy protection under Chapter 11.¹⁶⁰ Nonetheless, claims are being paid pursuant to a successor plan of compensation offered by several manufacturers of silicone.¹⁶¹ The tobacco and asbestos classes, however, were vacated by the courts of appeals, and the Supreme Court has affirmed that result in the asbestos case.¹⁶² Low tide for mass tort class actions apparently had returned.

C. *Low Tide Returns*

The court of appeals decisions of the mid-to-late 1980s signaled a significant receptivity to class actions in mass tort cases. Although the use of this device, particularly the settlement class, became more frequent, its use remained highly controversial. In the mid-1990s the tide turned again. In a series of cases, the courts of appeals in a variety of circuits vacated class certifications in a variety of mass tort contexts.¹⁶³

158. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 560-61 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

159. See *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 486 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 718 (1997).

160. See *id.*

161. In October 1995 Judge Pointer approved a substitute settlement plan proposed by the remaining defendants that would pay \$10,000 to \$250,000 per claim, depending upon a woman's medical condition. See Henry Weinstein, *New Terms Offered in Breast Implant Cases*, L.A. TIMES, Oct. 3, 1995, at D1. The original settlement agreement offered payments of \$105,000 to \$1.4 million per claim. That settlement collapsed after too many women applied for the \$4.2 billion in projected benefits. More than a third of the over 100,000 women who filed claims against silicone breast implant manufacturers have accepted these reduced settlements. However, thousands of other claimants rejected the plan. According to one article last year, many plaintiffs say they are receiving more in individually negotiated settlements. See *id.*

162. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997); *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (reversing and remanding with instructions that the district court dismiss the complaint); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 638 (3d Cir. 1996) (vacating asbestos settlement class).

163. See, e.g., *Castano*, 84 F.3d 734 (reversing and remanding district court order certifying nationwide cigarette litigation class action); *Georgine*, 83 F.3d 610 (remanding to the district court with directions to decertify the asbestos settle-

1. Has the balance of bargaining power shifted too far?

Recall that Judge Weinstein in the *Agent Orange* litigation and the Fourth Circuit in the *Dalkon Shield* litigation recognized the practical value of class certification in promoting global settlements of mass tort litigation.¹⁶⁴ Unfortunately, perceived and real abuses that have accompanied many class settlements in recent years have resulted in yet another judicial shift. The first "abuse" identified in the recent rash of cases is the old idea that once a class is certified, plaintiffs have an unfair bargaining advantage.¹⁶⁵ The best recent explanation of this theory is Judge Posner's opinion in *In re Rhone-Poulenc Rorer Inc.*,¹⁶⁶ concerning the HIV hemophiliac litigation. Over 300 lawsuits, involving some 400 plaintiffs, were filed in state and federal courts seeking to impose tort liability on the defendants for the transmission of HIV to hemophiliacs in blood solids manufactured by the defendants.¹⁶⁷ The federal cases were transferred, pursuant to 28 U.S.C. § 1407, by the MDL Panel to the Northern District of Illinois.¹⁶⁸ One of these cases became the subject of the class action.

As in the tobacco case in Louisiana, plaintiffs advanced a novel theory of tort liability. They claimed:

before anyone had heard of AIDS or HIV, it was known that Hepatitis B, [often] a lethal disease . . . could be transmitted either through blood transfusions or through injection of blood solids. The plaintiffs argue[d] that due care with respect to the risk of infection with Hepatitis B required

ment class); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (granting petitions for writ of mandamus and directing district court judge to decertify the plaintiff class in penile implant litigation); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied sub nom.* 116 S. Ct. 184 (1995) (directing district court judge to decertify class action in hemophiliac/HIV contamination litigation).

164. See *supra* Parts II.B.1.b, II.B.2.

165. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J. dissenting) ("The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action."), *rev'd*, 417 U.S. 156 (1974). Judge Friendly called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973). *But see* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 679-82 (1978-79) (arguing that serious abuses died out by the mid-1970s).

166. 51 F.3d 1293 (7th Cir. 1995).

167. See *id.* at 1296.

168. See *id.*

the defendants to take measures to purge that virus from their blood solids.¹⁶⁹

Such measures would have protected hemophiliacs "not only against Hepatitis B but also . . . as the plaintiffs put it 'serendipitously,' against HIV."¹⁷⁰

It was not feasible to certify a class action for all aspects of the case, largely because the differences in the dates of infection alone raised predominance problems.¹⁷¹ Nevertheless, the district court found that particular issues, such as this novel theory, could be adjudicated through special verdicts on a class-wide basis under Rule 23 (c)(4)(A).¹⁷²

Defendants sought review of the district court's interlocutory order by writ of mandamus.¹⁷³ The Seventh Circuit's two-to-one panel opinion began with a discussion about the standard for granting mandamus but illuminated the court's thinking about the propriety of class actions in mass tort cases.¹⁷⁴ Although it commended the district judge for his experiment with an innovative procedure for streamlining the adjudication, Judge Posner, writing for the majority, found that the "plan so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification."¹⁷⁵ Immediate review was warranted, according to the majority, because final review would come too late to provide effective relief for the defendants.¹⁷⁶

The reason that an appeal will come too late to provide effective relief for these defendants is the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them. Consider the situation that would obtain if the class had not been certified. The defendants would be facing 300 suits. More might be filed, but probably only a few more, because the statutes of limitations in the various states are rapidly expiring for potential plaintiffs

Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants

169. *Id.*

170. *Id.*

171. *Id.* at 1296-97.

172. *See id.* at 1297.

173. *See id.* at 1294-95.

174. *See id.* at 1294-98.

175. *Id.* at 1297.

176. *See id.*

have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. Perhaps in the end, if class-action treatment is denied (it has been denied in all the other hemophiliac HIV suits in which class certification has been sought), they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than \$125 million altogether. These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs. Many may already be barred by the statute of limitations, as we have suggested, though its further running was tolled by the filing of *Wadleigh* as a class action.¹⁷⁷

Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs in *Wadleigh* win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle Judicial concern about them is legitimate, not "sociological," as it was derisively termed in *In re Sugar Antitrust Litigation*.¹⁷⁸

Ironically, the defendants settled the hemophiliac HIV litigation for \$640 million, a rather staggering sum if Judge Posner is correct about the merits of the litigation and the number of suits the defendant was likely to face.¹⁷⁹

177. *Id.* at 1297-98 (citations omitted).

178. *Id.* at 1298-99 (citations omitted).

179. See Thomas M. Burton, *Makers of Blood Products Agree to Offer \$640 Million to Settle Cases Tied to AIDS*, WALL ST. J., April 19, 1996, at B6. Assuming Judge Posner was correct that only about 300 cases would confront defendants, each case would be worth well over \$200,000.

The Seventh Circuit also justified vacating the district court order on the ground that the *Erie*¹⁸⁰ doctrine requires the federal courts to apply the law that each of the transferor states would have applied. Accordingly, class treatment would be unmanageable even on the novel tort theory issue proposed to be treated as a class-wide issue by the district court.¹⁸¹

I have previously proposed a way for federal courts to deal with choice of law problems in mass tort cases.¹⁸² My proposal would allow courts to apply federal common law in mass tort cases where the MDL Panel has transferred cases for pretrial purposes. Given the entrenchment of the *Erie* doctrine, however, it has never been adopted.¹⁸³ Nor have various proposals to enact a federal courts

180. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1300 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

181. See *id.* at 1302.

182. 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) [hereinafter Vairo, *Multi-Tort Cases*].

183. However, as Professor Mullenix explained, no other approaches have gained sufficient favor with the courts or Congress. Rather, it appears that courts will continue to have to work within the *Erie* framework. See Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1625-26 (1992) ("And with some naiveté, perhaps, civil procedure professors have been the vanguard academicians to recognize the complex choice-of-law issues generated by mass-tort cases. Proceduralists, at least, early understood that finding a solution to the choice-of-law dilemma was intricately related to finding a plausible aggregate mass-tort procedure.") (citation omitted). Professor Mullenix also stated:

Finally, Professor Lowenfeld's closing thoughts on choice of law in mass-tort litigation pointedly suggest the ironclad hold that conflicts scholarship has on original or otherwise unorthodox thinking with regard to conflicts problems: "It may be thought to be an admission of defeat for a conflict-of-laws professor to tell a conflict of laws symposium that the only way to solve the assigned problem is to adopt substantive legislation."

The good news is that non-conflicts professors lack this instinct and training and therefore are less likely to share this sense of defeat. Non-conflicts scholars, then, are in a much better position to risk it all, and renew the suggestion for a substantive law solution. Hear, hear. As long as Congress and the ALI continue with their current legislative endeavors, these efforts ironically help to renew the desirability of enacting substantive legislation. These efforts also suggest the parallel desirability of relieving conflicts scholars of the task of recommending a choice-of-law scheme for mass-tort litigation. And who knows, perhaps some non-conflicts scholar will throw caution and reputation completely to the wind, and renew the ridiculous suggestion for federal common law.

Id. at 1662 (referring to Vairo, *Multi-Tort Cases*, *supra* note 182) (citation omitted).

choice of law statute been adopted.¹⁸⁴ Nonetheless, it is significant to note that the choice of law consideration is relevant only if a dispositive motion is made or if the case goes to trial. A primary purpose of class certification, however, is to facilitate the aggregated resolution of a mass tort through settlement. This is, of course, precisely why Judge Weinstein wanted to certify the Agent Orange class.¹⁸⁵ Thus, the choice of law rationale should only be sufficient ground, if ever, for denying class certification in non-settlement classes. The Supreme Court's limited approval of the use of settlement classes in *Amchem* suggests that manageability problems stemming from the *Erie* doctrine will not necessarily doom future class actions.

2. Understanding fairness

Judge Posner's opinion in *Rhone-Poulenc* squarely puts the legalized blackmail anti-class action bias on the table. But, where Judge Posner seeks to protect corporate defendants from plaintiff class action lawyers in cases where the plaintiffs appear to have an uphill battle in proving liability, the Supreme Court's decision in the multidistrict asbestos litigation purportedly seeks to protect plaintiff class members from their class action lawyers and the defendants.¹⁸⁶

As discussed above, until recently, the federal courts increasingly used class actions as a means to settle mass tort cases. As the Fourth Circuit put it, the trend in academic commentary and in judicial opinions had turned in favor of the use of class actions as a vehicle for settlement.¹⁸⁷

As courts became more accustomed to certifying classes, some commentators and courts began to question whether abuses and ethical lapses had permeated the use of the class action procedure to the detriment of class members.¹⁸⁸ For example, the Third Circuit reversed a so-called "coupon settlement" in the General Motors side saddle fuel tank litigation.¹⁸⁹ Judge Edward Becker, writing for the

184. See *id.* at 1635-47.

185. See *supra* Part II.B.1.b.

186. In *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the Court was concerned about the fairness to absent plaintiff class members. See *id.* at 2248.

187. See *Robins II*, *supra* note 10, 880 F.2d 709, 739-40. (4th Cir. 1989).

188. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, Jr., *Class Wars*]; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); John A. Siciliano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995).

189. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*,

unanimous panel, found that the settlement did not meet the test of fairness under Rule 23 because the plaintiff class members' individual recoveries were intolerably low in the face of huge attorneys' fees for the class lawyers.¹⁹⁰ Indeed, the court questioned whether settlement classes were appropriate at all.¹⁹¹ In the Seventh Circuit and the Third Circuit, it was clear that mass tort class actions were no longer friends; rather, they have become the enemies. Judge Becker returned to this theme a year later in the MDL asbestos litigation, again vacating a settlement class.¹⁹² The Supreme Court, by a 6-2 vote, recently affirmed the Third Circuit's judgment.¹⁹³

The Supreme Court, just as the Third Circuit did, quite clearly is signaling its distaste for the possibly collusive conduct of counsel for the opposing parties that may lead to the use of settlement classes in mass tort cases.¹⁹⁴ At the same time, however, the Court rejected the Third Circuit's opinion that settlement classes must meet the same criteria for certification as if the case were to be tried.¹⁹⁵ Accordingly, it is important to look carefully at how the class in the asbestos case came about in order to understand what the Court's opinion means for the future use of class actions in mass tort cases, particularly settlement classes.

As discussed in Part II,¹⁹⁶ thousands of asbestos cases were pending throughout the federal district courts. Many of them were pending in the Eastern District of Texas. The MDL Panel transferred most of the remaining asbestos cases to the Eastern District of Pennsylvania¹⁹⁷ where they were consolidated for pretrial purposes. Attorneys for plaintiffs and defendants formed separate steering

55 F.3d 768, 819 (3d Cir. 1995), *cert denied sub nom.* 116 S. Ct. 88 (1995).

190. *See id.* at 803, 822.

191. *See id.* at 818.

192. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

193. *See Amchem*, 117 S. Ct. 2231 (1997). Justice Ginsburg delivered the opinion of the Court. *See id.* at 2237. Justice Breyer wrote a dissenting opinion in which Justice Stevens joined. *See id.* at 2252. Justice O'Connor took no part in the case. *See id.* Justice Breyer's dissent was based on his view that the extensive fairness hearing conducted by the district court warranted a more deferential degree of judicial review. This observation then led to his policy-based rationale that if ever there was a case that warranted, indeed compelled, class settlement, the protracted asbestos litigation which has swamped state and federal courts for decades was it. *See id.* at 2253-54.

194. *See id.* at 2239, 2248-50.

195. *See id.* at 2235, 2248.

196. *See supra* notes 79-82 and accompanying text.

197. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 422-24 (J.P.M.L. 1991).

committees¹⁹⁸ and began settlement negotiations.¹⁹⁹ Two well-known and experienced lawyers, each of whom represented numerous clients with pending asbestos claims, co-chaired the Plaintiffs' Steering Committee. The Counsel for the Center for Claims Resolution (CCR), a consortium of twenty asbestos manufacturers who were defendants in the actions, participated in the Defendants' Steering Committee.²⁰⁰ Negotiations focused not only on the pending claims that had been transferred and consolidated by the MDL Panel's transfer order, but also on settling all future asbestos claims that might be filed.²⁰¹ Throughout the negotiations, CCR made clear that it would resist settling the individual pending claims which had been transferred by the MDL order—the so-called “inventory claims” of the plaintiffs' attorneys who were co-chairing the Steering Committee—unless the settlement also provided protection from the filing of future asbestos claims.²⁰² The focus of the settlement talks was on devising an administrative scheme for disposition of future asbestos claims.²⁰³

During these negotiations, plaintiffs' counsel purported to be negotiating not only on behalf of their own “inventory” plaintiffs, but also on behalf of the anticipated future claimants, although, for obvious reasons, those lawyers had no attorney-client relationship with such unknown claimants.²⁰⁴ CCR refused to settle the inventory cases until the negotiations seemed likely to produce an agreement purporting

198. Complex litigation, such as mass tort cases, involve numerous parties on the plaintiffs' side and often on the defendants' side as well. “Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and conducts witness examinations, may result in waste of time and money, in confusion and indirection, and in unnecessary burden on the court.” MANUAL FOR COMPLEX LITIGATION § 20.22 (3d ed. 1995). A solution to the problem is the judicial appointment of lead or liaison counsel or steering committees composed of representative counsel for the parties. The court appointing such counsel generally will apprise them of their duties, and they are charged with insuring that all attorneys involved are apprised of the proceedings. *See id.*

199. *See Amchem*, 117 S. Ct. at 2238.

200. *See id.*

201. *See Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 266 (E.D. Pa. 1994) (“The 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,” including claims that might be filed in the future.)

202. *See Amchem*, 117 S. Ct. at 2239.

203. *See id.*

204. *See id.*

to bind future plaintiffs.²⁰⁵ Upon settling the inventory claims, CCR, together with the plaintiffs' lawyers, returned to the district court with a class action complaint, an answer, a proposed settlement order and a joint motion for the conditional certification of a settlement class.²⁰⁶

Notably, none of the claims transferred by the MDL Panel were covered by the proposed settlement because none existed at the time.²⁰⁷ Rather, the class consisted of all those who may have asbestos personal injury claims, whether their injuries had manifested themselves or not, who had not filed a lawsuit before the submission of the settlement to the court.²⁰⁸ Although the matter is subject to some debate as to degree, the Supreme Court makes clear that the recoveries negotiated for the inventory claimants were more generous than those that the future claimants would receive.²⁰⁹ Nonetheless, the district court, after extensive fairness hearings under Rule 23(e), approved the settlement as fair and not collusive.²¹⁰ The Third

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.* at 2239-40.

209. *See id.* at 2241; *id.* at 2256 (Breyer, J., dissenting).

210. *See Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 319-25, 337 (E.D. Pa. 1994). The district court held an 18-day fairness hearing under Rule 23(e), at which dozens of witnesses testified to the ethical dilemmas of the settlement and its fairness to the class:

Counsel for the Settling Parties, several lawyers representing various Objectors, and counsel for various *Amici* participated at the fairness hearing. Under the direction of the Court, the Objectors closely coordinated their activities throughout the fairness proceedings.

Because of the complexity of the issues involved, and to give all interested parties a full and fair opportunity to present their views, the fairness hearing was extensive and protracted, involving the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of over five weeks. The Court heard testimony from participants in the settlement negotiations, several representative plaintiffs, two high-ranking officers of the CCR, medical experts, financial experts, legal ethics experts, and representative asbestos plaintiffs' attorneys. Numerous exhibits were also submitted. The substance of the testimony covered, among other things: the decades-long history of asbestos litigation in the United States; the details of the handling of asbestos litigation in the current tort system; the negotiation and operation of the proposed settlement and various objections to certain of its provisions; the competence and adequacy of Class Counsel; the medical conditions caused by exposure to asbestos and the reasonableness of the medical criteria set forth in the settlement; the ability of the CCR defendants to meet their financial obligations under the Stipulation through insurance proceeds or otherwise; and the negotiation and operation of settlements reached between Class Counsel and the CCR defendants to settle in the present tort system the inventory of pending claims of clients represented by Class Counsel and their affiliated law

Circuit vacated the class certification, and the Supreme Court affirmed.²¹¹

The Supreme Court began its analysis by reviewing the 1966 amendments to Rule 23, noting that Rule 23(b)(3) damages classes were thought to be the “most adventuresome” of the innovations adopted that year.²¹² Furthermore, harkening back to early class action opinions in mass tort cases, the Court quotes from the famous 1966 Advisory Committee’s note which warned that “ordinarily [class actions are] not appropriate in such cases.”²¹³ Rather than represent a return to the time when courts routinely denied class actions in mass tort cases by simply invoking the Advisory Committee’s note, however, the Court reviewed with apparent approval the more recent trend in favor of class certification generally, and settlement classes in particular.²¹⁴

Nonetheless, the Court makes it clear that district courts must scrutinize such classes carefully. Unlike the Third Circuit, however, the Court makes it equally clear that settlement classes are appropriate in some cases.²¹⁵ Indeed, instead of looking at whether all the requirements under Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—and Rule 23(b)(3)’s special requirements of predominance of common questions and superiority, are met as if the case would be tried, the district court is required to consider the settlement in determining whether the class can be

firms.

In May, 1994, this Court received voluminous post-hearing submissions from the Settling Parties, Objectors and *Amici*. On May 23, 1994, the Court heard day-long final oral arguments on the fairness of and objections to the proposed settlement.

Id. at 260-61.

211. *See Amchem*, 117 S. Ct. at 2252.

212. *Id.* at 2245 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

213. *Id.* at 2250 (“[M]ass accident’ cases are likely to present ‘significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways.’ And the Committee advised that such cases are ‘ordinarily not appropriate’ for class treatment.”).

214. *See id.* at 2247.

In the decades since the 1966 revision of Rule 23, class action practice has become ever more “adventuresome” as a means of coping with claims too numerous to secure their “just, speedy, and inexpensive determination” one by one. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue.

Among current applications of Rule 23(b)(3), the “settlement only” class has become a stock device.

Id. (citations omitted).

215. *See id.* at 2247-48.

certified.²¹⁶ This approach opens the door for the use of settlement classes in appropriate cases because a court could well find that the possibility of reaching a fair settlement is the reason why a Rule 23(b)(3) class is a superior means for resolving the dispute. The Court provides some guidance as to how the analysis needs to be done:

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.²¹⁷

So, what was wrong with the asbestos class action? The Court seemed troubled by three important factors. First, to meet the commonality requirement of Rule 23(a)(2), it is not sufficient to rely solely on the class members' claimed shared interest in the fairness of the settlement or their desire for prompt and efficient compensation.²¹⁸ This is probably the Court's way of telling district courts that they must carefully analyze the substance of the plaintiffs' claims to determine whether the commonality element is satisfied. Second, the Court's reference to the "sprawling" nature of the class suggests its uneasiness with a nationwide class of hundreds of thousands, if not millions of claimants.²¹⁹ Specifically, the Court agreed with the Third Circuit that because the class members were exposed to asbestos at different times, for different lengths of time, and under different circumstances, the predominance of common questions requirement of Rule 23(b)(3) was not satisfied.²²⁰ Differences in state law exacerbated these disparities.²²¹ Third, and perhaps most importantly, the

216. See FED. R. CIV. P. 23(a), 23(b)(3); *Amchem*, 117 S. Ct. at 2247-48, 2251 n.20.

217. 117 S. Ct. at 2248 (citations omitted).

218. See *id.* at 2250.

219. *Id.* at 2250.

220. See *id.* at 2250.

221. See *id.*; see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (noting that constitutional limitations on choice of law apply in nationwide class actions).

Court, like the Third Circuit, expressed grave concern about the fairness of the settlement itself because of what it viewed as the serious conflicts of interest of the attorneys representing the class.²²² Allocation decisions were made by the class lawyers and defendants, as between inventory plaintiffs and future plaintiffs, and as between earlier future plaintiffs and later ones, without specific regard to the needs of each group. Thus, the adequacy of representation element of Rule 23(a)(4) went unsatisfied. The Court opined:

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

The disparity between the currently injured and exposure [sic]-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. Although this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.²²³

222. See *Amchem*, 117 S. Ct. at 2250-51.

223. *Id.* at 2251 (citations omitted). The Court has not decided a case certified as a mandatory class under Rule 23(b)(1). In the context of mass tort cases, as the Court suggests, a case might be certified under a "limited fund" theory. The Court granted certiorari in the *Ahearn* case. In this case the Fifth Circuit certified a mandatory class in connection with the remaining pending and future

D. Are Settlement Classes Dead?

Settlement classes clearly are not dead. The question, however, is whether, as a practical matter, the serious adequacy of representation problems discussed by the Court can be addressed by the parties in *Amchem* and in other mass tort cases. There is no question that the economic realities, both in terms of the size of compensation funds and attorneys' fees, are huge.²²⁴ Perhaps because so many dollars are always at stake in a mass tort litigation, there will always be a concern as to whether it is possible for lawyers to steer clear of all conflicts. Additionally, given the reality of modern tort litigation, where most product liability actions result in some lawyers handling hundreds or thousands of claims, the potential for conflicts is ever present.²²⁵

Nonetheless, the Court seems to suggest that the use of Rule 23(c)(4)(B) subclasses, but with independent counsel for all named representatives, could have ameliorated its concerns about adequacy of representation.²²⁶ In summary, the *Amchem* case keeps the door ajar for the use of settlement classes. However, counsel must tread lightly under the trestle. Practice as usual will not be tolerated. The lower courts have been sent a message to very carefully scrutinize, and not to rubber stamp, proposed class action settlements.

claims in the Texas asbestos litigation. See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996). However, the Court then vacated and remanded the case for reconsideration in light of its decision in *Amchem*. See *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997). On the one hand, from the Supreme Court's quote, it appears that given the equitable nature of a mandatory class theory, it is appropriate for those negotiating a settlement to make allocation decisions. On the other hand, it appears equally clear that the Court will not approve a mandatory class without the type of adequate representation its decision in *Amchem* requires. See generally, Linda S. Mullenix, *Do Mandatory Monetary-Settlement Classes Violate Due Process?*, PREVIEW U.S. SUP. CT. CAS., Dec. 23, 1996, at 221; Patricia Anne Solomon, *Are Mandatory Class Actions Unconstitutional?*, 72 NOTRE DAME L. REV. 1627 (1997).

224. See Coffee, Jr., *Class Wars*, *supra* note 188, at 1347-51; Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 479-80 (1997); Myron Levin, *Battling Big Tobacco Earns Lawyers Big Fees*, L.A. TIMES, Aug. 18, 1997, at A10; see generally Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41 (1991) (discussing attorneys' fees problem and potential remedial solutions in, among other cases, class action suits with resulting common funds).

225. See Vairo, *Paradigm Lost*, *supra* note 15, at 619. See generally Lu, *supra* note 224 (discussing attorneys' fees problem and potential remedial solutions in, among other cases, class action suits with resulting common funds).

226. See *Amchem*, 117 S. Ct. at 2250-51.

We will now turn to a consideration of the genesis and the policies and performance of the Dalkon Shield Claimants Trust to demonstrate that it is possible to achieve arms-length negotiated settlement funds and claims resolution mechanisms that provide for fair and adequate compensation to the victims of a mass tort.

III. FAIRNESS AND EFFICIENCY: THE DALKON SHIELD CLAIMANTS TRUST²²⁷

The Dalkon Shield Claimants Trust, the key part of the A.H. Robins Company's Chapter 11 Plan of Reorganization, was established to resolve the claims of the thousands of women and men who claimed injuries due to the use of the Dalkon Shield intrauterine device.²²⁸ After resolution of all appeals of the Confirmation Order, the Plan was consummated on December 15, 1989 (the "Consummation Date"), at which time the Trust received the bulk of its funds: \$2.33 billion.²²⁹ I have discussed elsewhere quite extensively the genesis and history of the Dalkon Shield Claimants Trust.²³⁰ In the next section, I will provide a summary of the relevant parts of that discussion,

227. Part III is based on the author's knowledge and experience as Chairperson of the Dalkon Shield Claimants Trust. The statistics that do not footnote to an outside source were calculated for the express purpose of this Article and are on file with the author.

228. See Debtor's Sixth Amended and Restated Plan of Reorganization, *In re* A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter Plan]. The Dalkon Shield Claimants Trust was established as part of the Plan of Reorganization of the A.H. Robins Company. See Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Bankr. E.D. Va. Mar. 28, 1988) (No. 85-01307-R) [hereinafter Disclosure Statement], *confirmed*, *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989). The Claimants Trust Agreement authorized the Trustees to establish a claims resolution process to resolve the claims of those who timely notified the court that they intended to seek compensation. See Claimants Trust Agreement § 2.02, *In re* A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter CTA].

229. See CTA, *supra* note 228, § 5.01; *see also* Agreement and Plan of Merger Dated as of March 21, 1988, among A.H. Robins Company, American Home Products Corporation and AHP Subsidiary (9) Corporation § 6.12(a), *In re* A.H. Robins Co. (No. 85-01307-R), *in* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988). Robins's Plan of Reorganization was confirmed on July 26, 1988. The Confirmation Order established the Dalkon Shield Claimants Trust and provided for an initial funding in the amount of \$100,000,000. See *Robins III*, *supra* note 52, 880 F.2d 769, 771 (4th Cir. 1989).

230. See Vairo, *Paradigm Lost*, *supra* note 15.

and provide details of later-adopted policies and the Trust's performance.²³¹

A. *The Bankruptcy Case Estimation and Plan of Reorganization*

1. The estimation process

After the Supreme Court's decision, it is clear that no aggregated solution will be considered fair unless it provides sufficient funding for all claimants.²³² Thus, an important aspect of the Robins bankruptcy proceeding for posterity's sake is the question of adequate funding. Accordingly, the A.H. Robins Chapter 11 estimation process was of critical importance. Its purpose was to estimate the amount of money that would be needed to satisfy all valid Dalkon Shield claims.²³³ As the breast implant litigation makes clear, realistically estimating the number of claims is critical to insuring the success of any attempt at setting up a claims resolution process.²³⁴

It is perhaps easier to accomplish this goal in the context of a reorganization plan because all creditors—tort claimants and potential tort claimants—must file proofs of claim or their tort claims may be

231. A brief history of the Dalkon Shield and the Chapter 11 case is set forth in *In re A.H. Robins Co.*, 880 F.2d 709, 711-22 (4th Cir. 1989). Other details regarding the A.H. Robins bankruptcy case are explained in *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988) [hereinafter Breland], *aff'd*, 880 F.2d 694 (4th Cir. 1989). See *Robins I*, *supra* note 147, 880 F.2d 694, 696 n.1 (4th Cir. 1989) for a list of the Fourth Circuit's series of Dalkon Shield cases. See also *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1218-24 (D. Kan. 1987) (affirming \$1.75 million compensatory and \$7.5 million punitive jury award).

At least three books have focused on the various relationships of the key players involved in the bankruptcy case. See RONALD C. BACIGAL, *MAY IT PLEASE THE COURT, A BIOGRAPHY OF JUDGE ROBERT R. MERHIGE, JR.* (1992); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985); SOBOL, *supra* note 40. The main players were: (1) United States District Judge Robert R. Merhige, Jr., who retained jurisdiction over the case and jointly decided matters with bankruptcy Judge Blackwell N. Shelley; (2) the Claimants Committee, led by Murray Drabkin, at the time a partner at Cadwalader, Wickersham & Taft; (3) the Robins family, who controlled the company; (4) Aetna Insurance Company, Robins's insurance carrier, which was being sued for fraud and RICO violations along with Robins after plaintiffs' lawyers alleged that Robins and Aetna conspired to withhold information about the problems with the Dalkon Shield; and (5) American Home Products, the company which eventually acquired Robins for more than \$3 billion, the bulk of which funded the Trust. See *Robins II*, *supra* note 10, 880 F.2d 709, 720 (4th Cir. 1989).

232. See *supra* Part II.C.2 and accompanying footnotes.

233. See Vairo, *Paradigm Lost*, *supra* note 15, at 627-28.

234. See *supra* notes 159-60 and accompanying text.

extinguished through the discharge of the debtor.²³⁵ However, even in a Rule 23(b)(3) class action, the same kind of notice can be given to potential claimants, the members of a properly defined class or subclasses, of their right to opt out, and that their failure to do so generally means they will be bound in the same manner as a bankruptcy claimant.²³⁶ In any event, the breast implant litigation teaches that it is difficult, if not impossible, to negotiate the size of the fund first, and then determine how many claimants will file claims or be a part of the class. A \$4.225 billion settlement fell apart because more women opted to participate in the settlement at the amounts projected than the fund could possibly pay.²³⁷

Rule 23(d)(1) empowers the district court to "make appropriate orders . . . determining the course of the litigation." Perhaps if the district court had ordered a process like that used in the *Robins* case under Rule 23(d)(1), a more realistic settlement could have been achieved. In the *Robins* case, a bar date established a period in which all claims had to be filed.²³⁸ As a result of a worldwide notification campaign publicizing the Bar Date, approximately 300,000 American and almost 35,000 foreign women and men filed claims. After receiving these claims, the court mailed a brief questionnaire to the claimants to obtain preliminary information about the claim in order to provide more details to the estimation experts for their use in determining how much would be needed to fund the Trust. Over 100,000 claimants failed to return the questionnaire, and the court disallowed most of those claims.²³⁹ This left the court with the task of

235. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-30 n.10 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost."). I do not mean to suggest that the problem posed by future claimants is non-existent in the context of bankruptcy, but rather that it is ameliorated by the ability to ferret out and bind anyone who has or may have a claim. See Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. (forthcoming Jan. 1998).

236. It is axiomatic that a class action judgment binds all class members so long as they were adequately represented. See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). In the case of a Rule 23(b)(3) class action, assuming proper notice to the class, class members who fail to exercise their right to opt out of the class action are bound. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Even if a class member has not received the notice, they will be bound. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950).

237. See *In re Dow Corning Corp.*, 86 F.3d 482, 486 n.4 (6th Cir. 1996); *supra* note 159 and accompanying text.

238. See Vairo, *Paradigm Lost*, *supra* note 15, at 627-28; see also SOBOL, *supra* note 40, at 97.

239. See Vairo, *Paradigm Lost*, *supra* note 15, at 628.

approximating how much would be required to compensate the approximately 197,000 active, timely claims required.²⁴⁰

To assist the parties and the court in determining how large a compensation fund needed to be, the court-appointed experts developed and sent a detailed questionnaire to a scientific sample of claimants.²⁴¹ The various parties used the data obtained to present to the court their estimates of the funds necessary to pay all valid claims.²⁴² Judge Robert R. Merhige, Jr., the district court judge handling the Robins matter, determined that in order to pay all valid Dalkon Shield claims and the Trust's administrative expenses in full, the Trust required \$2.475 billion, payable over a reasonable period of time.²⁴³ Although the disclosure statement made it clear that if the money ran out, there would be no recourse against doctors, Aetna or others, the creditors approved the Plan because they believed that there would be sufficient money to pay all valid claims, including personal injury claims.²⁴⁴

Clearly, the estimation process worked well. By the end of the summer of 1997, all claimants, except for fewer than 100 who are still in the arbitration or trial processes, had been paid \$2.76 billion. The \$2.76 billion includes about \$1.55 billion in initial settlements or awards, and over \$1.1 billion in pro rata payments. The Trust has also paid administrative and other expenses, including taxes, of almost \$400 million. Thus, the Court's estimation of \$2.4 billion paid over time was conservatively correct. Initial payments plus expenses will total just over \$2 billion. Thus, a portion of the pro rata payments will be financed with the original fund. The Trust's lean administrative structure, however, caused expenses to be approximately

240. *See id.*

241. *See id.*; *see also Robins I, supra* note 147, 880 F.2d 694, 699 (4th Cir. 1989).

242. The estimates ranged from Robins's low-end estimate of \$800 million to the Claimant Committee's high-end estimate of \$7 billion. Aetna's expert estimated that the Trust would need \$2.2 billion. *See Special Note to Women Who Used the Dalkon Shield: How Your Dalkon Shield Claims Will Be Treated 3, In re A.H. Robins Co. (No. 85-01307-R), in Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter Special Note to Women].*

243. *See id.*

244. Some claimants appealed the Plan on the basis that there may not be enough funding to pay all valid claims. *See Robins I, supra* note 147, 880 F.2d at 697. The Fourth Circuit affirmed and the Supreme Court denied certiorari. *See id.* at 702. That fear proved to be unfounded. Rather than lack sufficient funding the Trust has already paid an additional 85% of each award to all claimants whose claims have been resolved and expects to pay another 15-18% at the time the Trust closes. *See discussion infra* Part III.B.5.c.

\$250 million lower than the court's estimation.²⁴⁵ In addition, the Trust's investment policies generated approximately \$850 million in revenues.²⁴⁶ Accordingly, because of the Trust's efficient administration and investment program, an additional \$1.1 billion will be available to pay claimants. Thus, the claimants will receive large pro rata payments, and are likely to receive a 100% dividend above their compensatory awards.

2. Global peace

As seen in the asbestos, breast implant, other mass tort cases, and now the tobacco matter, defendants particularly want global peace as a consequence of settling a mass tort. Not only should all tort claims be resolved in the vehicle for settlement, but ideally so should all potential cross-claims. As the lawyers in the asbestos litigation learned from the Supreme Court, achieving global peace may come at the price of great controversy. The Dalkon Shield case was no different. There were many parties to the bankruptcy litigation, and many defendants, including treating physicians and Aetna, Robins's product liability insurer, were named in the pre-bankruptcy Dalkon Shield cases.²⁴⁷ Each of the defendants wanted the Chapter 11 case to result in the channeling of all Dalkon Shield claims, both pending and future, into the Trust.²⁴⁸

Through a number of innovative devices, Judge Merhige managed to achieve the desired global peace. First, to resolve claims against Aetna, which allegedly conspired with Robins to deny or undervalue the viability of claims, he certified a Rule 23(b)(1) settlement class in what came to be known as the *Breland* case.²⁴⁹ The settlement required Aetna to pay up to an additional \$500 million to the

245. See *In re A.H. Robins Co.*, 86 F.3d 364, 368, 375 (4th Cir. 1996) (stating the Trustees "have done an excellent job of administration" and have "minimized administrative expenses" and the Trust "had limited its operating and administrative expenses and had diligently monitored the claims resolution process"), *cert. denied sub nom.* 117 S. Ct. 483 (1996).

246. See *id.* at 368, 375 (stating the Trustees have "engaged excellent financial consultants, and [as of Spring of 1995] earned over \$800,000,000 by investing the Trust funds" and "the assets of the Trust were wisely invested").

247. These defendants included: the A.H. Robins Company; members of the Robins family and other high officials of the Robins Company; Aetna, which was accused of conspiring with Robins; and doctors and hospitals accused of medical malpractice associated with the use of the Dalkon Shield.

248. See *Robins I*, *supra* note 147, 880 F.2d at 701-02 (discussing interrelationship of *Breland* class action with Robins's Chapter 11 reorganization).

249. See *Breland*, *supra* note 231, 88 B.R. 755 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989).

compensation fund for Dalkon Shield claimants. These funds provided some insurance in case the Trust's corpus of \$2.33 billion was insufficient to pay all timely claims. In addition, the settlement provided that those claimants whose claims had been disallowed for failure to return the court's estimation questionnaire could participate in the *Breland* settlement.²⁵⁰

The *Breland* settlement thus killed at least two birds with one stone. Because it was a mandatory class, Aetna was essentially discharged along with Robins from any future liability for Dalkon Shield claims.²⁵¹ Second, the settlement fund provided a place for the disallowed claimants to receive compensation. This benefited all possible defendants because such claimants could participate in the settlement fund, rather than seek to sue any or all of the defendants. Obviously, American Home Products, the company that purchased Robins and provided the bulk of the Trust's funding, had a major interest in insuring that all Dalkon Shield claimants and others who may have claims for contribution indemnification, had some place to receive compensation so that such claimants would not be tempted to sue it.

Perhaps equally controversial at the time, the Plan itself not only discharged the debtor, A.H. Robins, but it also provided for permanent injunctions which had the effect of releasing the Robins family, company officials, American Home Products, and doctors or health care providers who otherwise could have been sued for malpractice for any Dalkon Shield claims.²⁵² Finally, to insure that anyone who had current or potential claims for contribution or indemnification against Robins had a place to seek compensation, the Other Claimants Trust, which was funded with \$50 million, was created by the Plan to provide for those claims.²⁵³ Thus, any claims arising out of the use, insertion, or removal of the Dalkon Shield could only be filed in the Dalkon Shield Claimants Trust, the Other Claimants Trust, or the *Breland* settlement class vehicle.²⁵⁴ The Fourth Circuit specifically

250. See *supra* notes 238-40 and accompanying text.

251. See *Robins II*, *supra* note 10, 880 F.2d 709, 749 (4th Cir. 1989).

252. See *id.* at 752.

253. See *Robins I*, *supra* note 147, 880 F.2d at 700.

254. Not all plaintiffs' lawyers agreed that there would be sufficient funds to pay all personal injury claimants and expressed concern that there would be no recourse against third parties such as doctors. As a result, these plaintiffs' lawyers appealed both the injunction provisions against third parties and the *Breland* class action settlement. However, none of the appeals were successful and the Supreme Court denied certiorari in the fall of 1989. See *Menard-Sanford v. A.H. Robins Co.*, 493 U.S. 959 (1989). The Plan was consummated in December 1989

upheld the Plan's global peace aspect when it affirmed the Confirmation Order, which provided for the permanent injunctions on litigation against defendants other than Robins, and approved the use of a class action in the related Aetna/Breland matter.²⁵⁵

3. The Claims Resolution Facility

The Plan provided for the establishment of a Claims Resolution Facility ("CRF"), to be run by five court-appointed independent Trustees, to resolve the Dalkon Shield personal injury claims.²⁵⁶ The CRF provided the bare-bones guidelines for settling the claims. First, it provided for several compensatory settlement options. The amount of compensation provided for in each of the options was to be geared to the type of proof of injury and Dalkon Shield use the claimant could present.²⁵⁷ Second, the CRF also provided a process for the Trust to accept "late claims." As discussed earlier, in connection with the estimation process, the court established a Bar Date for the acceptance of claims.²⁵⁸ Those claims became the "timely" claims. The CRF authorized the Trust to accept the claims of persons who had not filed as of the Bar Date, and to pay such claims, on a subordinated basis, if funds were available after paying all timely claims.²⁵⁹ Third, no punitive damages were permitted under the Plan.²⁶⁰ Finally, the CRF provided that if after paying all timely and late claims funds remained, such funds were to be disbursed on a pro rata basis, in lieu of punitive damages.²⁶¹

B. The Trustees' Implementation of the CRF

Three factors strongly influenced the Trustees' decision-making. First, they were sensitive to the fact that the claimants were women, many of whom believed themselves to have been victimized by the

when American Home Products acquired A.H. Robins and remitted \$2.33 billion to the Dalkon Shield Claimants Trust. See Alan Cooper, *Way is Cleared for Robins Trust*, NAT'L L.J., Nov. 20, 1989, at 3; David Savage, *Court Clears Way for Dalkon Shield Payouts*, L.A. TIMES, Nov. 7, 1989, at A1. The balance of the \$2.457 billion necessary to pay valid Dalkon Shield would come from members of the Robins family and from Aetna.

255. See *Robins I*, *supra* note 147, 880 F.2d 694, 702 (4th Cir. 1989).

256. See *In re A.H. Robins Co.*, 86 F.3d 364, 367-68 (4th Cir. 1996), *cert. denied sub nom.* 117 S. Ct. 483 (1996); *Robins I*, *supra* note 147, 880 F.2d at 722;.

257. See *Robins I*, *supra* note 147, 880 F.2d at 699.

258. See *supra* note 238 and accompanying text.

259. See Special Note to Women, *supra* note 242, at 4; *infra* Part III.B.5.b.

260. See *Robins II*, *supra* note 10, 880 F.2d 709, 722 n.16 (4th Cir. 1989).

261. See Special Note to Women, *supra* note 242, at 4; *infra* Part III.B.5.c.

lawyers and the legal process.²⁶² Second, fewer than 30% of the claimants were represented by counsel. The claimant population illustrated the need for carefully considered policies, procedures, and claim forms in order to enable claimants from various socioeconomic backgrounds to receive appropriate compensation with or without legal assistance.

Third, the Trustees' study of pre-bankruptcy litigation demonstrated that a claimant's recovery generally had less to do with the merits of her claim than other factors, such as the geographic location, the particular claims adjusters' settlement limits, and the attorney. As a result, the system the Trustees developed made claimants less dependent on external forces and put them in a better position to handle their claims themselves if they so chose. In turn, this development controversially reduced the role and importance of lawyers.²⁶³

1. Decision-making principles

Three principles motivated the Trustees' policy decisions: (1) treat all claimants equally and fairly by focusing on the best interests of claimants collectively, instead of on the best interests of a particular claimant or group of claimants ("fairness principle"); (2) keep administrative expenses at a minimum to preserve the funds available to claimants with valid claims ("efficiency principle"); and (3)

262. See Karen M. Hicks, *Dalkon Shield IUD Survivors: A Case Study of Contraceptive Tragedy and an Emerging Social Protest Movement, 1986-1989 (1990)* (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with *Loyola of Los Angeles Law Review*). Ms. Hicks founded the Dalkon Shield Information Network, perhaps the largest support group for unrepresented Dalkon Shield claimants, through which she sought to participate in the bankruptcy process. The dissertation provides a history of the group and its attempts to participate fully in the bankruptcy process, and to become a political or social force for change in the methods for handling mass tort litigation. See *id.*

The dissertation shows the numerous difficulties the Dalkon Shield Information Network experienced. For instance, Ms. Hicks describes the necessity for the group: there were few if any attempts, even by the creditors' committee representing the interests of the Dalkon Shield Claimants, to keep the claimants themselves apprised of the legal proceedings. See *id.* at 75-76, 97-98, 105. She also discusses how, instead of supporting her efforts, various plaintiffs' lawyers tried to co-opt her group. See *id.* at 150-61. Few women's groups provided assistance or support. See *id.* at 96-97, 145-47.

Ms. Hicks also argues that the activities of many lawyers led to "revictimization" of those injured by the Dalkon Shield. See *id.* at 168-69.

263. This reduced role for lawyers is especially evident during the claims resolution part of the process. The Trustees designed the claims forms so that it would be possible for unrepresented claimants (73% of the total claimant population) to obtain fair settlements without the assistance of attorneys.

encourage settlement and prompt payment of claims instead of arbitration and litigation ("settlement principle").²⁶⁴ The result of these principles was that through the claims resolution process the Trust had a fiduciary stance in relation to the claimants, and an adversarial one if the claimant elected the traditional tort process that the Plan preserved.²⁶⁵

With respect to the first principle, fairness required the Trust to treat every claimant alike. The Trust therefore adopted policies to insure that every claimant's case was evaluated solely on the basis of her evidence, without regard to who her lawyer was, what jurisdiction she was from, or what type of witness she might make. Occasionally, extraordinary circumstances would arise which required an exception to this principle. For instance, the Trust would expedite the disposition of a claim for a claimant in a terminal medical condition.

Not all people are equally powerful in the real world. The adversary model all too often results in unequal justice, with more compensation for the powerful. In a mass tort litigation, this has the potential to lead to systemic unfairness especially where there is a limited fund from which to compensate all claimants. Every extra dollar a more powerful claimant extracts from the Trust is a dollar less for the less powerful claimant. Generally, a represented claimant will be more powerful in an adversarial process than an unrepresented one. Failing to equalize the power relationships thus would injure or be unfair to the nearly 75%²⁶⁶ of the claimants who were unrepresented. By refusing to play the adversary game during the administrative claims resolution process, the Trust made it possible for the claimants to compete against each other solely on the strengths of their claims, rather than on the strength of their legal representation.

For example, the Trust designed its claim forms and informational materials so that all claimants would be able to handle their claims without lawyers. The claim forms and instructions were tested on unrepresented claimants from a broad spectrum of socioeconomic levels. The testing led to the claim forms being revised many times.

264. See Vairo, *Paradigm Lost*, *supra* note 15, at 637-38; see also WEINSTEIN, *supra* note 16, at 280 n.88.

265. See WEINSTEIN, *supra* note 16, at 280 n.86; Vairo, *Paradigm Lost*, *supra* note 15, at 638.

266. At the time, virtually all the Trustees' major policy decisions were made, approximately 134,000 claimants of the approximately 176,000 domestic claimants (76%) who qualified for review were unrepresented, and 142,000 of the total number of over 195,000 claimants who filed claims, domestic and foreign, were unrepresented (73%).

In addition, the Trust devised a program to help claimants prepare their claims. Once a claimant submitted her claims materials, a reviewer examined her materials to ensure they were complete, and assisted the claimant in obtaining missing documents from doctors and other health care providers.

The Trustees' policies also were designed to maximize the benefits accorded to the group of claimants as a whole. For example, the Trust's "best and final offer/no negotiation" approach sought to reduce the upward settlement creep accompanying a negotiation regime which might have resulted in claimants obtaining varying settlement amounts that had less to do with the merits of their claims.²⁶⁷ The Trust's approach avoided a system in which claimants, through their attorneys, vied with each other for a settlement jackpot, to the detriment of later claimants and unrepresented claimants. Instead, the Trust developed a system that treated all claims fairly and equally by equalizing the position of represented and unrepresented claimants and that promoted settlements that would give the highest possible amount to each individual claimant. The amounts varied according to the strength of the medical evidence, without depleting the funds necessary to treat all remaining claims in the same manner.

With respect to the efficiency principle, the Trustees wanted to treat the last claimant to whom an offer was made in the same manner as they treated the first claimant. Thus, it was important to the Trustees to operate the Trust as administratively leanly as possible. The Trust was a model of efficient administration. The court had projected that administrative expenses would amount to approximately 15%²⁶⁸ of the trust corpus of over \$2 billion. Actually, the Trust expenses have amounted to approximately 6% of the fund, which resulted in savings of over \$250 million which would be distributed to the claimants as part of their pro rata distribution.²⁶⁹

267. See *infra* Part III.B.3.a.i.

268. Two of the party experts (for Robins and its product liability insurer) estimated administrative expenses at 10% during the estimation hearing. The expert for the claimants estimated a higher percentage. The courts' estimation process was based on an estimate of 15%. This amount is closer to the overhead costs of insurance companies. The Fourth Circuit acknowledged the efficiency of the Trust operation. See *supra* notes 245-46.

269. See Vairo, *Paradigm Lost*, *supra* note 15, at 621. The Trust's success in keeping administrative costs low stands in stark contrast to the experience of the Johns-Manville Personal Injury Settlement Trust which was set up as part of Johns-Manville's Chapter 11 proceeding. At the time, that Trust was unprecedented. See Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Trust*, 53 LAW & CONTEMP. PROBS. 27, 27 (1990). However, due to

In addition, because it was not clear whether there would be sufficient funds at the inception of the Trust, the Trustees adopted a number of important policies to help insure that such funding would be available. To achieve this end, the Trustees have made a number of controversial decisions, such as the “best and final offer” approach, the “no negotiation” policy, and the “holdback,” each of which will be discussed below.

With respect to the settlement principle, the same controversial policies also were designed to provide incentives to claimants to settle through the claims resolution process rather than to litigate. For example, the theory behind the best and final offer approach was to make the claimant as high an offer as possible, given the Trust’s limited fund and the claimant’s evidence. If she knew the Trust would not negotiate or “settle on the courthouse steps” because those increments were already included in her offer, she would be reluctant to test the offer and thereby subject herself to delay in payment, or, possibly, an adverse verdict. Similarly, the Trust would fulfill the goals of preferring settlement and prompt payment by paying the claimant her full Option 3 offer once she accepted it.

2. Administrative payment options and claims evaluation

a. Option 1

The responses to the questionnaires submitted in connection with the estimation hearing verified that many of the claims filed would be frivolous or of relatively low value, either because of lack of proof or the provable existence of only a minor injury. The purpose

flaws in the Plan and high administrative costs, the claims resolution system employed had to be drastically over-hauled. See *In re Johns-Manville Corp.*, 982 F.2d 721, 727 (2d Cir. 1992). Before the reorganization of the system however, Manville’s transactional and administrative costs were 25 times higher than those of the Dalkon Shield Claimants Trust. See Vairo, *Paradigm Lost*, *supra* note 15, at 655-56. At that time, in 1992, the Dalkon Shield Claimants Trust cost per claim was under \$400 per claim, and the Manville Trust’s cost per claim was \$4,900. See *id.* at 656 n.140 (discussing how this cost per claim was calculated). For other comparative information, see *id.* at 655-56. Undoubtedly, the Manville Trust’s per claim cost has gone down and the Dalkon Shield Claimants Trust costs per claim have risen. However, the Dalkon Shield Claimants Trust’s costs are still only about \$700 per claim, and the rise is due in large part to the rising legal costs. When the numbers above were reported, the Dalkon Shield Claimants Trust had yet to pay the expenses of retaining defense counsel to represent the Trust when a claimant rejected her offer and elected litigation or arbitration. Since fewer than 150 claims will be resolved through litigation or arbitration, the cost per claim over the life of the Trust will remain very low.

of Option 1 was to permit the quick disposition of such claims. As a result, the Trustees adopted a simple procedure for electing Option 1 in the fall of 1988. A claimant needed only to file a form affidavit acknowledging that she had used the Dalkon Shield and suffered a Dalkon Shield associated injury.²⁷⁰ The Trustees offered Dalkon Shield users \$725 each, and offered nonusers such as husbands, whose spouses claimed they used the Dalkon Shield, \$300. By the December 1989 Consummation Date, the Trust had paid nearly 85,000 Option 1 claims, totaling almost \$60 million.²⁷¹

The Trustees continued to offer Option 1 throughout the entire claims resolution process. Another almost 50,000 claimants elected Option 1. By the end of the Trust, over 132,000 Option 1 claimants will have been paid a total of almost \$90 million.²⁷²

Most surprisingly, even claimants who initially elected Option 3, then rejected their offers and proceeded to elect trial or arbitration, in many cases²⁷³ decided after analysis of their cases that it was in their interest not to pursue the litigation, or even the Trust ADR process,²⁷⁴ but to receive some compensation under Option 1.

The success of Option 1 surprised not only those involved with the estimation, but the Trustees and the Trust management as well. The experts testifying at the estimation hearing predicted that only 28% of the claimants would elect Option 1.²⁷⁵ Instead, over 60% of the claimants eligible for consideration for payment elected Option 1. The fact that so many claimants elected Option 1 made it possible for the Trust to achieve lower transaction costs, and ultimately, was a major factor enabling the Trust to make large pro rata payments.

270. See Vairo, *Paradigm Lost*, *supra* note 15, at 633.

271. *See id.*

272. Not surprisingly, a large number of unrepresented claimants elected Option 1. In fact, 115,426 claimants were unrepresented, and 17,322 were represented. A total of about \$77 million was paid to the unrepresented claimants, and about \$10 million to represented claimants.

273. At least forty-four claimants elected Option 1 after rejecting their settlement offers.

274. *See infra* Part III.B.3.b.

275. In early 1989, before the Plan was finally consummated and the Trust received the bulk of its funding, the Trust was concerned that some claimants had unwisely chosen Option 1 and that they should have waited for the Option 2 and 3 claims process to begin. Accordingly, the Trustees ordered an Option 1 study on this issue. The report showed that in fact, the Option 1 elections in all but about 3% of the cases were the best choice for the claimants. Further analysis of the other 3% showed that in most cases, there was a valid reason why the claimant did not await Options 2 or 3.

b. Option 2

The Dalkon Shield litigation, like other mass tort litigation, presented causation issues. In the Dalkon Shield case, the global causation issue was not too troublesome because medical experts agreed, at the time,²⁷⁶ on the types of injuries the Dalkon Shield could cause. In fact, the CRF provided an exhibit which listed the various types of recognized Dalkon Shield injuries for which the Trustees could authorize payment.²⁷⁷

The possibility of alternative causation, however, presented problems for many claimants. Medical evidence indicated that most of the injuries which were linked to the Dalkon Shield could have been caused by something else, such as another manufacturer's IUD, sexually transmissible diseases, or cancer.²⁷⁸ The purpose of Option 2 was to provide payment to claimants with good medical proof of Dalkon Shield use and good medical proof of a Dalkon Shield associated injury, but whose medical records revealed serious alternative causation problems.²⁷⁹

276. Ironically, subsequent medical research now indicates that the Dalkon Shield may not have been the cause of some of the injuries alleged to the degree thought in the early 1970s and through the 1980s. See P.M. Ditchick & J.M. Ditchick, *A Comparative Evaluation of Three IUDs*, CONTRACEPTION DELIVERY SYS., Apr. 1984, at 117-21 (1984); H.M. Hasson, *Clinical Experience with Intrauterine Devices in a Private Practice*, ADVANCES IN CONTRACEPTION, Mar. 1985, at 51-61; Elton Kessel, *Pelvic Inflammatory Disease with Intrauterine Device Use: a Reassessment*, FERTILITY & STERILITY, Jan. 1989, at 1-11; Richard A. Kronmal, *The Intrauterine Device and Pelvic Inflammatory Disease: The Women's Health Study Reanalyzed*, J. CLINICAL EPIDEMIOLOGY, Nov. 2, 1991, at 109-22; Stephen D. Mumford and Elton Kessel, *Was the Dalkon Shield a Safe and Effective Intrauterine Device? The Conflict Between Case-Control and Clinical Trial Study Findings*, FERTILITY & STERILITY, May 15, 1992, at 1151-76; J.E. Rioux, *Pregnancy After IUD Use*, ADVANCES IN CONTRACEPTION, June 1986, at 185-92; Herbert F. Sandmire & Robert A. Cavanaugh, *Long-term Use of Intrauterine Contraceptive Devices in a Private Practice*, AM. J. OBSTETRICS & GYNECOLOGY, May 15, 1985, at 169-75; R. Snowden & B. Pearson, *Pelvic Infection: A Comparison of the Dalkon Shield and Three Other Intrauterine Devices*, BRIT. MED. J., May 26, 1984, at 1570-73; Juhani Toivonen, *Intrauterine Contraceptive Device and Pelvic Inflammatory Disease*, ANNALS OF MED., Apr. 1993, at 171-73.

277. See Dalkon Shield Trust Claims Resolution Facility CRF 8-9, *In re A.H. Robins Co.* (No. 85-01307-R), in Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (Mar. 28, 1988) [hereinafter CRF].

278. See sources cited *supra* note 276.

279. See SOBOL, *supra* note 40, at 313.

Fewer than 18,000 claimants elected Option 2.²⁸⁰ The Trustees expected that Option 2 would prove to be relatively unpopular for two reasons. First, the payment scale was relatively low. Payments ranged from \$850 to \$5500, depending on the severity of the injury.²⁸¹ The scale was low because this Option was designed for plaintiffs with serious alternative causation problems who would have received much less, if anything, in the traditional tort system. Second, the Plan imposed rather stringent proof requirements. Specifically, a claimant could not elect Option 2 unless she had medical proof of Dalkon Shield use, which many claimants with alternative causation problems did not have.²⁸²

For an Option 2 type alternative to be more viable for resolving more claims in future claims resolution facilities, the parameters would have to be less stringent. For example, if the Trust could have accepted non-medical proof of Dalkon Shield use, many claimants with more serious injuries, but alternate causation problems, could have chosen Option 2 instead of Option 3. Such claimants generally receive a lower Option 3 offer than the scheduled Option 2 amount for such injury claimed. This is because the Option 3 claims evaluation rules generate low offers when the claimant's medical submission shows a significant alternative causation problem. Offering higher payments under Option 2 may have attracted more claimants. However, the Trustees believed that such amounts would be too high given the presumed presence of alternative causation problems. If too much of the Trust's funding were devoted to Option 2, the Trustees feared that there would be insufficient funds to pay the most seriously injured claimants with the best proof the amounts they deserved in Option 3.

c. Option 3

The purpose of Option 3 was to provide settlement offers based on the pre-petition historical settlement amounts for claimants with serious and provable Dalkon Shield injuries.²⁸³ The CRF provided

280. Of those electing Option 2, 11,504 were unrepresented, and 6303 were represented. A total of \$56,582,861 has been paid to unrepresented claimants, and \$39,856,172 has been paid to represented claimants. These amounts include pro rata payments that have been paid by the Trust.

281. See Vairo, *Paradigm Lost*, *supra* note 15, at 636-37.

282. See *id.*; CRF, *supra* note 277, § D.

283. See CRF, *supra* note 277, § E.2. The Plan provides for the payment of compensatory damages; punitive damages were prohibited under the Plan. Amounts offered under Option 3 ranged from \$125 (to claimants whose claims

that claimants who rejected Option 3 offers could attend a settlement conference.²⁸⁴ Finally, if settlements could not be reached within certain timeframes, claimants could elect binding arbitration or trial.²⁸⁵ To facilitate the fair and equal treatment of all claims, the Trust designed the claims review process to evaluate each and every Option 3 claim under the same highly structured, rules-based decision-making process.²⁸⁶ For instance, in making Option 3 offers, the Trust did not consider a claimant's geographical location or legal representation. In addition, the rules were medically oriented, rather than legally oriented. Thus, offers were unaffected by possible statute of limitations problems, vagaries of state law, and the like.

In order to assure that the Option 3 payment system would both reflect the values of the Trustees and be likely to generate acceptable offers to claimants, the Trust put together an eclectic team to work on the claims resolution procedures and payment systems. The members of the team included the Executive Director of the Trust, the Chairperson of the Trustees, the experts who had testified for both A.H. Robins and the Claimants Committee, and a lawyer from one of the most successful law firms to represent Dalkon Shield claimants. The Trust also developed the Attorney Evaluation Project in which experienced Dalkon Shield plaintiffs' lawyers evaluated claims files and rendered opinions on their value, both before the Robins bankruptcy, and in the Plan context with a limited fund. The Attorney Evaluation Project helped the experts refine the claims evaluation rules and increased the likelihood that the Trust's system would result in proper evaluation of claims and acceptance of the Trust's Option 3 offers.

Approximately 49,000 claimants initially elected Option 3. Payments ranged from \$125 to over \$2 million. Over 40,000 claimants accepted their offer without taking further action. Thus, the initial acceptance rate for Option 3 offers was about 83%. Another 1300 claimants, about 37% of the Option 3 claimants who attended a settlement conference, accepted their offers after their settlement conference.²⁸⁷ Although the Trustees were encouraged by the acceptance rate, they remained concerned that the remaining Option 3 claimants, which numbered over 7000, might elect their way into arbitration or

fail due to a lack of probative evidence of Dalkon Shield use or injury) to over \$2 million.

284. *See id.*

285. *See id.* § E.4.-5.

286. *See id.* § E.2.

287. *See infra* Part III.B.3.b.i.

litigation and inevitably greatly increase the transaction costs of the Trust by generating the need to pay defense counsel.

Analysis of the rejections, however, showed that most rejections—approximately 67% were by claimants who received offers of less than \$6000.²⁸⁸ Thus, the Trustees knew there would be a need to develop a process other than arbitration or litigation to resolve these claims. The Trustees believed that in most instances, there was a serious problem with the claims valued at under \$6000, generally because of the lack of proof on a provable serious injury or because of a quite clear indication of alternative causation. Nonetheless, it was apparent that these claimants believed that the Dalkon Shield caused their injuries. Thus, the Trustees ultimately developed an ADR process which would provide a vehicle for the claimants to quickly resolve such claims at a low administrative cost to the Trust.²⁸⁹

3. Claims resolution policies and processes

a. policies

The Trustees made a number of policy decisions to accomplish their goal of promoting settlement over litigation and arbitration.

i. best and final offer/no negotiation

The singular, most important decision of the Trustees was to make Option 3 offers as high as possible considering the medical evidence submitted, historical settlement values, and the existence of the limited fund, rather than an initial low-ball offer. Accordingly, the offers were necessarily the best and final offers, and not a point of departure for negotiation.

Flowing from the best and final offer policy is the no negotiation principle. Because the Trust's offers were designed to be fair and as high as the evidence would support, the Trust did not negotiate at the

288. It was these claimants, the Trustees believed, who generally would have been better off taking Option 2. The acceptance rate rose along with the amount offered. In contrast to the 67% of the claimants who rejected their offers of under \$6000, 91.9% of claimants with offers between \$20,000 and \$100,000 accepted their offers; and 98.1% of claimants who received an offer of over \$100,000 accepted their offers. Similarly, the number of acceptances after settlement conferences appeared to be a function of the size of the initial offer. Only 25% of claimants with offers under \$6000 accepted after their conference, while over 58% of those who received initial offers over \$100,000 accepted them after the settlement conference.

289. See *infra* Part III.B.3.b.iv.

settlement conferences. Rather, these conferences were used to answer questions and to explain the strengths and weaknesses of the claims. Unless material newly discovered evidence²⁹⁰ was provided or an error was made, the offer was not increased or decreased.

If a claimant rejected the Trust's Option 3 offer, the claimant had to proceed to trial or arbitration. The Trust did not offer more money to settle on the courthouse steps. The Trustees were determined to avoid the creeping settlements, which occurred in the *Marville* case,²⁹¹ which could have caused serious financial deficiencies to the Trust and which would have worked to the detriment of claimants who had not yet been paid. The Trustees will not change this policy because it would be fundamentally unfair to those claimants who took the Trust at its word and accepted what they believed was the highest amount the Trust would pay.

The Trustees' no negotiation policy was certainly a novelty for trial lawyers, and it surprised many plaintiffs' lawyers and claimants. At first, lawyers thought that the Trust would negotiate and they tested the no negotiation policy. But after the Trust refused to settle on the courthouse steps a number of times, attorneys realized that the Trust was serious. At that point, the Option 3 acceptance rate increased, resulting in fewer cases being filed and much lower attorneys' fees for the Trust to pay to defend such cases. This led to huge administrative savings, which resulted in significant pro rata distributions. By the time the Trust finishes paying all claims, it is estimated that an additional \$1.5 billion will be paid to claimants in pro rata payments.²⁹²

ii. holdback

The holdback policy stemmed from the Trustees' initial belief that there might not be sufficient funds to pay all timely claims.²⁹³ Recall that at the time the Plan was confirmed, some attorneys appealed the Plan because they believed the fund was inadequate.²⁹⁴ At the initial expert meetings, there could be no assurances that there would be sufficient funds; however, the Plan's terms contained a provision to address the problem. The Plan permitted the Trustees

290. The Trust employed a FED. R. CIV. P. 60(b) standard. See *Vairo, Paradigm Lost*, *supra* note 15, at 644 n.93.

291. See *Vairo, Paradigm Lost*, *supra* note 15, at 643, 655-56.

292. Pro rata payments of over \$1.1 billion have already been made.

293. See *In re A.H. Robins Co.*, 86 F.3d 364, 368 (4th Cir. 1996), *cert. denied sub nom.* 117 S. Ct. 483 (1996).

294. See *supra* note 244.

to withhold some portion of the amounts awarded and to pay the balance when satisfied that sufficient funds would be available to pay all valid claims—the so-called “holdback.”²⁹⁵ The Trustees implemented the holdback by providing that claimants who settled their claims would be paid in full, but that a holdback would be invoked when a claimant rejected an offer and proceeded to obtain a judgment or arbitration award.²⁹⁶

Thus, pursuant to the holdback, if a claimant was offered \$X at Option 3, rejected that offer, and obtained a judgment for \$10X, the claimant would only be paid \$X or \$10,000, whichever was greater. The Trustees would pay the balance only when they were satisfied that there would be sufficient funds to pay all claimants their Option 3 offers in order to fulfill their obligation under the Plan to “ensure equality in distribution among claimants and the continued availability of funds to pay all valid non-subordinated claims.”²⁹⁷

The holdback provision was consistent with the Trustee’s goal of promoting settlement over litigation and arbitration. By announcing that any amounts awarded above the Trust’s offer would be held back, the Trust created a disincentive for claimants to “roll the dice” in litigation rather than accept a settlement offer from the Trust.

The holdback policy was very controversial. The district court approved the policy in Administrative Order Number 1, and the Fourth Circuit affirmed.²⁹⁸ In fact, however, lawyers seemed to have perceived the holdback to be more powerful than it really was. The policy was adopted in 1990, just as the Trust was gearing up to pay claims. The Trust was not up to full speed, handling over 200 Option 3 claims per week, until July 1991. The settlement conference process was also still in its incipient stages and would not be fully geared up until 1992. At that point, the claimant still could be years away from a trial. Given the backlog for settlement conferences in 1992, even if a claimant elected arbitration, rather than litigation, it would be years before most claimants would be in a position to get paid more than the holdback allowed. In the end, the holdback was invoked in only seven cases.²⁹⁹

295. See CRF, *supra* note 277, § G.3.

296. See Amended Administrative Order Number 1, Governing Dalkon Shield Arbitration and Litigation, *In re* A.H. Robins Co. (No. 85-01307-R) (July 1, 1991) at para. 13 [hereinafter Amended Administrative Order 1].

297. CRF, *supra* note 277, § G.3.

298. It took the Fourth Circuit over two years to rule on the issues. See *In re* A.H. Robins Co., 42 F.3d 870 (4th Cir. 1994).

299. The total amount initially held back in these cases was \$300,674. The

Clearly, the best and final offer and no negotiation approach and the holdback provision were designed to be, and were, strong incentives for claimants to settle. Once ADR resolutions³⁰⁰ are factored in, the acceptance rate for Option 3 claims was a very high 99.4%. On the other hand, these policies also ensured that once claimants rejected the Trust's Option 3 offers or ADR, litigation or arbitration would inevitably follow.

b. post Option 3 processes

i. settlement conferences

The in-depth review and settlement conference stage was the final administrative step of the claims resolution process for Option 3 claimants who rejected the Trust's settlement offers.³⁰¹ As discussed above, the settlement conference was not a negotiation session. Rather, it provided the opportunity for Trust representatives to explain the weaknesses in the claim. While the rules for the initial review of an Option 3 claim were construed liberally in favor of the claimant, the in-depth review took a closer look at the claimant's claim and additional submissions using the same evaluation rules used in the initial review. Following this in-depth review, settlement conferences were scheduled for the claimant to meet with Trust representatives to discuss the strengths and weaknesses of her claim and to determine whether any mistakes had been made in the evaluation process. Unless a mistake in the evaluation of the claim was discovered or the claimant presented newly discovered evidence, the Trust did not increase its Option 3 offer.³⁰²

Given that the purpose of the conference was to discuss the reasons for a claimant's offer, not to negotiate, the Trustees had no

holdback was first applied in December of 1992. All amounts held back were paid in September 1994, when the Trustees determined that there would be sufficient funds to pay the remaining Option 3 claims.

300. See *infra* Part III.B.3.b.iv.

301. See CRF, *supra* note 277, § E.4.-5.

302. Adapting case law that interprets Rule 60(b)(2) of the Federal Rules of Civil Procedure to Trust procedures, "newly discovered evidence" is defined as evidence in existence when the initial claim review occurred, but of which the claimant was excusably ignorant. Therefore, the claimant must demonstrate that she used due diligence when she attempted to obtain this evidence prior to the initial review of her claim. This new evidence must be relevant and not merely repetitive or cumulative of evidence previously submitted. Furthermore, to be considered "newly discovered," such evidence must be likely to lead to a different result when the claim is reviewed again.

expectations that the conferences themselves would lead to many settlements. In fact, almost 40% of claimants who attended their conferences, either personally or through an attorney, accepted their offers after the conference.

Participation in the settlement conference was voluntary.³⁰³ Originally, the Trust scheduled the conference, whether or not a claimant intended to attend, because the conference date was critical to the determination of when the claimant was eligible to commence or recommence litigation or arbitration. The Trustees, however, changed this policy in order to implement its ADR program. The settlement conference process was time-consuming for Trust personnel and expensive. The ADR program was designed for claimants who received relatively low offers. Thus, it seemed more cost effective to permit claimants who rejected their offers to either bypass the settlement conference and elect ADR, or go through the settlement process, if the claimant thought the claim was worth more than the ADR limit.

The Trustees continued to believe that it was important to schedule the settlement conferences unless the claimant elected ADR because 37% of the claimants who attended them accepted their offers instead of pursuing litigation. In any event, the conferences put the claimant and her attorney on notice of the Trust's perceptions about the defects of the claim.

ii. litigation

Because the Trustees were and remain determined to keep litigation and defense costs to a minimum to preserve the assets available for compensation and large pro rata payments, they did not hire, as is usual in mass tort litigation, a large law firm to serve as a "national coordinating counsel." Rather, the Trustees believed that the cost of litigation could be controlled most cost-effectively by centralizing its coordination out of the Trust's offices in Richmond, Virginia. The Trust's approach was successful both in keeping costs as low as possible and in achieving favorable litigation and arbitration results.

aa. internal organization and relationship with outside counsel

The Trust developed a skilled internal legal department to minimize costs and maintain consistent defense positions on a national

303. See CRF, *supra* note 277, § E.4.

level. Because consistency was crucial, in-house lawyers were responsible for directing the defense of Dalkon Shield cases in specific regions and coordinating strategy among themselves and outside counsel.

The Trust also needed experienced outside trial counsel. Early on, the Trustees decided to use a regional counsel concept in which five or six lawyers experienced in the defense of IUD cases would serve as lead trial lawyers in all cases within their regions. This system allowed the Trust to capitalize and expand upon the technical knowledge of a few attorneys rather than having to educate local counsel in each state on the complicated science involved in IUD cases. The small number of regional counsel also enabled the Trust to maintain consistent defense positions nationally. The Trust used local counsel sparingly to avoid duplication of effort and expense.

The Trust's in-house lawyers were intimately involved and closely scrutinized activity in each of their cases. There were frequent planning meetings with regional counsel, where strategies for handling specific cases, as well as global strategies, were discussed and agreed upon.

The Trust developed in-house resources staffed by legal assistants to control costs and insure consistency. The Trust prepared draft discovery responses using a discovery database. All A.H. Robins documents and testimony were kept in-house and research on those materials was conducted by in-house staff. The Trust maintained a brief bank and based motions and responses to motions on materials from that resource rather than having outside counsel "reinvent the wheel" in each case. The Trust also coordinated the use of expert witnesses in-house and maintained a database of information on the witnesses.

bb. focusing on medical causation

The legal strategy that allowed the Trust to keep the Dalkon Shield caseload at a manageable number, resolve cases quickly, and avoid high damage awards focused on pushing cases forward to trial and making medical causation the focus of each case. Unlike other defendants, who may allow cases to sit without much activity for significant periods of time because they know the case is likely to be settled at some later date, the Trust, because of its no negotiation policy, began planning the defense of each case with the expectation that it would be tried. As soon as possible after a lawsuit was filed, the Trust served written discovery, subpoenaed medical records, took

depositions and asked courts for scheduling conferences. This early discovery educated some plaintiffs' attorneys about the weaknesses in their clients' medical causation cases and discouraged other attorneys, who would have liked a slow-moving process, from staying in this fast litigation track.

In conjunction with the fast track toward trial, the Trust created "bail outs"³⁰⁴ to let claimants out of the litigation or arbitration process without negotiating claim values.

The key substantive defense strategy for the Trust was to make scientific evidence on causation the focal point of each case. This was an essential defense strategy because individual causation issues predominate and because the medical view of how or whether the Dalkon Shield actually caused pelvic inflammatory disease changed between the time of A.H. Robins's bankruptcy and the 1990s when the Trust's cases were tried.³⁰⁵ In the mass tort context with a notorious product, factfinders may have turned a deaf ear to medical testimony about whether the Dalkon Shield actually caused a particular plaintiff's injuries if most of the evidence they heard was focused not on the medicine, but on irrelevant "bad company" evidence, such as whether A.H. Robins acted properly in the marketing of the Dalkon Shield.

Over time, the Trust employed a variety of methods to focus each case on medical causation. In its first cases, the Trust was successful in obtaining plaintiffs' counsels' consent to stipulate that the only issues to be tried would be causation and damages. However, after the Trust consistently prevailed or kept recoveries to a minimum in these first trials, the plaintiffs' bar began rejecting the Trust's offers to stipulate or demanding provisions that would have defeated the whole purpose of a stipulation—for example, "The parties stipulate that the Dalkon Shield was a dangerously defective product."

Once attempts to obtain stipulations began to fail, the Trust unilaterally began asking courts to narrow the issues to causation and damages. Such methods as formal Motions to Narrow Issues, Waivers of Proof, and Amended Answers containing waivers, met with greater success in achieving the Trust's objective of focusing on the case-specific medicine rather than "bad company" allegations.

The Trust estimates that its defense system resulted in savings of approximately 25% to 33% in legal expenses. Indeed, the Trust's

304. See *infra* Part III.B.5.d.

305. See *supra* note 276 (discussing substantial revision of the medical community's findings on causation).

legal expenses have been far lower than predicted. The greatest savings, however, are a result of the high acceptance rate of the Trust's Option 3 offers.³⁰⁶ Original predictions for the number of claims that would have to be tried ranged from 1500 to 10,000. In fact, fewer than 1000 claimants, only 2% of those eligible to seek compensation, initially elected arbitration or trial. All but 296 of them, only 0.2% as of September 1997, subsequently accepted their offers or one of the other Trust programs to resolve their claims.

For the claims that have been adjudicated, the results have been very gratifying from the Trust's perspective, and vindicate the fairness of its Option 3 offer process. The Trust prevailed, either through summary judgment, failure to prosecute, or a defense verdict in well over half of the cases that have proceeded. By the end of September, 51 cases had been finally resolved through litigation. In 21 of the cases, the plaintiff prevailed; in 30 of the cases the Trust prevailed. Another 37 arbitration cases have been concluded. There was a decision for the 23 plaintiffs in 12 of the cases and a decision for the Trust in 25 of the cases.

Of the cases in which the plaintiff prevailed, most jury verdicts have been far less than the plaintiff requested, and generally have been remarkably close to the litigant's Option 3 offer. Indeed, until a series of relatively high plaintiffs' verdicts in the spring of 1997, the aggregate amount, and the average award, recovered by plaintiffs in arbitration and litigation was less than the aggregated amounts, and average amounts, of their Option 3 offers. Even with these higher verdicts accounted for, given the risk of a non-recovery and the plaintiffs' demands, the amount gained in litigation was not dramatically higher on average. For example, the average Option 3 offer to a claimant who litigated was \$28,311. The average award was \$53,585, while the average plaintiff's demand was over \$600,000.

iii. arbitration

The Trust also developed arbitration procedures for claimants who rejected their Option 3 offers. The advantage of arbitration was that hearings were held much more quickly than were lawsuits filed in state or federal court. However, only about 22% of those claimants who elected to go beyond the claims resolution process elected some form of arbitration.

306. Given the high costs of litigation, it is obvious that keeping cases out of litigation resulted in substantial Trust savings.

To accommodate both represented and unrepresented claimants who rejected their Option 3 offers, the Trustees developed different arbitration options. First, the Trust devised regular, quite formal arbitration procedures that incorporated a discovery rule that the Trustees believed to be more generous than that of most states.

Second, the Trustees developed "Fast-Track" arbitration. If a claimant agreed to cap her recovery at \$10,000, the Trust would waive statute of limitations defenses, use an expedited procedure, and waive virtually all formal discovery and evidentiary requirements. Moreover, if the claimant was unrepresented, the Trust would be represented by a non-lawyer employee of the Trust.

The Trust expected this option to be most attractive to unrepresented claimants, particularly those who had received low offers. These claimants truly believed that their injuries were caused by the Dalkon Shield, but could not prove it. This option gave them an opportunity to "tell their story," which the Trustees realized is an important ingredient of claimant satisfaction with the dispute resolution process.

As mentioned above, for whatever reasons, claimants did not choose either form of arbitration frequently. The refusal to invoke arbitration is surprising, however, because lawyers actually fared relatively better in arbitration than in litigation. Claimants, when they prevailed, generally received considerably higher awards from arbitrators than from juries or judges. The Trustees suspected that claimants may fare better in arbitration because of the perception that arbitrators are more likely to "split the baby" than jurors or courts. However, the Trustees thought the concept of Fast-Track arbitration was especially viable. Accordingly, it was reincarnated as the Trust's very successful alternative dispute resolution program.

iv. ADR

After about one year's experience in making Option 3 offers, the Trustees realized that the vast majority of claimants rejecting their Option 3 offers had received offers under \$6000.³⁰⁷ The Trustees believed that it would be appropriate to develop an alternative dispute resolution process ("ADR") for these claimants, rather than require them to go through the in-depth review and settlement conference process before proceeding to arbitration or trial. While the latter

307. Sixty-seven percent of the unaccepted offers were by claimants who received an offer under \$6000. *See supra* note 288.

process is lengthy and costly, both for the claimant and the Trust, the ADR process is quick, simple and exacts very low transaction costs.³⁰⁸

The ADR option and rules are similar to the Fast-Track arbitration option outlined above. A claimant who agreed to cap her recovery was not required to wait for an in-depth review and settlement conference, but rather could immediately elect the expedited ADR process before an impartial referee. When unrepresented claimants elect ADR, the Trust is represented by a non-lawyer.

When the ADR program was first adopted, the cap was set at \$10,000. In the year the \$10,000 cap was in place, almost 1000 claimants elected the program. Because the program was proving to be very successful at diverting claimants who rejected their offers from litigation, once the Trustees realized that there would be sufficient funds to pay all Option 3 offers, they raised the cap to \$20,000, hoping to make it an even more attractive option. After the new cap was announced, the number of claimants electing the process shot upwards. In the first year and a half after the new cap was adopted, over 2200 claimants elected ADR. In addition, within that first year, the Trust permitted over 130 claimants who had previously elected trial or arbitration to switch to ADR. Eventually, 715 claimants who elected litigation or arbitration would switch to ADR. At the time the cap was raised, claimants were receiving a multiple of about 4.1 times their Option 3 offer. In other words, the average Option 3 offer of an ADR claimant was \$961. The average ADR award was \$3947. There were more \$0 awards (a total of 101) than \$10,000 awards (68). Despite the authority to make larger awards, ADR awards under the higher cap averaged less than 5.0 times the corresponding Option 3 offers.

In sum, the ADR program was extremely successful.³⁰⁹ Over 6600 claimants who rejected their Option 3 offer elected ADR. A total of over \$41 million was paid through the program, at a cost per claim of only about \$1050. In comparison, the average cost of defending each case in which a claimant elected litigation or arbitration was \$33,500. Of course, the cost of defending cases that were actually tried was far higher than that.

308. The cost per claim for resolving an ADR case is \$1050.

309. See, e.g., Frances E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 687 (1989) (“[Dalkon Shield] claimants seemed to relish the opportunity to tell their own stories.”).

4. Administrative Order Number 1

To avoid inconsistent and unfair results in the inevitable trials and arbitration proceedings, the Trustees devised an administrative order approved by the District Court.³¹⁰ The purpose of the Administrative Order was to govern various aspects of arbitration and litigation and to establish rules, in keeping with the Plan and the CRF, that can be applied consistently and uniformly throughout every arbitration and litigation forum.³¹¹

An important provision of the Administrative Order included approval of the Trust's holdback provision to "assure the continued availability of funds to pay all valid Dalkon Shield Personal Injury Claims" from the limited fund.³¹² The Order also contained a number of provisions controlling discovery in Dalkon Shield cases.³¹³ Because the Trust initially feared an avalanche of claims, it was clear that there was a need for the orderly initiation of suits against the Trust. Accordingly, the Administrative Order also contained procedures for insuring that a claimant not file an action without following all of the steps of the claims resolution process.³¹⁴ It also empowers the court to stay any arbitration or litigation if the Trust can show undue prejudice from the multiplicity of ongoing, pending or scheduled arbitration hearings or trials.³¹⁵ Finally, the district court retains various powers regarding litigation and arbitration.³¹⁶ The Plan grants the court continuing supervisory powers in connection with disputes arising under the Plan.³¹⁷

310. See Motion of the Dalkon Shield Claimants Trust for an Administrative Order Governing All Arbitration and Litigation Proceedings Commenced, Recommended or to be Commenced Pursuant to Section E of the Claims Resolution Facility, *In re A.H. Robins Co.* (No. 85-01307-R) (Mar. 6, 1991) [hereinafter Motion]. The Order was approved by the district court and affirmed by the Fourth Circuit. See *In re A.H. Robins Co.*, 42 F.3d 870, 872 (4th Cir. 1994).

311. See Motion, *supra* note 310, at paras. 8, 11.

312. See Amended Administrative Order Number 1, *supra* note 296, at para. 13.

313. See *id.* at paras. 4-6.

314. See *id.* at paras. 1-2.

315. See *id.* at para. 11. Because the volume of cases initially feared never materialized, this power was never invoked. Rather, the Trust has aggressively pursued trial dates.

316. See *id.* at paras. 3, 7.

317. See Plan, *supra* note 228, § 8.05; see also *Robins III*, *supra* note 52, 880 F.2d 769, 776 (4th Cir. 1989) (upholding district court's supervisory power, except in the case of day-to-day operations of the Trust).

5. Winding up

a. final option election date

In the early days of its history, the Trust was working hard to make all of its Option 3 offers and to schedule settlement conferences. The claimants received claims packets in March of 1990 that detailed the various payment options and provided guidance on which option to elect.³¹⁸ Claims came rushing in the day after the packets were mailed. On the other hand, thousands of claimants did not make a payment option election. Given the crunch of claims it had received, however, the Trust was not concerned with pushing claimants to make elections at that time. By 1991, however, the Trust was able to estimate when its claims resolution department would be fully operational and when the settlement conference process would be put in place. The Trust then estimated its Option 3 resolution rate, and began to plan for the ultimate termination of the Trust. At that time, it was important for planning purposes to know which option all the claimants would elect.

In addition, the Plan required claimants to return their claim forms within a year after the mailing, unless the Trustees excused the delay.³¹⁹ Because the Trust had mailed virtually all option claim packets to active timely claimants by June of 1990, the Trustees established July 1, 1991, as the deadline by which these claimants had to submit their claim forms to the Trust to avoid the disallowance of their claims. However, as of May 1991, over 60,581 claimants had not submitted a claim form. In order to avoid massive disallowances, the Trustees gave claimants the option to file only an Option Election Form, which simply required them to indicate which type of payment option (Option 1, 2 or 3) they ultimately would file. Additionally, the Trust mailed several warnings to unresponsive claimants to remind them to file their elections, or be disallowed. Between the May 1, 1991, mailing and the deadline, the number of claimants facing disallowance was reduced to under 18,000.

Similarly, after the Trust completed making all its Option 3 offers in early 1995, it was important for planning purposes and to ensure the earliest possible termination of the Trust to require all claimants to either accept their offers, or to elect ADR, litigation or arbitration. The Trust set a deadline of October 1996 for this

318. See SOBOL, *supra* note 40, at 312.

319. See CRF, *supra* note 277, § B.

purpose. Accordingly, by that date the Trust knew the highest possible number of cases it might have to defend and could make accurate predictions about the duration of the Trust.

b. disposition of late claims

Under the Plan, the Trust was required to accept late claims. Late claimants received subordinated treatment.³²⁰ In other words, late claimants could be paid by the Trust only after all timely filed claims had been paid in full.

The Trust accepted late claims until June 1994. Over 74,000 late claims were received by the Trust. The Trust turned its attention to late claims shortly before it had made its last Option 3 offers to timely claimants in early 1995. By that time, it became apparent that the Trust would have sufficient funds to pay not only all timely claims, but also all late claims. The Trust's more optimistic projections also suggested that funds would be available to make pro rata distributions.³²¹

The CRF sets forth a detailed administrative procedure pursuant to which the Trust must review late claims to determine whether they are entitled to treatment equivalent to timely filed claims.³²² Of the over 74,000 late claims filed, the Trust suspected that about 43,000 were fraudulent.³²³ Accordingly, the Trust successfully moved to disallow those claims.³²⁴ The Trust then decided that it would be administratively simpler and cheaper to use the CRF provision to declare all the late claims to be timely. Thus, the claims could be paid while the Trust's Option 3 claims review process was continuing. Resolving the claims also meant that the pro rata could be paid sooner because it could not be paid until all late claimants were paid. Almost \$150 million has been paid to the late claimants.

320. *See id.* § G.15.ii.d.

321. *See infra* Part III.B.5.c.

322. *See* CRF, *supra* note 277, § G.15. The Trustees originally tried to set a deadline for late claims in December 1989. On March 30, 1990, however, the court entered an order requiring the Trust to continue accepting late claims. *See* Order, *In re* A.H. Robins Co. (No. 85-01307-R) (Mar. 30, 1990). With court approval, the Trust then set a deadline of June 1994 for the filing of late claims. Pursuant to the court's order, the Trust sent a Late Claim Form to all persons who contacted the Trust between December 15, 1989, and March 30, 1990, regarding the filing of late claims.

323. Indeed, most of the fraudulent claims were submitted purportedly on behalf of citizens of the Philippines. Some of the claims were asserted on behalf of girls under the age of ten.

324. *See* Order, *In re* A.H. Robins Co. (No. 85-01307-R) (Nov. 11, 1994).

c. pro rata distribution

The Plan provided that if funds remained after the last timely and late claims were paid, the remaining Trust corpus would be paid to the claimants on a pro rata basis.³²⁵ Once it became clear to the Trustees that even under a worst case scenario there would be remaining funds, they decided it was appropriate to begin making pro rata distributions. Because the Trustees could demonstrate that there would be sufficient funds, the Trust decided to make a 60% distribution in the fall of 1995. In fact, knowing an offer was in actuality worth 60% more encouraged many claimants who had not yet accepted their offers to accept them, and encouraged many claimants in litigation to accept their offers.

The accelerated rate of acceptances, together with the October 1996 elections, led the Trustees to announce a 25% pro rata distribution in November 1996. At the time, there were fewer than 200 cases pending, and the Trust had more than enough money to satisfy any conceivable awards that might be forthcoming.

A controversial aspect of the pro rata distribution was the Order limiting attorneys' fees. Judge Robert R. Merhige, Jr. issued a sua sponte order limiting the attorneys' fees payable out of any pro rata distributions to 10%, rather than whatever contingency fee or other contractual arrangements made between an attorney and client would have provided.³²⁶ Judge Merhige reasoned that the court had received numerous complaints from claimants over the years regarding the level of attorneys' fees, and found that no additional effort would be required by claimants' counsel to receive the pro rata payments.³²⁷ Quoting Shakespeare's observation that lawyers "dream on fees," the Fourth Circuit found that the lawyers' attempts to obtain higher fees amounted to a "wonderful example of chutzpah," and affirmed.³²⁸

d. bailouts

As discussed in Part III.B.3.b.iv, the Trust adopted its ADR program to provide an alternative to costly litigation and arbitration to claimants who rejected their Option 3 offers. The program was remarkably successful, with over 6600 claimants electing the program.

325. See CRF, *supra* note 277, § G.14.

326. See *In re A.H. Robins Co.*, 86 F.3d 364, 367 (4th Cir. 1996) (affirming district court order), *cert. denied sub nom.* 117 S. Ct. 483 (1996).

327. See *id.* at 370.

328. See *id.* at 367, 377.

In addition, it was apparent in many of the almost 1000 individual cases that were proceeding to trial or an arbitration hearing that the claimant or the claimant's attorney would realize that going further was not in their best interest.

As discussed earlier, the Trust would not negotiate the claims. However, even where the Trust was quite confident it would prevail at trial, the Trustees believed it would be pointless for the Trust to spend the large amounts required to defend the case. Accordingly, the Trust developed a number of "bailout" procedures to provide for these situations.

The claimants had a number of options. First, they could elect Option 1. Forty-four claimants elected this option.³²⁹ Second, the claimant could elect ADR. Over seven hundred claimants of the over 900 claimants who initially elected litigation or arbitration switched to the Trust's ADR option. Third, the Trust also would agree to reevaluate the claimant's claim. There was no guarantee that the re-review would result in a higher offer. In fact, the claimant was required to agree to accept whatever sum the Option 3 re-review generated. The Option 3 reviewer would consider not only the original materials provided in the claims review process, but also discovery materials. In forty-six cases these materials resulted in higher offers, but in sixty-three cases, the same offer was made. In two cases, the offer was lowered.

Another process the Trust developed was its dividend offer. Before the Trust was confident enough about its finances to actually make pro rata payments, but after it was confident it had enough money to pay all claims and it appeared there would be payment of pro rata claims in best case scenarios, the Trust knew it had enough funding to permit the payment of a dividend. Accordingly, to induce claimants to abandon litigation and arbitration, the Trust offered to pay the claimant's Option 3 offer, plus a 75% dividend. In return, the claimant was required to waive any rights to the pro rata distribution. Claimants currently in arbitration or litigation remain eligible for the dividend program.

Together, these programs resulted in large scale abandonment of litigation and arbitration. Fewer than 200 cases remained in the litigation or arbitration track. By September of 1997, 51 litigation cases and 37 arbitration cases had been concluded, and by the end of September 1997 there were fewer than 100 cases to resolve.

329. See discussion *supra* notes 273-86 and accompanying text.

*e. Administrative Order Number 2*³³⁰

To effectively complete its mission by the end of 1998, the Trustees asked the district court to enter an order requiring all plaintiffs who had elected trial to commence or conclude their trials by July 31, 1998. To enable claimants who were unable to get a timely trial date, the requested order provided for such claimants to switch to arbitration. All arbitrations were to be completed by October 30, 1998. The district court entered an Order setting these deadlines. Accordingly, the claims of claimants who do not meet these deadlines will be disallowed, unless they obtain relief from the district court for good cause shown.

6. Dalkon Shield Claimants Trust: a summary appraisal

The following data suggests that the Trust's approach to resolving claims worked well. Since the Trust began resolving claims, it has settled over 217,700 out of 218,500 Dalkon Shield claims and approximately 27,000 *Breland* claims eligible for review,³³¹ at a total administrative cost of about \$700 per claim. The Trust will have approximately 75 cases to resolve by the end of 1997 and expects to resolve all remaining claims and is planning to terminate by the end of 1998.

When evaluating the Trust's performance, it appears that the Trust was successful in leveling the playing field for unrepresented claimants. Although unrepresented claimants have received approximately \$483.1 million, over \$1.1 billion has been paid to represented claimants through the various payment options, ADR, litigation or arbitration.

At first glance, the average payment to unrepresented claimants may appear far less than that to represented claimants. In fact, that is true because 157,117 unrepresented claimants have been paid, while only 60,630 represented claimants have been paid. However, the average payment to unrepresented claimants must be evaluated in light of the fact that a far higher number of unrepresented claimants had

330. See Administrative Order Number 2, *In re* A.H. Robins Co. (No. 85-01307-R) (Oct. 31, 1997).

331. A total of approximately 350,000 timely and late claims were filed. Over 106,000 of these claims were disallowed by the court during the bankruptcy proceeding, and approximately 50,000 claims were disallowed by the Trust. Claims were disallowed for failure to comply with court or Trust deadlines for submitting claims materials, or for fraud. An approximately 35,000 additional claims were filed with the *Breland* Trust. The Dalkon Shield Claimants Trust handled the resolution of those claims as well.

de minimus injuries and chose the \$725 Option 1 payment. When payments under Option 3 are examined, unrepresented claimants are actually netting higher average amounts than the average amounts netted by represented claimants.³³² Based on 1995 data, unrepresented claimants received an average of \$33,150 before they received their pro rata payments. Represented claimants received an average of \$39,047 before they received their pro rata payments. Assuming a one-third contingency fee, represented claimants actually received just over \$26,000, about 21% or \$7000 less than unrepresented claimants.

Further, the Trust's compensation offers appear to be fair and just, given that the initial acceptance rate on all Option 3 offers was over 83%. Moreover, 37% of those claimants who initially rejected the Trust's Option 3 offer changed their decision and accepted the Trust's offer after the settlement conference, at which the Trust's offer was explained. Most of the rest of the rejections (approximately 67%) were by claimants who received offers of less than \$6000. The Trust's ADR option proved to be very attractive for the vast majority of these claimants. The Trust's ADR option provided claimants with the opportunity to "tell their story" to a neutral third party. At the same time, the Trust was able to conserve resources because damages were limited by the cap, and because administrative costs for the ADR program were only approximately \$1000 per claim, in comparison to the six figure amounts for defense costs that trying a case or formal arbitration hearings might entail.

Taking into account those claimants who rejected their Option 3 offer but who accepted the ADR option, the effective acceptance rate was approximately 99.4%. Indeed, out of the over 350,000 claims filed, as of September 1997, fewer than 100 claims were resolved through arbitration or litigation, and there were fewer than 100 claims still in those processes. Because of the high acceptance rate, and, by correlation, its very low administrative and legal costs, the Trust has been able to make pro rata payments that amount to 85% of the initial payments to claimants, and expects to make an additional 15% in pro rata payments.

Moreover, the processing of claims has moved efficiently,

332. See Direct Examination of Georgene Vairo, Chairperson, Dalkon Shield Claimants Trust, Apr. 27, 1995, *In re A.H. Robins Co.*, 182 B.R. 128 (Bankr. E.D. Va. 1995). Originally, the Trust did not disclose average settlement amounts because it did not want claimants to decide whether to accept their Option 3 offer based on other claimants' experiences.

allowing injured persons to be compensated without undue delay. Between the fall of 1992 and spring of 1993, when the Trust was at its highest resolution rate of making over 250 claims per week, it was paying about \$1 million in claims per day, and sometimes as much as \$10 million per week. In approximately four years, all Option 1, 2 and 3 offers were made, and in fewer than ten years, over 300,000 claims were resolved.

To almost universal surprise, the Trust is likely to effectively complete its mission by the end of 1998. Thus, the Trust was able to resolve all claims within less than nine years after it mailed out all its payment options to claimants in March of 1990, and approximately nine years after the Plan was consummated and the Trust received full funding in December of 1989. The Claimants Trust Agreement itself suggested that it would take until the year 2008 for the Trust to terminate.³³³ Accordingly, it appears that the Trust was able to complete its mission in about the half the time contemplated. The Trust's policies, which provided incentives to settle, rather than to litigate, will result in the Trust going out of business well before the millennium.³³⁴

The success of the Trust in resolving claims fairly and efficiently has serious implications for resolving claims of women and other traditionally less powerful persons, or for any victims of a mass tort. Most claims were resolved through the Trust's administrative processes or through the Trust's ADR process. Since no two claims were exactly alike, each Option 3 claim was given an individualized review under the Trust's highly structured, rules-based claims processing system for analyzing each claim.³³⁵

As for individual autonomy, claimants who rejected their offers

333. The Claimants Trust Agreement provided for the Trust to terminate on the date the Trustees certify that all claims have been paid and that the Trust's mission has been fulfilled. See CTA, *supra* note 228, § 6.03(a)(i). However, the Claimants Trust Agreement also provides for the Trust to terminate on December 31, 2008, and further provides for the Trustees to put into place procedures for resolving any remaining claims and obtaining a court order approving such procedures, but such order was limited by rule against perpetuities language. See *id.* § 6.03(a)(ii)-(iii). Thus, it appears that the architects of the Plan believed that the earliest date the Trust was likely to terminate was around the year 2008.

334. This fact tends to disprove the implication that the Trustees have an incentive to stay in business for the purpose of earning fees for as long as possible. See SOBOL, *supra* note 40, at 323-24. The Trustees could have adopted policies designed to prolong the process. Instead, they chose policies, such as the best and final offer/no negotiation policy and the holdback, which were designed to encourage early settlement.

335. See *supra* Part III.B.2.c.

had several opportunities to tell their stories. First, they could present their case at the settlement conference. Although the Trust would not change its offer, the high acceptance rate after the conference seems to indicate the value claimants placed on the individual treatment such a conference necessarily entails.

More traditionally, claimants had the right to ADR, arbitration or a classic jury trial. Because of the Plan, claimants would not be entitled to punitive damages.³³⁶ But in all other important respects, the Plan preserved those traditional values.

Thus, the Trust experience shows that aggregated mass tort resolution systems can be created—assuming a sufficient fund—which preserve individual autonomy, and provide for the quick, efficient and fair resolution of hundreds of thousands of claims.

IV. WHAT CONGRESS MAY WROUGHT

It is rarely a good idea to get Congress, or state legislatures, for that matter, involved in torts. As I have argued elsewhere, tort law, and specifically mass tort cases, are better handled by the judiciary as a matter of common law.³³⁷ Returning now to the analysis in Part II.C., the courts and commentators are largely concerned about three things: (1) whether aggregation provides claimants with too much bargaining power; (2) whether the due process rights of claimants can be adequately protected; and, implicit in (2), (3) whether the settlements that emerge from aggregation are fair. With respect to the first question, the irony is that most commentators believe that class counsel often “sell out” the class members by settling for an amount that provides inadequate compensation.³³⁸ In any event, I

336. However, the pro rata payment was distributed in lieu of punitive damages. Certainly, the equitable pro rata distribution is fairer than the windfall system that characterizes punitive damage awards today. Moreover, substantial pro rata payments have been made in lieu of punitive damages.

337. See Vairo, *Multi-Tort Cases*, *supra* note 182, at 219 n.349; see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-7, 31-32, 163-64 (1982) (discussing the problems arising from excessive law making by Congress); A. Twerski & J. Weinstein, *A Critique of the Uniform Products Liability Law*, 28 *DRAKE L. REV.* 221, 222 (1978) (discussing the complications resulting from the codification of products liability law).

338. See Hay, *supra* note 224, at 479. (“The risk that class counsel may in effect ‘sell out’ the class members in the settlement has long been a source of concern among courts and commentators, and has become particularly pronounced as the class action device has been used with increasing frequency in damages actions.”); see also *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972) (Friendly, J.) (discussing divergence of interests between attorneys and clients when there are large amounts at stake); *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir.

showed in Part III that it is possible to answer all three questions in the affirmative.

First, a proper estimation procedure can result in the creation of a settlement fund that assures adequate compensation to claimants. With respect to the second two questions, distribution mechanisms can be created to provide fair settlements and fair procedures that protect the due process rights of the claimants.

(Friendly, J.) (discussing divergence of interests between attorneys and clients when there are large amounts at stake); *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (discussing the lack of adequate representation of class action plaintiffs by their attorneys); Coffee, Jr., *Class Wars*, *supra* note 188 (discussing the safeguards necessary to protect the interest of claimants); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (examining the tensions between attorney and client in class actions); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 57-59 (1975) (explaining the increased likelihood that attorneys will settle in class actions); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (discussing the involvement of courts in ensuring adequacy of settlements); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (examining the problems inherent in class representation); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 5-7 (1993) (explaining the safeguards recommended by commentators to protect the interests of class members); John C. Coffee, Jr. & Susan P. Koniak, *Rule of Law: The Latest Class Action Scam*, WALL ST. J., Dec. 27, 1995, at A11 (warning of an alarming trend in class action litigation in which large, nationwide class actions are being settled in distant state courts, often on terms that do not benefit class members); Barry Meier, *Fistfuls of Coupons: Millions for Class-Action Lawyers, Scrip for Plaintiffs*, N.Y. TIMES, May 26, 1995, at D1 (reporting on settlements "in which consumers are paid off in scrip while their lawyers walk away with millions"); Richard B. Schmitt, *Behind Apple's Class Action Settlement*, WALL ST. J., Dec. 4, 1996, at B1 (discussing case where judge tentatively approved a class-action settlement in which the judge's brother, a partner in a law firm, would share in the \$2 million settlement fees); Richard B. Schmitt, *The Dealmakers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1 (discussing how companies use class actions to their advantage because the terms favor companies and plaintiffs' lawyers but provide questionable benefits to consumers).

The proposed tobacco settlement,³³⁹ however, is just as flawed from a due process perspective as the asbestos settlement class was.³⁴⁰ Amazingly, the proposed settlement will deprive many persons claiming injury from the use of tobacco products or exposure to such products of their right to bring individual lawsuits, and class action suits on behalf of such claimants would be entirely barred.³⁴¹ Justice Ginsburg likely would be just as offended, from an adequacy of representation perspective, by state attorneys general seeking reimbursement for state monies paid to sick citizens bargaining away the right of the sick to sue for themselves or in classes, as she was of plaintiff class lawyers seeking to settle their inventory claims bargaining away the rights of future claimants.³⁴² Even though the tobacco companies have not paid a dime to a personal injury claimant,³⁴³ without a provision for a claims resolution facility that could handle the claimants' personal individual claims, the due process rights of those who file claims last, or whose claims have not matured into a legally cognizable injury, may well be left with no recompense. In essence, the tobacco settlement presents the same kind of future claimant problem and its attendant conflict of interest problems as the asbestos settlement. To the extent that the adequacy of representation prong of Rule 23 simply codifies the constitutional rule of *Hansberry v. Lee*,³⁴⁴ Congress cannot do away with due process rights any more than a court could in a class action.

339. See John M. Broder, *Major Concessions: Industry Would Pay for the Costs of Treating Smoking Diseases*, N.Y. TIMES, June 21, 1996, at A1; see also Barnaby J. Feder, *One Company Seen Settling Tobacco Suit*, N.Y. TIMES, Mar. 13, 1996, at D5 (discussing the Liggett & Myers proposed settlement).

340. See *supra* notes 218-23 and accompanying text.

341. See Broder, *supra* note 339, at A1 ("The plan would end lawsuits filed by 40 states seeking repayment for Medicaid costs incurred by smokers, as well as all class-action suits now in the courts and in the future. Individuals could sue tobacco makers for past or future damages, but compensatory damages would be capped at \$5 billion a year."). President Clinton has objected to the settlement on the grounds that it would not impose sufficient penalties on the tobacco companies if teenage smoking fails to decline to target levels. However, the President apparently will not object to the broad tort liability immunity that the proposed settlement provides. See *Aide to Clinton Sees Flexibility on Tobacco*, N.Y. TIMES, September 22, 1997, at A14.

342. See *supra* notes 222-23 and accompanying text.

343. See *supra* note 52.

344. 311 U.S. 32 (1940).

In any event, the Dalkon Shield litigation, the asbestos litigation, and now the tobacco litigation all raise the kind of conflict of interest considerations discussed by the Supreme Court in *Amchem*. The Court tells us that inherent conflicts generally will preclude one attorney or firm from properly representing hundreds, let alone thousands, of clients with disparate injuries.³⁴⁵ When counseling

345. Articles on the Dalkon Shield case indicate that some lawyers are representing thousands of Dalkon Shield claimants. See, e.g., Paul Blustein, *How 2 Young Lawyers Got Rich by Settling IUD Liability Claims*, WALL ST. J., Feb. 24, 1982, at A1 (reporting on two plaintiffs' attorneys representing over 900 claimants); Malcolm Gladwell, *Latest Fight In a Long Case: Attorney Fees*, WASH. POST, Jan. 22, 1989, at H1 (reporting on an attorney representing 1000 Dalkon Shield claimants and still searching for more); *Women Reject Settlement Offers From Stingy Dalkon Shield Trust*, ATLANTA J. & CONST., Nov. 14, 1991, at D4 (reporting on attorney representing 1000 clients). With lawyers representing such large numbers of claimants, obvious questions arise—notably, whether these lawyers even have the time for individual communication or consultation with their clients. See Jack B. Weinstein, *A View From the Judiciary*, 13 CARDOZO L. REV. 1957, 1961 (1992); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 325. Huge fees are at stake in class actions. The contingent fee arrangement is supposed to shift risks from the client to the attorney—the high risk of litigating justifies a high fee. Commentators have criticized the use of high contingent fee arrangements in claims resolution, as opposed to litigation, contexts because the high risk does not exist. See Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1837 (1992) [hereinafter Brickman, *Asbestos Litigation Crisis*]; Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. REV. 29, 74 (1989) [hereinafter Brickman, *Contingency Fees*]; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 889-94 (1987).

Charging high contingent fees but not assuming any risk is arguably unethical. See, e.g., Brickman, *Asbestos Litigation Crisis*, *supra*, at 1837 (calling it “illegal and unethical” as well as “grossly exorbitant” to collect contingent fees under such circumstances); Brickman, *Contingent Fees*, *supra*, at 53 (charging 33% to 40% contingency fee is violative of “the fiduciary obligation to deal fairly with the client” when risk of nonrecovery is low).

346. In the case of a properly screened Dalkon Shield claim, risk of nonrecovery is minimal. Lawyers know exactly how much they can expect from any single Option 1 or Option 2 claim simply by checking the Trust's damage schedules. Although it is possible to recover from \$125 to over \$1 million in Option 3, the medical evidence, and not the skill of the lawyer in “presenting” a claim, is determinative. See *supra* Part III.B.2.c. Arguably, the lawyer's skill and “risk” factors are relevant only if the claimant rejects the Option 3 offer and elects trial or arbitration. One commentator, in describing the asbestos claim resolution process, noted that it is “unfathomable . . . why lawyers continue to be paid on a contingency basis since the processing of asbestos claims has become relatively simple.” See Lu, *supra* note 224, at 49. Although the medical issues are not always simple, the claims resolution process in the Dalkon Shield is very

client A, an attorney's judgment may be clouded by his or her fee expectations in other cases.³⁴⁶ Contingent fees ranging from 24% to 50% for settling mass tort claims may be inappropriate if a claim is settled without the need for negotiation or formal dispute resolution. Courts should carefully supervise lawyers' conduct and fee structures when lawyers are representing hundreds or thousands of non-monolithic claimants.

Properly applied, however, the federal class action rule and similar state provisions can protect the interests of class members when hundreds or thousands of persons have similar claims by requiring courts and the parties to provide for separate representation of the various subgroups of injured claimants.³⁴⁷

Of course, the Dalkon Shield Claimants Trust, which I have argued successfully blended efficiency with fairness, was created as part of a bankruptcy reorganization. In class actions cases, district courts, however, have the power to issue orders under Rule 23(d)(1) "determining the course of the proceedings," and, under Rule 23(d)(3) "imposing conditions on the representative parties and intervenors."³⁴⁸ Thus, for example, the district court could appoint experts to develop the data and order the parties to participate in an estimation process similar to that used in the bankruptcy context. In addition, the court-appointed experts could independently evaluate the parties' submissions to insure the independence of each groups' representations to the court.³⁴⁹ Then, when the district court conducts its fairness hearing under Rule 23(e), it will be in the position of choosing among a group of submissions, rather than simply testing

straightforward. *See supra* Part III.B.

347. The Federal Rules of Civil Procedure provide for adequate representation of class members to protect the due process interests of the class and of the adversary. *See* FED. R. CIV. P. 23.

348. *See* FED. R. CIV. P. 23(d)(1) & (3).

349. *See* FED. R. CIV. P. 53 (providing for the appointment of special masters).

one proposed settlement in what is essentially a vacuum.

As a practical matter, there appears to be a presumption that the proposed settlement was fair. Thus, those objecting to the settlement face a very heavy burden in showing that it is not fair. If the court were to choose among competing proposals, even when the defendant has only signed onto one proposal, courts would be less likely to buy into the presumption that the proposed settlement, the only one before it, is fair.

The Supreme Court's decision in *Amchem* commands a strong judicial presence. While it is true that the approval of the *Georgine* class action settlement appeared to be the product of careful scrutiny because the court conducted an eighteen day fairness hearing, the real problem is that the settlement proposal essentially competed against itself. In other words, because it was the only proposal on the table, there was a strong likelihood that the judge would approve it.³⁵⁰ If, on the other hand, the court were evaluating competing proposals, it is more likely that the court would approve an amount that would result in greater value to the claimants.

In *Amchem*, for example, the district court could have issued a Rule 23(d)(1) order and appointed independent biostatisticians to collect data about the claimant population to provide the basis for determining what subclasses needed to be formed to insure adequate representation. Such experts could look at the various injuries alleged, exposure data, and settlement history to enable the parties to more realistically determine the scope of the putative class and the amounts that may be needed to compensate them. Then, had the district court certified a group of subclasses, each group could have proposed differing amounts from their perspectives. In addition, especially in mass tort cases with relatively few subclasses, objecting counsel ought to be taken seriously and be permitted to put on their own extensive evidence as to the amount appropriate for a settlement

350. As many commentators have noted, a district court judge may have "little ability or incentive to resist the settlements that the parties in class action litigation reach." Coffee, Jr., *Class Wars*, *supra* note 188, at 1348 (citing THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CENTER, PRELIMINARY EMPIRICAL DATA ON CLASS ACTION ACTIVITY IN THE EASTERN DISTRICT OF PENNSYLVANIA AND THE NORTHERN DISTRICT OF CALIFORNIA IN CASES CLOSED BETWEEN JULY 1, 1992 AND JUNE 30, 1994 at 57-58 (Apr. 1995) (unpublished manuscript on file with the *Columbia Law Review*)), in which the authors appeared to find that class action settlements were approved in almost 90% of the cases, and that the requested attorneys' fees were approved in over 80% of the cases. *See id.* at 1348 n.14.

fund. Of course, the defendant is likely to agree to the lowest amount proposed. However, in rejecting the amount agreed to by the defendant, the court could inform the parties as to which settlement it thought was fair. It is possible that the defendant would refuse to settle at the higher amount. Yet, it is also likely that a better settlement ultimately will be agreed to because to do otherwise would substantially raise the "bet the company" risks.

In my view, strong, continuing judicial control over the class action process is a key ingredient to achieving fairness. Of course, many district court judges will want to dispose of the burden of handling a mass tort litigation. There are, however, means to insure that experienced and motivated judges adjudicate mass tort cases. Under 28 U.S.C. § 1407, which is the vehicle pursuant to which cases are consolidated in one district, the MDL Panel may choose not only the district court, but also the district judge, to handle the multidistrict litigation. The MDL Panel should choose a judge experienced in handling mass torts, or similar complex litigation, who has demonstrated a willingness in such cases to understand the issues fully and do more than rubber stamp a proposed settlement. The real issue is one of power and inclination to use the tools available carefully. Each mass tort case presents its own set of problems, and judges ought to be allowed to use the flexible Federal Rules of Civil Procedure to determine the best methods for handling them.³⁵¹

There is an understandable unease about ad hoc, discretionary use of judicial power to achieve aggregated solutions to mass tort cases.³⁵² For example, Professor Coffee has written that judges have done a poor job policing class action settlements and that their authority needs to be constrained.³⁵³ Similarly, Professors Fiss and Resnick have argued that informal, ad hoc processes should not uniformly take the place of formal adjudication.³⁵⁴ However, as I have argued before, once a case or series of cases becomes a megacase, or a mass tort case, dispute resolution should be about insuring

351. See Vairo, *Multi-Tort Cases*, *supra* note 182, at 203-08 (discussing use of procedure in the context of a mass tort case).

352. See Coffee, Jr., *Class Wars*, *supra* note 188, at 1461-65 (discussing need to constrain judicial authority in class actions). See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1084 (1984) (discussing the importance of a judge's obligations to conduct careful inquiries into the law and facts of a case); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 432 (1982) (discussing need to preserve formal adjudication).

353. See Coffee, Jr., *Class Wars*, *supra* note 188.

354. See Fiss, *supra* note 352; Resnick, *supra* note 352.

open access to compensation, and about achieving fairness.³⁵⁵ Indeed, Professors Fiss, Resnick, and Coffee are all correct to note the importance of the federal judge. I do not suggest informality; rather, I propose a systematic means for allowing the district judge to formally find the facts and law with respect to the need for separate representation and the fairness of a class action settlement.

Moreover, given the reality of litigation, individual autonomy is a myth. As many commentators have demonstrated, in tort cases, rarely do clients confer with their lawyers.³⁵⁶ The problem in mass tort cases is that the group of injured clients is not monolithic. Proper representation of plaintiffs in mass tort cases will require "radical alterations in our usual methods of protecting individual client autonomy in the lawyer-client relationship."³⁵⁷

There are a number of ways to balance individual autonomy and the group and satisfy Justice Ginsburg's concerns about adequacy of representation. There could be a steering committee of lawyers, each responsible for a subclass. Perhaps one subclass should be comprised of those who want to opt out. These subclasses ought to be determined by the court *after* an expert analysis of the claims identifies the different types of injuries and proof problems. Techniques such as focus groups or claimant meetings could be used to identify claimant wishes.³⁵⁸

It may well be true that some claimants would be better off without aggregated solutions. However, there is no due process right to get more when that means some injured people will get less or nothing. Equitable fairness considerations underlie the Bankruptcy Code and Rule 23(b)(1)(B) mandatory class actions. Indeed, the Supreme Court's decision in *Amchem* suggests that it is a due process violation for those with some claims, for example, pending claims, to receive better compensation than others, such as those with future

355. See Vairo, *Reinventing Civil Procedure*, *supra* note 3, at 1079.

356. See Deborah H. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-97 (surveying studies showing that attorneys usually do not maintain regular contact with their clients).

357. Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1107 (1992).

358. See Weinstein & Hershonov, *supra* note 345, at 325 (discussing communication in the mass tort case and advocating the use of the federal courthouse as central meeting site).

claims. Thus, the Supreme Court in *Amchem* appears to have rejected the notion that there is an inherent due process right to go it alone and receive a maximum recovery that would be to the detriment of others similarly situated.

Through the class action device, a notice campaign can be used to identify all or most claimants, a settlement can be negotiated that provides enough money for compensating the victims of a product, expert panels can assist courts in ensuring the fairness of aggregated settlements, and a claims resolution facility, managed by independent trustees, can be created to provide various options for payments. A balanced expert team, with a broad spectrum of ideas and approaches, should work with an independent group of Trustees to develop payment systems and procedures. There is a need for arms length cooperation between the Trustees and plaintiffs' lawyers as the structure of the Claims Resolution Facility is being established and formally implemented. But the Trustees ought not be controlled by any of the parties. The Dalkon Shield Claimants Trust routinely received criticisms from lawyers, especially during its foundation years, that it was not responsive to the suggestions of the plaintiffs' bar.³⁵⁹ Yet, as I argued in my earlier article on the Trust, it was clear to the Trustees that their fiduciary duty ran to the claimants as a whole, and not to any subgroup through their lawyers.³⁶⁰

The challenge now is to develop a consensual plan in asbestos litigation and in the context of the tobacco settlement that results in the distribution of the most money to the victims in a way in which the victims feel that justice has been served. Justice Ginsburg's opinion in *Amchem* shows a particularized fear of the abuses that can infect mass tort settlements. She has not closed her eyes to the practicalities but requires that greater attention be paid to the needs of the claimants.³⁶¹ Allowing those with too great an economic incentive to proceed without careful judicial scrutiny will compromise important due process rights.³⁶²

V. CONCLUSION

We have seen the evolution of class action rhetoric over the last

359. See Vairo, *Paradigm Lost*, *supra* note 15, at 652-54.

360. See *id.* at 637-39, 652-54.

361. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2250 (1997).

362. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 910-11 (1987).

twenty-five years. At first, the theoretics of individual autonomy prevailed, and courts rejected aggregated solutions to mass tort litigation. Next, the rhetoric of efficiency propelled courts to embrace aggregation as a means of facilitating settlements. Perhaps this rhetoric invited abuse. Finally, the Supreme Court spoke without embracing either point of view. Rather, the Court tells us that settlements may be approved but only when claimants are grouped to insure an appropriate degree of commonality and adequate representation. The rhetoric of adequacy of representation ought to be the last word.

Settlement classes are not dead. Rather, courts must carefully scrutinize proposed settlements to insure that settlement funds are sufficient and that the settlement proceeds are fairly distributed. This can be accomplished by the use of proper estimation processes and by providing for independent Trustees, under appropriate judicial supervision, to determine the fairest and most efficient ways of distributing the settlement fund thereby approved.

Even Professor John Coffee, perhaps one of the most passionate critics of some of the class action settlements achieved to date, understands the need for aggregated solutions in some cases.³⁶³ He is not sanguine, however, that courts are able to deal effectively with the problems raised by mass torts and is opposed to giving district courts even more discretion.³⁶⁴ I do not think the problem is the degree of discretion. Rather, the problem remains whether a settlement is fair. As the Dalkon Shield Claimants Trust experience shows, tools do exist to insure the creation of an adequate settlement fund. As long as the court actually independently gauges the appropriateness of the settlement amount, as Judge Merhige did in *Dalkon Shield* and as could be done in the context of a class action settlement fairness hearing, attorneys for plaintiffs will not be able to collude with defendants to sell out the class.

In addition, rather than permit class counsel and the defendants to make the essential decisions regarding allocation of the fund among the various subgroups of claimants, to prevent conflicts of interest from infecting the distribution, those decisions should be made by independent Trustees, under continuing overall supervision

363. See Coffee, Jr., *Class Wars*, *supra* note 188, at 1348 (“Still, the possibility of opportunistic behavior and collusive settlements is not, standing alone, a sufficient basis for rejecting mass tort class actions. In truth, individual tort litigation is notoriously expensive . . .”).

364. See *id.* at 1462-63.

of the court approving the settlement. The court's involvement should not result in interference with the day-to-day operations of the Trust.³⁶⁵ Rather, the court should be available to insure the smooth overall workings of the settlement plan.

It is too late in the day for the rhetoric of individual autonomy in mass tort cases. The rhetoric of efficiency and unusual circumstances arguably invited abuse. It is time for the courts to fully embrace the rhetoric of adequacy of representation so that mass tort claims can be resolved efficiently and fairly.

365. See *Robins III*, *supra* note 52, 880 F.2d 769, 776 (4th Cir. 1989).