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The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation

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The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation

Jeremy T. Grabill*

ABSTRACT

Notwithstanding the fact that personal injury claims are no longer certified as class actions for purposes of adjudication (i.e., as “litigation classes”), the class action tolling doctrine is alive and well in various jurisdictions across the country, and it is a feature of state law that transferee courts must grapple with in mass tort multidistrict litigations (MDLs). The pesky persistence of the class action tolling doctrine allows individual statutes of limitations for potential plaintiffs to be tolled in many jurisdictions by virtue of the mere filing of a putative personal injury class action in a related case. In contemporary mass tort MDLs, which are increasingly being resolved by non-class aggregate settlements, it is simply not true that “a little tolling never hurt anyone.” Rather, by permitting and/or encouraging potential plaintiffs to sit in the shadows and not come forward to assert their claims, the class action tolling doctrine can delay and altogether undermine efforts to resolve modern mass tort litigation by creating disabling uncertainty about current and future plaintiff populations.

This Article argues that transferee courts should reexamine their current tendency to defer consideration of class action issues in mass tort MDLs; instead, transferee courts should issue an “omnibus class action pretrial order” at the inception of any MDL that contains at least one putative personal injury class action. That omnibus order can rely on the long line of well-established precedent rejecting certification of personal injury litigation classes and should do at least four things: (i) strike all current and future personal injury class allegations from all current and future complaints in the MDL; (ii) deny all current and future requests for personal injury claims to be certified as litigation classes; (iii)

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explicitly provide that the purpose of the order is to suspend any and all tolling of the applicable statute(s) of limitations that might otherwise occur as a result of the class action tolling doctrine; and (iv) make clear that the parties are not precluded from subsequently seeking certification of one or more settlement classes. Such an order would short-circuit any harmful impact the class action tolling doctrine might otherwise impose without precluding the parties from subsequently seeking to use the class action device to implement a global settlement. Ultimately, this is a modest modification of current MDL practice that should be implemented in mass tort cases.

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I. INTRODUCTION

Courts may authorize the use of class actions in two essential ways—the claims of one or more class representatives may be certified for purposes of adjudication (“litigation classes”) or for purposes of settlement (“settlement classes”).¹ Although mass tort litigation continues to be occasionally resolved via class action settlements,² it is essentially unquestionable that personal injury claims can no longer be certified as litigation classes.³ As the

1. See, e.g., Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793 (2010) (noting that “the settlement class . . . appears to have displaced the litigation class as the dominant form of class certification,” although “the existing empirical evidence is consistent with the thesis that class certification [in general] has become less likely” following the U.S. Supreme Court’s decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)). In federal court, the class certification analysis under Rule 23 of the Federal Rules of Civil Procedure differs slightly depending on whether the parties are seeking certification of a litigation class or a settlement class. See *infra* Part II.B.2.b. Stepping back from the distinction between litigation classes and settlement classes for a moment, “[t]he paradigmatic application of the modern class action [as a procedural vehicle] . . . is to make civil claims marketable that otherwise would not be brought on an individual basis.” Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009).

2. See *infra* Part II.B.2.b.

3. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (identifying “a national trend to deny class certification in drug or medical product liability/personal injury cases”). The discussion of “personal injury” claims in this Article should be understood to include claims for monetary damages arising from both non-fatal and fatal injuries. It should also be noted here that issues concerning tolling for non-personal injury claims are beyond the scope of this Article, largely because certain non-personal injury claims may still be amenable to class certification in mass tort litigation. See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013) (affirming certification of a class of consumers that had purchased allegedly defective washing machines); *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010) (affirming certification of two consumer fraud classes in defective window litigation and noting that “[w]hile consumer fraud class actions present problems that courts must carefully consider before granting certification, there is not and should not be a rule that they never can be certified”); *Donovan v. Philip Morris USA, Inc.*, No. 06-12234, 2012 WL

American Law Institute recently explained, “This development reflects many factors,” including “difficulties presented by choice-of-law problems” and “the need for individual evidence of exposure, injury, and damages.”⁴ Thus, whenever a discrete accident or event, harmful substance or condition, or defective drug, device, or product is suspected of causing similar injuries to multiple people in the United States, plaintiffs must generally pursue relief by filing individual lawsuits—and the “mass tort” moniker refers to the resulting influx of hundreds or thousands of related cases into the judicial system.⁵ Those individual cases will often be filed in both state and federal courts, and while some cases may remain in state courts for jurisdictional reasons,⁶ it is increasingly common for

957633 (D. Mass. Mar. 21, 2012) (denying defendant’s motion to decertify a single-state class of former smokers that was only asserting claims for medical monitoring); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D. La. 2006) (certifying a class of plaintiffs asserting claims for property damage arising from an oil spill during Hurricane Katrina).

4. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02, at 25 (2010). *See also infra* Part II.A.

5. The “mass tort” moniker may be somewhat misleading because often the claims that arise in such situations go beyond traditional tort claims and can also include a variety of contract, warranty, fraud, economic loss, environmental, and statutory claims. That said, mass torts come in two varieties—they are either localized or dispersed in space and time. *See* Jeremy T. Grabill, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 304–05 (2005) (discussing “single situs” and “widespread” torts); *see also* Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 129 (1989) (“[T]here are two forms of the ‘mass tort.’ In one, the same event killed or injured the victims. In the other, injuries occur over a period of time and at different locations but have the same cause, typically a defective product.”); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1120 (2010) (“Mass tort litigation today . . . focuses overwhelmingly on alleged product defects that are not of a one-off nature but, instead, concern the design of products or the warnings conveyed with them—aspects that implicate all those who consumed the disputed product, not just an unlucky few who might encounter an anomalous manufacturing defect.”).

6. Recent expansions of federal subject matter jurisdiction, however, have increased the degree of aggregation that can be accomplished in the federal courts. For example, the Class Action Fairness Act of 2005 (CAFA) expanded federal diversity jurisdiction over putative class actions where the amount in controversy exceeds \$5 million and minimal diversity exists between the parties (i.e., where “any member of a class of plaintiffs is a citizen of a State different from any defendant”). *See* Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332(d), 1453, and 1711–15); *see also infra* Part IV.C. Another example is the U.S. Supreme Court’s recent holding that federal district courts may exercise supplemental jurisdiction over class members’ claims even if those claims do not independently satisfy the amount-in-controversy requirement, provided that “at

related mass tort cases pending in federal courts across the country to be transferred by the Judicial Panel on Multidistrict Litigation (JPML) from their home districts to one “transferee” judge for “coordinated or consolidated pretrial proceedings” pursuant to the multidistrict litigation (MDL) statute.⁷

Despite these developments, plaintiffs’ lawyers continue to file “putative” personal injury class actions. In this context, the term “putative” is used during the period prior to a court ruling on class certification to refer to a case that has been styled as a class action in the complaint.⁸ Why do putative personal injury class actions continue to be filed? It is conceivable that some plaintiffs’ lawyers do so with the hope that such cases will be assigned to rogue trial court judges willing to certify litigation classes, thereby placing significant pressure on the defendants to settle.⁹ It could also be

least one named plaintiff in the action satisfies the amount-in-controversy requirement.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005).

7. 28 U.S.C. § 1407. *See generally* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2326–30 (2008) (discussing the modern multidistrict litigation process); John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2225 n.1 (2008) (“In MDL parlance, the court to which an action or actions are transferred (or centralized) under 28 U.S.C. § 1407 is referred to as the ‘transferee’ court, and the court from which the action or actions are transferred is called the ‘transferor’ court.”).

8. In other words, although plaintiffs’ counsel may craft a complaint as a class action, the case does not actually obtain class action status until a court certifies the class as complying with the necessary statutory requirements. Similarly, a “putative” class member is someone who falls within the complaint’s class definition—but again, a court order certifying the class is necessary before anyone actually becomes a class member. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1346 (2013) (“[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.”). Nevertheless, putative class members may enjoy certain judicial protections. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 21.12 (4th ed. 2004) (“Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification.”); *see also, e.g., In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 323866 (E.D. La. Feb. 2, 2011) (regulating the Gulf Coast Claims Facility’s communications with putative class members); Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237 (2011) (discussing Judge Barbier’s regulation of the Gulf Coast Claims Facility’s communications with putative class members in the BP Deepwater Horizon oil spill litigation).

9. *See infra* note 65. Prior to 1998, the only generally available avenue for immediate review of an order certifying a class action was via a petition for a writ of mandamus—but, of course, “mandamus is issued only in extraordinary cases.” *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995) (“An order

possible that plaintiffs' lawyers file putative personal injury class actions simply as placeholders for possible settlement classes down the line, notwithstanding the modern trend toward the use of non-class aggregate settlements in mass tort litigation.¹⁰ But the predominant reason behind the continued filing of putative personal injury class actions is likely the persistence of a favorable legal doctrine known as "class action tolling."

The U.S. Supreme Court originally recognized the class action tolling doctrine in 1974 in *American Pipe & Construction Co. v. Utah*.¹¹ Generally, the class action tolling doctrine provides that the filing of a putative class action tolls or suspends the applicable statute(s) of limitations for all putative class members until class certification is denied.¹² Following the Supreme Court's decision in *American Pipe*, the class action tolling doctrine has been adopted

certifying a class is not a final decision within the meaning of 28 U.S.C. § 1291 . . . and it has been held not to fit any of the exceptions to the rule that confines federal appellate jurisdiction to final decisions." *But see* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (exercising jurisdiction over an interlocutory appeal of a class certification order pursuant to 28 U.S.C. § 1292(b) and decertifying the class). As a matter of federal procedure, the availability of appellate review for orders "granting or denying class-action certification" was expanded in 1998. *See* FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."). Even today, however, there is no absolute right to appeal a federal court order certifying a class action, and if the court of appeals denies permission to appeal under Rule 23(f), mandamus may still be the only way to seek immediate review of such an order.

10. *See generally* Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012) (discussing the emerging non-class opt-in paradigm for aggregate mass tort settlements).

11. 414 U.S. 538 (1974).

12. *See infra* Part III.A. It is worth emphasizing that tolling generally stops upon the *district court's* denial of class certification. That said, the law appears to be somewhat unclear regarding whether this general rule should be modified when an order denying certification is subsequently reversed on appeal. *Compare* *Giovanniello v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013) ("We now take this opportunity to join our sister circuits and hold that *American Pipe* tolling does not extend beyond the denial of class status."), *with* *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 376 n.8 (5th Cir. 2013) ("If a denial of certification is reversed on appeal, the putative class members can claim the benefit of uninterrupted tolling from the original class action filing date."). In any event, that issue has been addressed elsewhere, and it is beyond the scope of this Article given that orders denying certification of personal injury claims are rarely, if ever, reversed on appeal. *See generally* Kevin Welsh, Comment, *Collision Course: How Federal Rule of Civil Procedure 23(f) Has Silently Undermined the Prohibition on American Pipe Tolling During Appeals of Class Certification Denials*, 73 LA. L. REV. 1183 (2013).

and applied in different ways to state law personal injury claims by various state courts and federal courts sitting in diversity.¹³ And despite the demise of the personal injury litigation class, the class action tolling doctrine persists in a variety of forms and permutations in jurisdictions across the country; thus, it is a feature of state law with which MDL transferee courts must grapple.

Notwithstanding Federal Rule of Civil Procedure 23's statement that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action," the issue of class certification is often deferred in contemporary mass tort MDL practice.¹⁴ For example, in the BP Deepwater Horizon oil spill multidistrict litigation, plaintiffs' counsel filed multiple putative class actions and various master complaints that also included class action allegations.¹⁵ But in an early pretrial order, the transferee court imposed a broad stay of all motion practice and discovery on class certification issues within the MDL.¹⁶ Similarly, plaintiffs' counsel filed various putative class actions as part of the prominent MDL involving the pharmaceutical drug Vioxx, but the transferee court did not address the issue of class certification for personal injury claims until more than a year and a half after the MDL was created.¹⁷ Unfortunately, and perhaps unbeknownst to transferee

13. For a discussion of the various permutations of the class action tolling doctrine, see *infra* Part III.B.

14. FED. R. CIV. P. 23(c)(1). From 1966 until 2003, this provision read as follows: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." The change from "as soon as practicable" to "at an early practicable time" was intended to recognize that "many circumstances may justify deferring the certification decision," such as allowing time for limited discovery "in aid of the certification decision" or for exploring "designation of class counsel" or "interim counsel." FED. R. CIV. P. 23 advisory committee note (2003). In his concurring opinion in *American Pipe*, Justice Blackmun relied on the earlier version of this provision to assume that the class certification decision "will normally be made expeditiously." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 562 (1974) (Blackmun, J., concurring).

15. See *infra* notes 92–99 and accompanying text for further details about the BP Deepwater Horizon MDL.

16. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 19, 2010) (Pretrial Order No. 11) para. VII, available at <http://www.laed.uscourts.gov/OilSpill/Orders/PTO11.pdf> ("Local Rule 23.1 and Federal Rule 23 motion practice and discovery on class certification issues is hereby stayed for all cases until further order of this Court.").

17. Compare *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006) (denying plaintiffs' motion for certification of a nationwide personal injury class action), with *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (creating MDL 1657).

courts, the statutes of limitations for putative class members are likely to be tolled in many jurisdictions until the transferee court affirmatively strikes personal injury class allegations or otherwise denies class action status to personal injury claims styled as putative class actions.

This Article describes the ways in which the pesky persistence of the class action tolling doctrine can undermine efforts to resolve modern mass tort litigation. In the MDL context, given the threat of remand that the MDL statute confers upon transferee courts, it is inevitable that a time will come when the parties begin thinking about a potential global settlement.¹⁸ And when that time comes, it is extremely helpful—if not essential—that the universe of plaintiffs making claims be known with relative certainty so that appropriate valuation decisions can be made and the defendants can have reasonable comfort that a wave of new claims will not emerge after a settlement is announced. Class action tolling frustrates both of those conditions by allowing and even encouraging potential plaintiffs to sit in the shadows and not come forward to assert their claims.¹⁹ In light of the reality that personal injury litigation classes are no longer certified, putative class members clearly should not benefit from the windfall of an extended limitations period simply because someone has filed a putative personal injury class action in a related case. Indeed, as Justice Blackmun noted in his concurring opinion in *American Pipe*, the Court's decision “must not be regarded as encouragement to lawyers . . . to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.”²⁰

Contrary to the suggestion of several prior commentators, however, it is not necessary or advisable for the class action tolling

18. The MDL statute “obligates the [JPML] to remand any pending case to its originating court when . . . pretrial proceedings have run their course.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998). The usual procedure is for the transferee court to “suggest” to the JPML that remand is appropriate. *See generally In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 76–78 (D. Me. 2011) (discussing the standards to be used in determining “when—short of trial—the transferee court’s work is done”).

19. *See, e.g., Adam N. Steinman, Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1159 (2011) (noting that class action tolling “allows a single plaintiff to satisfy the limitations period for a vast group of yet unidentified potential plaintiffs who have, in many instances, taken no action at all to pursue their claims”).

20. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 562 (1974) (Blackmun, J., concurring). *See also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring) (reiterating Justice Blackmun’s precautionary words).

doctrine to be abolished in its entirety.²¹ Moreover, abolition may not even be practical given that the class action tolling doctrine has been adopted as a matter of state law in various jurisdictions. Thus, even if one sought to eliminate the doctrine only in the mass tort context, short of convincing various state courts of last resort to abandon their prior decisions embracing class action tolling principles, coordinated legislative reform would need to occur in jurisdictions throughout the country.²² Rather, the modest proposal set forth herein is that transferee courts should reexamine their current tendency to defer consideration of class action issues in mass tort MDLs and instead issue an “omnibus class action pretrial order” at the inception of any MDL that contains at least one putative personal injury class action. That omnibus order could be entered by the transferee court sua sponte or upon a motion by the defendant(s), and it should do at least four things: (i) strike all current and future personal injury class allegations from all current and future complaints in the MDL; (ii) deny all current and future requests for personal injury claims to be certified as litigation classes; (iii) explicitly provide that the purpose of the order is to suspend any and all tolling of the applicable statute(s) of limitations that might otherwise occur as a result of the class action tolling doctrine; and (iv) make clear that the parties are not precluded from subsequently seeking certification of one or more settlement classes.

The current practice of transferee courts to defer consideration of class action issues in mass tort MDLs is understandable given the predictable and obvious result of the certification inquiry (e.g., certification of personal injury litigation classes will be denied) and

21. For example, it has been argued that class action tolling should not be applied in mass tort litigation because “notice in class actions will rarely be adequate to apprise mass tort personal injury defendants of the evidence they need to gather” to defend against each class member’s claim “before that evidence becomes stale.” Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 577, 580 (1996). Other practitioners have made similar arguments against the application of the class action tolling doctrine in mass tort litigation. See JOHN H. BEISNER & JESSICA D. MILLER, LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED (2009), available at <http://www.wlf.org/upload/beisner09.pdf>.

22. In order to abolish the class action tolling doctrine either in whole or in part, Rule 23 of the Federal Rules of Civil Procedure and analogous state law rules of procedure would need to be amended to provide either that personal injury claims cannot be certified as litigation classes or that the filing of putative personal injury class actions does not toll any otherwise applicable statute(s) of limitations for putative class members. Additionally, or alternatively, state legislatures could amend their statutes of limitations for personal injury claims to provide explicitly that the filing of a putative personal injury class action does not toll the time periods established by those statutes for unnamed putative class members.

the reality that more pressing matters are bound to exist. Such a triaged approach, however, allows the class action tolling doctrine to wreak havoc in the background by creating uncertainty about plaintiff populations. The omnibus class action pretrial order that this Article proposes would short-circuit any harmful impact the class action tolling doctrine might otherwise impose and need not unduly distract transferee courts because the order can be based on the long line of well-established precedent refusing to certify personal injury claims as litigation classes.²³ Moreover, the omnibus class action pretrial order would not preclude the transferee court from subsequently certifying a personal injury settlement class because (i) a district court's class certification decision is always subject to revision and (ii) the traditional Rule 23 analysis is modified in the settlement class context, such that an order denying certification for a litigation class cannot have collateral estoppel effect on a subsequent request to certify a settlement class. Ultimately, both law and practice must account for the dual realities that personal injury class actions are no longer certified for purposes of adjudication and that the efficient and successful resolution of modern mass tort litigation often requires relative certainty regarding current and future plaintiff populations.

II. THE DEMISE OF PERSONAL INJURY LITIGATION CLASSES AND THE EMERGENCE OF MASS TORT MULTIDISTRICT LITIGATION

Before delving into the details of how the class action tolling doctrine operates and impacts contemporary mass tort litigation, it is first necessary to discuss why personal injury claims are no longer certified as litigation classes and how the judiciary has turned to multidistrict litigation as the primary mechanism for organizing and resolving mass tort claims in the post-class action era. This preliminary discussion will not only provide helpful procedural context for understanding the ways in which the class action tolling doctrine currently threatens the fair and efficient resolution of mass tort litigation, but it will also set forth the legal justifications that transferee courts may quickly rely on to issue an "omnibus class action pretrial order" at the inception of any MDL that contains at least one putative personal injury class action.

23. See *supra* notes 3–4; see also *infra* Part II.A.

A. Personal Injury Litigation Classes Are No Longer Certified

Rule 23 of the Federal Rules of Civil Procedure governs the use of class actions in the federal courts.²⁴ As amended in 1966, Rule 23 contemplates various forms of class actions—most notably the Rule 23(b)(3) damages “opt-out” class action.²⁵ So-called “(b)(3)” class actions may be maintained if common questions of law or fact predominate over individualized issues and class resolution is superior to other available methods of adjudication.²⁶ Provided that a court finds that all of the necessary statutory requirements are satisfied, a single class representative seeking money damages can litigate and/or settle on behalf of—and bind—all similarly situated individuals who do not take the affirmative step of opting out of the class action.²⁷

24. FED. R. CIV. P. 23. As an initial matter, Rule 23 requires that four prerequisites be satisfied before any class action may be certified: numerosity, commonality, typicality, and adequacy of representation. FED. R. CIV. P. 23(a). The jurisprudence has recognized a fifth prerequisite, namely “ascertainability.” *See, e.g., Carrera v. Bayer Corp.*, No. 12-2621, 2013 WL 4437225 (3d Cir. Aug. 21, 2013).

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

26. *Id.* The other types of class actions include Rule 23(b)(1)(A) incompatible standards classes, Rule 23(b)(1)(B) limited fund classes, and Rule 23(b)(2) classes seeking declaratory or injunctive relief. Unlike the (b)(3) class action, the (b)(1) and (b)(2) varieties are “mandatory” class actions, meaning that “Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13 (1999). The U.S. Court of Appeals for the Fifth Circuit has described the various types of class actions as follows:

Under Rule 23, the different categories of class actions, with their different requirements, represent a balance struck in each case between the need and efficiency of a class action and the interests of class members to pursue their claims separately or not at all. The different types of class actions are categorized according to the nature or effect of the relief being sought. The (b)(1) class action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all claims. The (b)(2) class action, on the other hand, was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary. Finally, the (b)(3) class action was intended to dispose of all other cases in which a class action would be “convenient and desirable,” including those involving large-scale, complex litigation for money damages. Limiting the different categories of class actions to specific kinds of relief clearly reflects a concern for how the interests of the class member will vary, depending on the nature of the class injury alleged and the nature of the relief sought.

Allison v. Citgo Petroleum, 151 F.3d 402, 411–12 (5th Cir. 1998).

27. “For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including

The Reporter to the Advisory Committee on Civil Rules who drafted the 1966 amendments to Rule 23 recognized that the new (b)(3) class action was “the most adventuresome” innovation of those amendments.²⁸ The Advisory Committee itself even noted at the time that 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.²⁹ Only in the past twenty years, however, have courts taken this guidance to heart and begun to almost categorically refuse certification of personal injury litigation classes.³⁰ As described below, the two most commonly cited roadblocks to the certification of personal injury litigation classes are the lack of class cohesion and the existence of choice-of-law complexities. Additionally, with so much at stake in mass tort litigation, several courts have also expressed discomfort with one adversarial proceeding resolving the rights and liabilities of all interested parties once and for all.

1. Lack of Class Cohesion

The downfall of personal injury litigation classes must be traced to the U.S. Supreme Court’s 1997 rejection of a proposed class action settlement of personal injury claims in *Amchem Products, Inc. v. Windsor*.³¹ Although the ambitious and wide-ranging putative

individual notice to all members who can be identified through reasonable effort.” FED. R. CIV. P. 23(c)(2)(B). Among other things, such notice must “clearly and concisely state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion [and] the time and manner for requesting exclusion.” *Id.* Notwithstanding these provisions, a leading empirical study has found that opt-out rates are “trivially small in the mass of cases.” Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532–34 (2004).

28. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969)).

29. See *Ortiz*, 527 U.S. at 844 n.20 (quoting FED. R. CIV. P. 23 advisory committee’s notes (1966)).

30. See, e.g., Nagareda, *supra* note 5, at 1170 (“The modern Rule 23 represented the new procedural kid on the block in 1966, a vital innovation at the time. As the rule now enters its middle age, one might say that a more elaborated sense has emerged not only about its genuine usefulness but also about its well-taken limitations.”).

31. 521 U.S. 591 (1997). This is not to suggest, however, that no court had rejected certification of personal injury claims prior to *Amchem*. For example, in

settlement class in *Amchem* presented a variety of problematic issues that a more modest litigation class could largely avoid, the Supreme Court's discussion of the lack of "class cohesion" in *Amchem* laid the foundation that subsequent courts have relied upon to reject certification of litigation classes in even routine putative personal injury class actions.³²

In *Amchem*, the Supreme Court affirmed the U.S. Court of Appeals for the Third Circuit's reversal of the district court's certification of a "sprawling" settlement class of "hundreds of thousands, perhaps millions, of individuals" connected by the "commonality" that "[e]ach was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies."³³ The putative personal injury class consisted of "persons occupationally exposed to defendants' asbestos products, and members of their families."³⁴ The Supreme Court agreed with the Third Circuit's reasoning that the putative class failed to satisfy the adequacy of representation requirement of Rule 23(a) and the predominance requirement of Rule 23(b)(3).³⁵

1984, the U.S. Court of Appeals for the Sixth Circuit issued a writ of mandamus directing the district judge presiding over the Bendectin multidistrict litigation to vacate his order certifying a Rule 23(b)(1) class of plaintiffs allegedly injured by in utero exposure to the prescription drug. *See In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984). Other courts had previously rejected class certification of personal injury claims under Rule 23(b)(3) as well. *See, e.g., Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392, 398–99 (E.D. Va. 1975) (refusing to certify class action in litigation arising from an aircraft crash in Indonesia). But the pre-*Amchem* decisions by and large did not focus on the core lack-of-cohesion defect in putative personal injury class actions identified in *Amchem*.

32. *See infra* notes 43–45. Two years later, in *Ortiz*, 527 U.S. 815, the Supreme Court held that a similar asbestos settlement class could not be certified under Rule 23(b)(1)(B). The Supreme Court's discussion in *Ortiz* focused primarily on the "conditions for certifying a mandatory settlement class on a limited fund theory," and not on the lack of class cohesion in personal injury cases. *Id.* at 821. However, by referencing "our deep-rooted historic tradition that everyone should have his own day in court" and the "inherent tension between representative suits and the day-in-court ideal," Justice Souter's majority opinion in *Ortiz* implicitly reinforced the rationale of *Amchem*. *Id.* at 846 (internal quotations and citations omitted).

33. *Amchem*, 521 U.S. at 597. As the Supreme Court explained, a "settlement class" is one that is "not intended to be litigated." *Id.* at 601. In *Amchem*, for example, "within the space of a single day, January 15, 1993, the settling parties . . . presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification." *Id.* at 601–02.

34. *Id.* at 605.

35. The Supreme Court also suggested, though did not decide, that it might not "ever" be possible to give "class action notice sufficient under the Constitution

The adequacy of representation defect in *Amchem* resulted from the novel structure of the wider settlement landscape that was being pursued in the asbestos litigation at that time. The putative class in *Amchem* was crafted by counsel to include only future claimants that had not yet filed individual lawsuits (in many cases, likely because an injury had not yet manifested); the claims of current plaintiffs with manifest injuries were settled separately by the same counsel as part of a two-pronged attempt to respond to the “asbestos-litigation crisis.”³⁶ The Supreme Court, however, agreed with the Third Circuit’s conclusion that “serious intra-class conflicts precluded the class from meeting the adequacy of representation requirement.”³⁷ As the Supreme Court explained: “[T]he 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.”³⁸ Ultimately, as the Third Circuit had concluded, “an undivided set of representatives could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.”³⁹ Although the Supreme Court’s analysis of the adequacy of representation defect in *Amchem* obviously remains relevant, counsel can generally avoid this pitfall

and Rule 23 . . . to legions so unselfconscious and amorphous” as current and future spouses and children of asbestos victims. *Id.* at 628.

36. *Id.* at 597–601 (discussing the findings of the March 1991 Report of the United States Judicial Conference Ad Hoc Committee on Asbestos Litigation).

37. *Id.* at 610 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996)).

38. *Id.* at 626. The Third Circuit had made the same essential point: “The [exposure-only plaintiffs] would rationally want protection against inflation for distant recoveries. They would also seek sturdy back-end opt-out rights and causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts.” *Id.* at 610–11 (citations omitted) (internal quotation marks omitted).

39. *Id.* at 611. *See also* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (“[I]t is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.”). *But see* *Juris v. Inamed Corp.*, 685 F.3d 1294, 1323–24 (11th Cir. 2012) (rejecting a collateral attack challenging a Rule 23(b)(1)(B) limited fund class action settlement approved by the district court in 1999 in the breast implant multidistrict litigation notwithstanding the fact that subclasses were not created for present and future claimants, and interpreting *Amchem* and *Ortiz* to merely call for “some type of adequate structural protection [of adequate representation], which would include, but may not necessarily require, formally designated subclasses”).

by drafting class definitions to encompass only individuals that have suffered some form of manifest injury.

The more influential aspects of *Amchem* for present purposes are the Supreme Court's recognition that "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and the Court's associated discussion of the lack of class cohesion in personal injury cases.⁴⁰ In this regard, the Supreme Court began by identifying relevant causation circumstances that would be unique for each putative class member:

Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.⁴¹

In light of those individualized circumstances, the Supreme Court concluded that the district court's "certification [of the putative class] cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design."⁴²

Although *Amchem* dealt specifically with a putative settlement class, the Supreme Court's reasoning has been followed by a long line of decisions refusing to certify personal injury litigation classes in a variety of factual scenarios. For example, in pharmaceutical and medical device litigation, individualized issues such as the plaintiffs' prior medical histories, the substance of interactions between plaintiffs and their doctors, the doctors' own reasons for prescribing the drug or device at issue, and the content of the warnings that accompanied the drug or device at different points in time will

40. *Amchem*, 521 U.S. at 623.

41. *Id.* at 624 (quoting *Georgine*, 83 F.3d at 626). See also *In re Asbestos Litig.*, 90 F.3d 963, 976 n.8 (5th Cir. 1996) (suggesting that a "global class of asbestos claimants" likely would not satisfy Rule 23 "due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations").

42. *Amchem*, 521 U.S. at 625. In *Ortiz*, the Supreme Court reiterated that "the determination whether 'proposed classes are sufficiently cohesive to warrant adjudication' must focus on 'questions that preexist any settlement.'" *Ortiz*, 527 U.S. at 858 (quoting *Amchem*, 521 U.S. at 622–23). See also RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 88 (2007) ("The *Amchem* Court chided the district judge for concluding that the proposed class was cohesive in the broad sense that all of its members, of course, would prefer to maximize the overall settlement pot.").

preclude class certification.⁴³ Similarly, in litigation involving other types of products, individualized issues such as the plaintiffs' prior medical histories, the details regarding each plaintiff's exposure circumstance and relevant knowledge, and the nature of the plaintiffs' alleged injuries have been cited as roadblocks to class certification.⁴⁴ The same is true in litigation involving environmental exposure to harmful substances, where individualized issues such as the location and duration of the plaintiffs' exposures, the plaintiffs' susceptibilities to illness, and the nature of the plaintiffs' alleged injuries will defeat class certification.⁴⁵

All of these individualized issues bear on the question of specific causation—namely, whether the plaintiffs' alleged injuries were in fact caused by the drug, device, product, or exposure at issue. Indeed, in mass tort personal injury litigation, “proof of wrongful conduct on the part of the defendant tends not to establish liability for compensatory damages . . . [because] further questions remain as to the existence of specific causation.”⁴⁶ As a result, regardless of

43. See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080–82 (6th Cir. 1996); *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982); *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 nn.7–8 (S.D.N.Y. 2008); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 65–67 (S.D.N.Y. 2002); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625, 631–32 (W.D. Wash. 2002).

44. See, e.g., *Amchem*, 521 U.S. at 625; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 n.15 (5th Cir. 1996) (“The class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member’s knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons.”); *McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278 (N.D. Ga. 1995) (denying certification to putative class of plaintiffs alleging personal injuries caused by the chemical composition of carpet manufactured by the defendants).

45. See, e.g., *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006) (noting that class certification was inappropriate in an exposure case because each plaintiff’s claim “will be highly individualized with respect to proximate causation, including individual issues of exposure, susceptibility to illness, and types of physical injuries”); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. MDL 1873, 2008 WL 5423488, at *12 (E.D. La. Dec. 29, 2008) (recognizing that “there are significant and notable variations among the Plaintiffs that affect whether, and the extent to which, any plaintiff was exposed to formaldehyde and experienced health effects resulting from that exposure”); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 651–52 (M.D. Fla. 2001) (refusing to certify putative class of plaintiffs alleging injuries from exposure to chemical sprayed as part of a statewide medfly eradication program because “the circumstances of each individual’s exposure, the individual’s past and current medical history, and the individual’s failure to mitigate” defeated a finding of predominance).

46. Nagareda, *supra* note 5, at 1134. See also *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (“[A]s claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases

the factual context, courts today almost universally recognize that the lack of class cohesion precludes certification of personal injury litigation classes.⁴⁷

2. Choice-of-Law Complexities

In recent years, choice-of-law complexities have also frustrated classwide treatment of state law personal injury claims.⁴⁸ Before a putative litigation class that is defined to include class members from different states can be certified, the trial court must engage in a choice-of-law analysis to determine whether multiple states' laws must be applied to the class members' claims.⁴⁹ This choice-of-law

while the need for enhanced procedural safeguards to protect the individual rights of class members increases.”).

47. The most notable exception to this trend occurred in *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999). The plaintiffs in *Mullen* were former employees of a floating casino and brought a class action against the casino alleging respiratory injuries (including asthma and bronchitis) as a result of the casino's allegedly defective air conditioning and ventilation system (which led to “extremely smoky conditions” in the casino). The district court crafted a trial plan that consisted of a Phase One class trial on common issues to be followed by waves of individual Phase Two trials on individual issues of causation and damages. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's certification of a “common issues” litigation class pursuant to Rule 23(b)(3) and held that the predominance requirement was satisfied because the class members were “symptomatic by definition and claim[ed] injury from the same defective ventilation system over the same general period of time.” *Id.* at 626–27. The Fifth Circuit also noted that the common issues in the case, notably negligence and seaworthiness of the floating casino, were the most “pivotal.” *Id.*

48. See generally Grabill, *supra* note 5, at 309–11. As I have previously argued, this development “should not be viewed as unnecessarily creating duplicative litigation, but rather as ensuring that the judicial system enjoys the benefits of parallel litigation of complex cases while respecting basic notions of federalism.” *Id.* at 319. Nevertheless, others continue to search for “fixes” to this purported choice-of-law “problem.” See Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 375 (2011) (arguing that “applying the average of the differing state laws can overcome [the] choice of law impediment to using class actions without compromising the functioning of civil liability in any significant way”); Linda Siberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2022–34 (2008) (advocating the adoption of an “independent federal choice of law rule”).

49. See, e.g., *Spence v. Glock*, 227 F.3d 308, 311–14 (5th Cir. 2000) (“The district court is required to know which law will apply before it makes its predominance determination [under Rule 23(b)(3)].”); *Castano*, 84 F.3d at 741–43 (“[V]ariations in state law [must not] swamp any common issues and defeat predominance.”). Federal courts sitting in diversity must generally apply the choice-of-law rules of the forum state. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*,

inquiry is part of the “rigorous analysis” that trial courts must conduct when determining whether to certify a putative class action.⁵⁰

More often than not, in putative personal injury class actions, the relevant choice-of-law rules will require that the putative class members’ claims be governed by their home states’ laws. For example, “the majority of states have adopted the choice-of-law rules set forth in the *Restatement (Second) of Conflict of Laws*,⁵¹ which provide that “[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.”⁵² Several states, however, “still apply the *lex loci delicti* principle, which was presented in the *Restatement (First) of Conflict of Laws*, and generally requires courts to apply the law of ‘the state where the last event necessary to make an actor liable for an alleged tort takes place.’”⁵³ But regardless of which choice-of-law regime applies, courts typically conclude that a plaintiff’s personal injury claims must be governed by his or her home state’s law.⁵⁴ This result has

313 U.S. 487, 496 (1941). In cases transferred into a multidistrict litigation proceeding pursuant to 28 U.S.C. § 1407, however, the transferee court must apply the choice-of-law rules of the transferor forum. *See Ferens v. John Deere Co.*, 494 U.S. 516, 523–25 (1990).

50. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). *See also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (reaffirming that trial courts must conduct a “rigorous analysis” before certifying class actions, even if that analysis “overlap[s] with the merits of the plaintiff’s underlying claim”). Courts must also ensure that their choice of law in putative class actions does not violate “the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985). In that regard, “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Id.* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

51. Grabill, *supra* note 5, at 302.

52. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

53. Grabill, *supra* note 5, at 303 (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934)).

54. For example, in *Amchem*, the Third Circuit noted that “[v]ariations in state law magnify” the individual factual differences among plaintiffs. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). *See also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995) (implicitly recognizing that plaintiffs’ claims would be governed by their home state law and noting that “[t]he voices of the quasi-sovereigns that are the states of the United States sing negligence with . . .

previously been described as creating a “complexity of application” that will often frustrate a putative class’s ability to satisfy Rule 23(b)(3)’s predominance and superiority requirements.⁵⁵

3. *Discomfort with All-or-Nothing Adversarial Proceedings*

In addition to the lack of cohesion and choice-of-law issues discussed above, some courts have also expressed a general discomfort with allowing hundreds or thousands of mass tort claims to be resolved by one trial. That discomfort often manifests itself in a finding that a proposed class action is not “superior to other available methods for fairly and efficiently adjudicating the controversy.”⁵⁶ The two leading cases expressing this view are *In re Rhone-Poulenc Rorer Inc.*⁵⁷ and *Castano v. American Tobacco Co.*⁵⁸ from the U.S. Courts of Appeals for the Seventh and Fifth Circuits, respectively.

Rhone-Poulenc involved a putative class of hemophiliacs allegedly infected by the AIDS virus as a result of using tainted blood solids manufactured by the defendants.⁵⁹ Notably, the district court did not certify the entire case as a class action but instead certified the case pursuant to Rule 23(c)(4) “as a class action with respect to particular issues.”⁶⁰ As understood by the Seventh Circuit, the district court envisioned “the rendition by a jury of a special verdict that would answer a number of questions bearing,

different pitch[es]”); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006) (holding that New Jersey’s choice-of-law rules required that “the substantive law of each plaintiff’s home jurisdiction must be applied to his or her respective claims”); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 67–68 (S.D.N.Y. 2002) (noting that the court “likely would be obliged to apply the laws of all fifty states” to the plaintiffs’ personal injury claims).

55. See Grabill, *supra* note 5, at 306–08; see also *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that because the class members’ claims “must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable”). Of course, there may be situations where the competing state laws are not in conflict, and, in those situations, the mere need to apply multiple states’ laws may not categorically prevent class certification. See Grabill, *supra* note 5, at 312–13 (collecting authorities).

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

57. 51 F.3d 1293 (7th Cir. 1995).

58. 84 F.3d 734 (5th Cir. 1996).

59. *In re Rhone-Poulenc*, 51 F.3d at 1294–95.

60. *Id.* at 1297 (quoting FED. R. CIV. P. 23(c)(4)(A)). The court noted that “differences in the date of infection alone of the thousands of potential class members would make [certification of the entire case under Rule 23(b)(3)] infeasible.” *Id.* at 1296–97.

perhaps decisively, on whether the defendants [were] negligent.”⁶¹ Assuming the issues-class trial resulted in a finding of negligence, “individual members of the class would then file individual tort suits in state and federal district courts around the nation and would use the special verdict, in conjunction with the doctrine of collateral estoppel, to block relitigation of the issue of negligence.”⁶² The defendants challenged the issues-class certification by seeking a writ of mandamus from the Seventh Circuit.

Notwithstanding the court’s recognition that “mandamus is issued only in extraordinary cases,”⁶³ the Seventh Circuit granted the defendants’ petition and decertified the issues class.⁶⁴ The court was particularly concerned that the defendants would be “under intense pressure to settle” as a result of the certification order.⁶⁵ At the time of the decision, approximately 300 similar lawsuits had been filed involving some 400 plaintiffs.⁶⁶ There had also been 13 individual trials, and the defendants had won 12 of them.⁶⁷ Extrapolating from these statistics, the court estimated that, but for the certification order, the defendants might be facing liability in

61. *Id.* at 1297.

62. *Id.* This is essentially the same approach being used in the so-called “*Engle* progeny” cases percolating through the Florida state courts in which plaintiffs allege smoking-related injuries. In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the Florida Supreme Court blessed “certain common liability findings” from a class-wide trial and held that those findings must be given “res judicata effect” in subsequent actions filed by individual class members. *Id.* at 1254. See also *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013) (clarifying the scope of the preclusive effect of the *Engle* findings).

63. *In re Rhone-Poulenc*, 51 F.3d at 1294.

64. *Id.* at 1297 (“With all due respect for the district judge’s commendable desire to experiment with an innovative procedure for streamlining the adjudication of this ‘mass tort,’ we believe that his plan so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification.”).

65. *Id.* at 1298. See also FED. R. CIV. P. 23 advisory committee’s notes (1998) (“An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”). Several recent decisions have reiterated the view that the certification of a litigation class can place significant pressure on defendants to settle. See *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) (“Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high.”); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (recognizing that class actions can entail a “risk of ‘in terrorem’ settlements”); *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (noting that having “to face all [class members] in a single trial . . . could produce a monstrous judgment” and that “[i]t is such threats of ruin that force most defendants in class action suits to settle if a class is certified”).

66. *In re Rhone-Poulenc*, 51 F.3d at 1296.

67. *Id.* at 1298.

about 25 cases that could total up to \$125 million.⁶⁸ But as a result of the certification of an issues class and based on the assumption that claims by 5,000 of the potential class members were not yet barred by the applicable statutes of limitations—likely a conservative estimate in light of the class action tolling doctrine—the court suggested that the defendants might “easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy.”⁶⁹ The court balked at the implications of such an all-or-nothing proposition and held that “it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.”⁷⁰

A little more than one year after the Seventh Circuit issued its decision in *Rhone-Poulenc*, a similarly ambitious issues-class certification met the same fate in the Fifth Circuit for essentially identical reasons. *Castano* involved a putative class of all nicotine-dependent persons in the United States who purchased and smoked cigarettes manufactured by the defendants since 1943.⁷¹ The putative Rule 23(b)(3) class sought a variety of relief, including compensatory and punitive damages “for the injury of nicotine addiction.”⁷² The district court certified an issues class pursuant to Rule 23(c)(4) for the issues of “core liability” and punitive damages.⁷³ Much like the district court in *Rhone-Poulenc*, the district court in *Castano* contemplated an issues-class trial on certain questions of liability to be followed by individualized damages proceedings, assuming the jury returned a pro-plaintiff verdict in the initial issues-class trial.⁷⁴

This all-or-nothing approach on questions of liability caused the Fifth Circuit serious concern. The court explained its discomfort by

68. *Id.*

69. *Id.*

70. *Id.* at 1300. The Seventh Circuit was also concerned about the district court’s plan to instruct the issues-class jury with “a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia,” *id.*, and the Seventh Amendment implications of the proposed bifurcation of liability issues between different juries, *id.* at 1302–04.

71. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996).

72. *Id.* The plaintiffs’ theory of liability was that “defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature.” *Id.*

73. *Id.* at 739. The district court defined “core liability” issues as “‘common factual issues [of] whether defendants knew cigarette smoking was addictive, failed to inform cigarette smokers of such, and took actions to addict cigarette smokers.’” *Id.* (quoting the district court).

74. *Id.* at 738.

noting that “class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not” because “[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.”⁷⁵ Consistent with the Seventh Circuit’s view, the Fifth Circuit held that “[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.”⁷⁶

Thus, whether resulting from the lack of class cohesion, the existence of choice-of-law complexities, or judicial discomfort with all-or-nothing trials, personal injury claims are no longer certified as litigation classes. As Professor Nagareda explained, these “constraints on class certification [have been] elaborated over decades of real-world experience [and] are not hypertechnical bugaboos.”⁷⁷

Rather, they stem ultimately from a well-taken notion of “preclusive symmetry”—an insistence that the plaintiff class ought not to be positioned to wield the bargaining leverage of a class-wide trial without, at the same time, affording to the defendant the assurance of a commensurately binding victory were the defendant, rather than the plaintiff class, to prevail on the merits.⁷⁸

In both *Rhone-Poulenc* and *Castano*, the courts expressed a preference for diversified decisionmaking by multiple juries in mass tort litigation.⁷⁹ For example, given that personal injury claims are

75. *Id.* at 746.

76. *Id.* at 752.

77. Nagareda, *supra* note 5, at 1113.

78. *Id.* Professor Nagareda further elaborated on this concept as follows:
The reason why material differences in the content of applicable substantive law or in the factual circumstances of class members matter to class certification as a format for litigation . . . stems from the need, absent settlement, to generate a judgment that will be issue preclusive on the parties plus those capable of being bound as nonparties, like absent class members. And issue preclusion turns upon actual litigation and determination of the *same* legal or factual issue across the proceeding said to yield such preclusive effect and the subsequent action to be precluded. Material differences matter in practical terms because they threaten to disable a [class-wide] trial from doing the essential thing that it is supposed to do: resolve the disputed issues conclusively so as not to allow the losing side to relitigate the issue later.

Id. at 1139 (footnotes omitted).

79. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995); *Castano*, 84 F.3d at 752. I have previously argued that the “diversified decisionmaking by legal communities around the country” that results from such “parallel litigation” is not only consistent with the U.S. Constitution’s

rarely small-value or negative-value claims that would be outweighed by the expense of litigation, the Seventh Circuit thought it was “entirely feasible to allow a final, authoritative determination of [the defendants’] liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions.”⁸⁰ Perhaps it should not be surprising then that MDL and bellwether trials have emerged to fill the procedural void left by the demise of personal injury litigation classes.⁸¹

B. Contemporary Mass Tort Multidistrict Litigation

In 1968, only two years after the extensive class action amendments to Rule 23 of the Federal Rules of Civil Procedure, Congress enacted the MDL statute, 28 U.S.C. § 1407.⁸² Section 1407 allows related lawsuits pending in federal courts across the country to be transferred by the Judicial Panel on Multidistrict Litigation (JPML) to one judge for “coordinated or consolidated pretrial proceedings.”⁸³ With the move away from personal injury class actions, MDL consolidation is increasingly being relied upon to aggregate the tens, hundreds, or thousands of related claims that flood into the federal courts every time a discrete accident or event, harmful substance or condition, or defective drug, device, or product

“fundamental principle of dual sovereignty” but will also “ultimately lead to better law.” Grabill, *supra* note 5, at 324.

80. *In re Rhone-Poulenc*, 51 F.3d at 1299. The Fifth Circuit similarly noted that the claims of the putative class members were not “negative-value” suits. *Castano*, 84 F.3d at 748 (recounting plaintiffs’ counsel’s promise to “inundate the courts with individual claims if class certification is denied”).

81. *See infra* Part II.B.1. By combining “individual actions with some manner of centralizing mechanism,” the emerging trends of multidistrict litigation and bellwether trials are consistent with Professor Nagareda’s prescription for “hybridization” in situations of “embedded aggregation” (i.e., “ostensibly individual litigation” that has an “aggregate dimension”). Nagareda, *supra* note 5, at 1108–14.

82. Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407).

83. 28 U.S.C. § 1407 (2006). *See generally* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov> (last visited Dec. 5, 2013). Section 1407 was enacted largely in response to the difficulties created by two waves of antitrust litigation in the 1950s and 1960s (the former involving the motion picture industry and the latter electrical equipment manufacturers). *See* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2258–66 (2008).

is suspected of causing similar injuries to multiple people.⁸⁴ And although state court cases are not subject to federal MDL transfer, it is increasingly common for MDL transferee courts to cooperate and coordinate with state courts handling similar claims.⁸⁵

The JPML consists of seven sitting federal judges designated by the Chief Justice of the United States, and it holds public hearings once every other month around the country to determine whether MDL proceedings should be created for various collections of similar claims.⁸⁶ To carry out its statutory function, the JPML engages in a two-step process when it is notified of potentially related lawsuits. The JPML first “considers whether common questions of fact among several pending civil actions exist such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions.”⁸⁷ If the JPML decides to create an MDL proceeding, it then “considers which federal district and judge are best situated to handle the transferred matters.”⁸⁸

84. See, e.g., Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 962 (2012) (“[R]ecent years have seen a rise in the use of coordinated multidistrict litigation to aggregate mass tort claims.”).

85. See *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2418, 2013 WL 565971, at *2 (J.P.M.L. Feb. 12, 2013) (identifying related state court litigation and noting that the creation of a federal MDL “likely will facilitate coordination among all courts with Plavix cases, simply because there will now be only one federal judge handling most or all federal Plavix litigation”). See generally Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000). For example, Professor McGovern was appointed as Special Master in the multidistrict litigation arising from the BP Deepwater Horizon oil spill and tasked with assisting the transferee court, the parties, and counsel “in coordinating . . . with other matters related to MDL-2179, including, but not limited to, matters in other federal courts [and] matters in state courts.” See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 7, 2010) (order appointing Professor McGovern as Special Master), available at [http://www.laed.uscourts.gov/OilSpill/Orders/10072010Order\(AppointSpecialMaster\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/10072010Order(AppointSpecialMaster).pdf). To achieve even greater aggregation of related claims and reduce the need for such cross-jurisdictional cooperation and informal coordination, Judge Weinstein has argued that “[i]t may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions” because “[m]uch the same concerns which animated CAFA’s preference for a single, federal forum [for class actions] apply to national MDL aggregate actions.” *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 542 (E.D.N.Y. 2006).

86. 28 U.S.C. § 1407(d).

87. Heyburn, *supra* note 7, at 2228.

88. *Id.*

1. Pretrial Management Techniques

MDL consolidation of related lawsuits does not merge the suits into one massive case. Rather, MDL consolidation merely brings related lawsuits before one judge so that they can be organized and managed collectively to avoid the need to conduct duplicative discovery. Nevertheless, the transferee court enjoys “broad” authority that “necessarily encompasses issuing pretrial orders, resolving pretrial motions (including discovery motions, motions to amend, motions to dismiss, motions for summary judgment, and motions for class certification), and attempting to facilitate settlement.”⁸⁹

Following the creation of an MDL, the transferee court will typically appoint plaintiffs’ and defendants’ liaison counsel to manage the litigation and be the primary points of contact for the court.⁹⁰ In order to focus its attention on key legal issues presented in the litigation, one of the first tasks that the transferee court may assign to plaintiffs’ liaison counsel is to review the claims and theories of liability set forth in the various individual cases that comprise the MDL and compile one or more master complaints to serve as the target for consolidated Rule 12 motion practice.⁹¹

For example, shortly after a multidistrict litigation proceeding was created for the claims stemming from the BP Deepwater

89. Fallon, Grabill & Wynne, *supra* note 7, at 2328.

90. *See id.* at 2338 n.74 (explaining that liaison counsel “essentially serve as the communication conduit between the transferee court and the thousands of lawyers that can often be involved in any given MDL”); *see also In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Aug. 10, 2010) (Pretrial Order No. 1) para. 16, *available at* <http://www.laed.uscourts.gov/OilSpill/Orders/PTO1.pdf> (discussing the duties of liaison counsel and providing that such counsel “shall be authorized to receive orders and notices from the Court on behalf of all parties within their liaison group and shall be responsible for the preparation and transmittal of copies of such orders and notices to the parties in their liaison group and perform other tasks determined by the Court”).

91. *See In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 453 (E.D. La. 2006) (noting that “[m]aster complaints help the Court and the parties focus on common issues in an efficient and effective manner”); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141 (E.D. La. 2002) (“Master complaints are often used in complex litigation, although they are not specifically mentioned in either the Federal Rules of Civil Procedure or in any federal statute.”). *But see In re Nuvaring Prods. Liab. Litig.*, No. 4:08-MD-1964, 2009 WL 2425391, at *2 (E.D. Mo. Aug. 6, 2009) (denying motion to dismiss master consolidated complaint because that complaint was simply an “administrative tool to place in one document all of the claims at issue in this litigation” and the court did not contemplate Rule 12 motion practice “against the master complaint”).

Horizon oil spill in the Gulf of Mexico in 2010,⁹² the transferee court organized the claims into various “pleading bundles” for purposes of “filing of complaints, answers and any Rule 12 motions.”⁹³ The massive oil spill arose “from the April 20, 2010 explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit . . . which resulted in the release of millions of gallons of oil into the Gulf of Mexico before it was finally capped approximately three months later.”⁹⁴ Accordingly, the pleading bundles were based on the types of claims being asserted and/or the identity of the parties, for example:

- Bundle A—personal injury and wrongful death claims involving individuals on the rig at the time of the explosion;
- Bundle B1—non-governmental economic loss and property damage claims;
- Bundle B2—RICO claims;
- Bundle B3—claims by clean-up workers for personal injuries or medical monitoring;
- Bundle B4—claims against vessels that responded to the rig’s distress call;
- Bundle C—public damage claims by governmental entities;
- Bundle D1—claims against private parties seeking injunctive relief; and
- Bundle D2—claims against governmental parties challenging regulatory actions.⁹⁵

In the pretrial order that created these bundles, the transferee court also directed plaintiffs’ liaison counsel to file master complaints in most bundles and established a schedule for Rule 12 motions.⁹⁶ Approximately one year later, the transferee court had resolved the Rule 12 motions that challenged the various master complaints and was preparing to conduct its first trial on the claims

92. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010) (creating MDL 2179).

93. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 19, 2010) (Pretrial Order No. 11) para. III, available at <http://www.laed.uscourts.gov/OilSpill/Orders/PTO11.pdf>.

94. *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 808 F. Supp. 2d 943, 947 (E.D. La. 2011).

95. *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 19, 2010) (Pretrial Order No. 11) para. III, available at <http://www.laed.uscourts.gov/OilSpill/Orders/PTO11.pdf>.

96. *Id.* at paras. III–IV.

that remained.⁹⁷ On the eve of that trial, however, two putative class action settlements were announced that held the promise of resolving many of the private-party claims in the litigation.⁹⁸ The transferee court subsequently certified both settlement classes and gave final approval to both settlement agreements.⁹⁹

Following an initial round of motion practice focused on key legal issues and to the extent that plaintiffs' claims survive such threshold scrutiny, MDL transferee courts are increasingly utilizing bellwether trial plans, whereby several individual cases are selected to proceed through full discovery and trial.¹⁰⁰ Although the results

97. See *In re Oil Spill*, 808 F. Supp. 2d 943 (granting in part and denying in part motions to dismiss the Bundle B1 master complaint); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 792 F. Supp. 2d 926 (E.D. La. 2011) (granting motions to dismiss the Bundle D1 master complaint), *aff'd in part, rev'd in part*, 704 F.3d 413 (5th Cir. 2013); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 802 F. Supp. 2d 725 (E.D. La. 2011) (granting motions to dismiss the Bundle B2 master complaint); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 4575696 (E.D. La. Sept. 30, 2011) (granting in part and denying in part motions to dismiss the Bundle B3 master complaint); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 2011 WL 4829905 (E.D. La. Oct. 12, 2011) (granting joint motion to dismiss the Bundle B4 cases), *aff'd*, 500 F. App'x 355 (5th Cir. 2012); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 835 F. Supp. 2d 175 (E.D. La. 2011) (granting in part and denying in part motions to dismiss certain Bundle C cases).

98. See Press Release, BP, BP Announces Settlement with PSC, Subject to Final Written Agreement, to Resolve Economic Loss and Medical Claims from Deepwater Horizon Accident and Oil Spill (Mar. 3, 2012), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7073667>.

99. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) (certifying a settlement class and granting final approval to the so-called Economic and Property Damages Settlement Agreement); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 2013 WL 144042 (E.D. La. Jan. 11, 2013) (certifying a settlement class and granting final approval to the so-called Medical Benefits Class Action Settlement Agreement). As this Article goes to press, various appeals are pending in the U.S. Court of Appeals for the Fifth Circuit regarding the transferee court's certification and approval of both settlement classes.

100. See Fallon, Grabill & Wynne, *supra* note 7, at 2325 ("A typical bellwether case often begins as no more than an individual lawsuit that proceeds through pretrial discovery and on to trial in the usual binary fashion: one plaintiff versus one defendant. Such a case may take on 'bellwether' qualities, however, when it is selected for trial because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases."); see also Ashley Post, *Yamaha and Merck Win High-Profile Bellwether Trials*, INSIDECOUNSEL (Feb. 1, 2012) (discussing the increasing use of bellwether trials), available at <http://www.insidecounsel.com/2012/02/01/yamaha-and-merck-win-high-profile-bellwether-trial>. Of course, "a transferee court cannot try

of those trials are not binding on other individual plaintiffs within the MDL, the “ultimate purpose of holding bellwether trials” is to “provide meaningful information and experience to everyone involved in the litigation[.]”¹⁰¹ Indeed, “bellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.”¹⁰²

After several years of intensive discovery, bellwether trials, and authoritative rulings on key legal issues during which time the applicable statutes of limitations should be running against individuals who have not yet come forward to assert claims, the statutory role of an MDL transferee court will often be largely complete. In fact, § 1407 “obligates the [JPML] to remand any pending case to its originating court when . . . pretrial proceedings have run their course.”¹⁰³ That said, “[f]ew cases are remanded for trial; most multidistrict litigation is settled in the transferee court.”¹⁰⁴ Nevertheless, it is the threat of remand—and the associated potential chaos of dispersed litigation in federal courts across the country—that often supplies the necessary impetus for the initiation of settlement negotiations within the MDL context.

2. *Modern Methods for Achieving Global Resolution*

As I have previously described, “mass tort litigation is increasingly resolved through non-class aggregate settlements” known as “private mass tort settlements.”¹⁰⁵ Notwithstanding this emerging trend, however, class action settlements are still occasionally used to settle mass tort litigation as well. It is important to understand both settlement approaches to appreciate the harmful effects that the class action tolling doctrine can have on efforts to resolve contemporary mass tort litigation and how those effects can be alleviated by MDL transferee courts.

cases transferred to it by the [JPML], unless the litigants consent to trial before the transferee court.” Fallon, Grabill & Wynne, *supra* note 7, at 2354 (discussing the Supreme Court’s ruling in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)).

101. Fallon, Grabill & Wynne, *supra* note 7, at 2332.

102. *Id.* at 2338.

103. *Lexecon*, 523 U.S. at 34.

104. *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 151 (D. Mass. 2006).

105. Grabill, *supra* note 10, at 123. Unlike proposed class action settlements, private mass tort settlements are not subject to judicial review. *Id.* at 162–69.

a. Private Mass Tort Settlements

Private mass tort settlements are non-class aggregate settlements to which individual plaintiffs must affirmatively opt in.¹⁰⁶ The two most prominent examples of private mass tort settlements are the 2007 settlement of the *Vioxx* pharmaceutical MDL and the 2010 settlement of the *World Trade Center Disaster Site* litigation.¹⁰⁷

For present purposes, the key distinguishing feature of private mass tort settlements is that the settlement offer is made only to current or eligible plaintiffs that have come forward in some fashion to assert a claim by a negotiated deadline that usually either predates or coincides with the date of the settlement announcement.¹⁰⁸ Thus, potential plaintiffs that have not identified themselves as of the relevant cutoff date usually “miss the boat” in terms of being able to participate in private mass tort settlements. This may, of course, be unfortunate for those individuals, but it can have broader consequences. As further discussed in Part III.C below, to the extent that such potential plaintiffs have been sitting on the sideline because their individual home states’ statutes of limitations have been tolled by the class action tolling doctrine, the defendant(s)—and the judiciary for that matter—will face the risk of a post-settlement wave of timely new claims. And depending on the magnitude of that risk, it is even possible that the defendant(s) may decide not to attempt a global settlement in the first place.

b. Class Action Settlements

As the Supreme Court explained in *Amchem*, a “settlement class” is one that is “not intended to be litigated.”¹⁰⁹ Accordingly, “[s]ettlement is relevant to class certification,” and a court presented with a request for certification of a settlement class “need not inquire whether the case, if tried, would present intractable

106. *Id.* at 157–58.

107. *Id.* at 142–53.

108. *Id.* at 156–57. There are at least four other distinctive features of private mass tort settlements:

(1) private mass tort settlements begin as a global settlement offer set forth in a contract between plaintiffs’ liaison counsel and the defendant(s); . . . [(2)] a requisite percentage of eligible plaintiffs must individually opt in for the deal to become effective, but plaintiffs who refuse to opt in are not bound by such settlements; [(3)] settlement awards are based on detailed “points” matrices administered by claims resolution facilities; [(4)] the entire settlement structure is transparent and available for each plaintiff, and the public at large, to review.

Id. at 154.

109. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 601 (1997).

management problems . . . for the proposal is that there be no trial.”¹¹⁰ Moreover, “although variations in state laws applicable to the claims of members of a putative multistate or nationwide litigation class ordinarily preclude class certification, courts have consistently held that such variations are no impediment to certification of a class for settlement purposes only.”¹¹¹ In short, although “[t]he same analytical rigor is required for litigation and settlement certification . . . some inquiries essential to litigation class certification are no longer problematic in the settlement context.”¹¹²

Notwithstanding that the law on settlement classes is still “evolving” and that “class settlement in mass tort cases (especially personal injury claims) remains problematic,”¹¹³ the relaxation of certain aspects of the Rule 23 analysis for settlement classes has allowed several prominent mass tort cases to be settled as class actions, including the *Agent Orange*,¹¹⁴ *Breast Implants*,¹¹⁵ and *Fen-*

110. *Id.* at 621. That said, “other specifications” of Rule 23, particularly those “designed to protect absentees by blocking unwarranted or overbroad class definitions,” “demand undiluted, even heightened, attention in the settlement context” because “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.” *Id.*

111. 2 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 6:3 (8th ed. 2011) (collecting authorities). *See also* Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 232 (D.N.J. 2005) (“Here, the case is not being certified for litigation purposes, thus . . . predominance is not defeated by any differences in the various laws of the fifty states.”).

112. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 335 (3d Cir. 2011) (Scirica, J., concurring).

113. *Id.* at 333–34 (Scirica, J., concurring). Perhaps the most important open question is the degree to which the Supreme Court’s recent strengthening of Rule 23’s commonality requirement in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), will apply in the settlement class context. *See* M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 840 (5th Cir. 2012) (noting that “the commonality test is no longer met when the proposed class merely establishes that ‘there is at least one issue whose resolution will affect all or a significant number of the putative class members,’” but rather it now requires that all of the class members’ claims “depend on a common issue of law or fact whose resolution ‘will resolve an issue that is central to the validity of each one of the [class member’s] claims in one stroke’” (quoting *Dukes*, 131 S. Ct. at 2551)).

114. *In re* “Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 163–67 (2d Cir. 1987) (affirming Judge Weinstein’s decision to certify a Rule 23(b)(3) class action given the centrality of the military contractor defense, notwithstanding the fact that the issue of specific causation was “highly individualistic, and depend[ed] upon the characteristics of individual plaintiffs (e.g. state of health, lifestyle) and the nature of their exposure” and nevertheless recognizing that the *Agent Orange* litigation “justifies the prevalent skepticism over the usefulness of class actions in so-called mass tort cases”).

115. *In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (certifying a Rule 23(b)(3) settlement class

*Phen*¹¹⁶ litigations. That relaxation may have also incentivized the recent use of the class action device to settle the personal injury and medical monitoring claims of individuals who were involved in and/or exposed to the clean-up operations after the BP Deepwater Horizon oil spill.¹¹⁷

III. THE PESKY PERSISTENCE OF THE CLASS ACTION TOLLING DOCTRINE

Despite the move away from personal injury litigation classes and toward multidistrict litigation, bellwether trials, and private mass tort settlements, the class action tolling doctrine is alive and well in various jurisdictions across the country. The U.S. Supreme Court first blessed the class action tolling doctrine in the antitrust context almost 40 years ago,¹¹⁸ and since then the doctrine has

and approving a \$4.25 billion class action settlement encompassing all people who received implants from the settling defendants prior to June 1, 1993). The original class action settlement in the *Breast Implants* litigation unraveled as a result of unexpectedly large numbers of claimants applying to the settlement fund and Dow Corning's subsequent bankruptcy filing. See *In re* Dow Corning Corp., 86 F.3d 482, 486 (6th Cir. 1996).

116. *In re* Diet Drugs Prods. Liab. Litig., Nos. 1203, 99–20593, 2000 WL 1222042, at *41–42 (E.D. Pa. Aug. 28, 2000) (certifying a nationwide settlement class pursuant to Rules 23(b)(2) and 23(b)(3) because “use of the diet drugs spanned a finite and relatively short period of time” and the drugs caused “a common injury type to heart valves”).

117. See *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179, 2013 WL 144042 (E.D. La. Jan. 11, 2013) (certifying a settlement class and granting final approval to the so-called Medical Benefits Class Action Settlement Agreement). It is worth noting here that the order granting *preliminary* approval to the Medical Benefits Class Action Settlement explicitly

toll[ed] and stay[ed] the statutes of limitation applicable to any and all claims or causes of action for Released Claims that have been or could be asserted by or on behalf of any Medical Benefits Settlement Class Members unless and until they Opt Out of the Medical Benefits Settlement Class or the Medical Settlement Agreement is terminated pursuant to Section XIV [of the settlement agreement].

In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179 (E.D. La. May 2, 2012) (preliminary approval order) para. 32, available at [http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order\(MedicalSettlement\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(MedicalSettlement).pdf). Although the class action tolling doctrine likely rendered this provision in the preliminary approval order unnecessary, it is still instructive because even if the transferee court had cut off class action tolling at the inception of the MDL as proposed in this Article, some minimal period of tolling may nevertheless be appropriate upon preliminary approval of a class action settlement.

118. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

expanded and been adopted by a variety of state courts as a matter of state law. Indeed, although several courts have called into question the continued application of the class action tolling doctrine in mass tort litigation,¹¹⁹ the fact is that the filing of a putative personal injury class action will still toll the applicable statutes of limitations for potential personal injury plaintiffs in many jurisdictions and thereby increase the amount of time such potential plaintiffs have to come forward and assert their claims.¹²⁰

A. *American Pipe and Its Progeny*

Prior to Rule 23's amendment in 1966, a so-called "spurious" class action could be maintained when "the character of the right sought to be enforced for or against the class [was] . . . several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought."¹²¹ Unlike modern Rule 23(b)(3) class actions, spurious class actions were opt-in class actions, such that "putative members of the class who chose not to

119. See, e.g., *In re Rezulin Prods. Liab. Litig.*, MDL 1348, 2005 WL 26867, at *3 (S.D.N.Y. Jan. 5, 2005) (noting that the "wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable"); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. Ct. App. 1995) (refusing to "hold that the filing of a mass personal injury suit, in a federal court, in another state, with the variety of claims necessarily involved in such a case, entitled a plaintiff to a tolling of the limitations period such as in *American Pipe*"); *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 937 (Cal. 1988) (stating that plaintiffs "would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations"); see also, e.g., *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 907 n.3 (E.D. La. 2007) (rejecting defendant's request not to apply *American Pipe* tolling and instead holding that "until such a uniform rule prohibiting certification of personal injury class actions is announced, the Court will faithfully apply *American Pipe*").

120. Of course, the plaintiff that seeks to rely on a previously filed putative class action for tolling purposes must fit within that putative class action's class definition. See, e.g., *Knollenberg v. Wyeth*, No. 2:05-CV-2044, 2011 WL 5358698 (W.D. Ark. Nov. 7, 2011) (refusing to toll the two-year statute of limitations on plaintiff's claims because she fell outside the class definition set forth in the previously filed putative class action). It is also worth noting that "a majority of the federal Courts of Appeals . . . have denied tolling in the successive class action context," that is, when "absent class members . . . seek to press their claims in the context of a successive class action initiated by a new class representative." Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 806-07 (2006). In other words, after certification is denied, putative members of a previously filed putative class action must generally come forward individually—not as part of a new putative class action—in order to enjoy the benefits of class action tolling.

121. *Am. Pipe*, 414 U.S. at 545 (quoting the pre-amendment version of FED. R. CIV. P. 23).

intervene or join as parties would not be bound by the judgment.”¹²² As the Supreme Court explained, “A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests.”¹²³ When Rule 23 was amended in 1966, there existed a conflict among the federal courts of appeals concerning whether the filing of a putative spurious class action tolled the applicable statutes of limitations for putative class members—to be more precise, the tolling issue at that time was framed as “whether parties should be allowed to join or intervene as members of a ‘spurious’ class after the termination of [their own] limitation period, when the initial class action complaint had been filed before the applicable statute of limitations period had run.”¹²⁴

In *American Pipe & Construction Co. v. Utah*, the Supreme Court finally addressed this question but did so through the looking glass of the amended version of Rule 23.¹²⁵ And, indeed, the Supreme Court viewed the revisions to Rule 23 as dispositive of the tolling issue:

Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a “separate cause of action” which must individually meet the timeliness requirements, such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer “an invitation to joinder” but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.¹²⁶

Thus, the Court held that “the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.”¹²⁷

122. *Id.* at 547.

123. *Id.*

124. *Id.* at 549–50 nn.18–19 (collecting authorities).

125. For a detailed discussion of the factual background in *American Pipe*, see Lowenthal & Feder, *supra* note 21, at 538–41.

126. *Am. Pipe*, 414 U.S. at 550. The Supreme Court noted that the 1966 amendments “were designed, in part, specifically to mend [the] perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.” *Id.* at 547.

127. *Id.* at 553. Notably, the Supreme Court limited its holding to the unique posture of the case before it, namely “where class action status ha[d] been denied solely because of failure to demonstrate that ‘the class is so numerous that joinder

Of course, in mass tort MDLs today, the question is not usually one of intervention but rather whether purported members of a putative class that is denied class action status should be allowed to subsequently file separate lawsuits if their individual limitations periods would have expired without the benefit of tolling. In 1983, the Supreme Court expanded upon *American Pipe* to shed light on this related issue (albeit not in the MDL context) in *Crown, Cork & Seal Co. v. Parker*.¹²⁸ The *American Pipe* decision had concluded with broad language that could be read to apply beyond the context of intervention: “[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”¹²⁹ In *Crown, Cork & Seal*, the Court reaffirmed this language and held that once the applicable statutes of limitations have been tolled by the filing of a putative class action, they “remain[] tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.”¹³⁰

of all members is impracticable” but “common issues of law and fact respecting the underlying conspiracy” were nonetheless probable. *Id.* at 552–53 (quoting FED. R. CIV. P. 23(a)(1)). Today, those original limiting conditions have largely been forgotten.

128. 462 U.S. 345 (1983). As with the antitrust claim at issue in *American Pipe*, the racial discrimination claim at issue in *Crown, Cork & Seal* arose under federal law. For further details concerning the factual background in *Crown, Cork & Seal*, see Lowenthal & Feder, *supra* note 21, at 541–43.

129. *Am. Pipe*, 414 U.S. at 554.

130. *Crown, Cork & Seal*, 462 U.S. at 354. At least as a matter of federal decisional law, this rule only applies with respect to the first putative class action that is filed; putative class members cannot “stack” or “piggyback” subsequent class actions to extend the tolling period. See *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (“Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.”); *Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334, 1350 (5th Cir. 1985) (“Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any.”). Moreover, when an individual chooses to file his or her own lawsuit *before* the class certification issue has been resolved in the putative class action relied upon for tolling purposes, some courts have held that such an individual is not entitled to any tolling benefit at all. See, e.g., *In re Hanford Nuclear Reservation Litig.*, 497 F.3d 1005, 1025–27 (9th Cir. 2007); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 566–69 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983). *But see* Caleb Brown, Note, *Piped In: The Tenth Circuit Weighs In on Extending American Pipe Tolling in State Farm Mutual Automobile Insurance Co. v. Boellstorff*, 62 OKLA. L. REV. 793, 800–09 (2010) (discussing conflicting holdings on this issue and arguing that

B. Class Action Tolling in Personal Injury Litigation

Both *American Pipe* and *Crown, Cork & Seal* addressed whether limitations periods for asserting federal causes of action had been tolled by the filing of putative class actions in federal court.¹³¹ In putative personal injury class actions, however, state law will supply the rules of decision and the applicable statutes of limitations—even though such cases are increasingly being aggregated in federal court via the MDL statute.¹³² Although there has been some debate about whether the tolling doctrine announced by the Supreme Court in *American Pipe* should be limited to federal causes of action or instead apply broadly to any class action filed in federal court,¹³³ most courts now agree that “a federal court evaluating the timeliness of state law claims must look to the law of the relevant state to determine whether, and to what extent, the statute of limitations should be tolled by the filing of a putative class action in another jurisdiction.”¹³⁴ In mass tort MDLs that may contain claims by individual plaintiffs from all 50 states, the most

“*American Pipe* tolling should be extended to cover independent suits filed prior to class certification”).

131. See *supra* notes 125, 128.

132. See *supra* notes 6–7 and accompanying text.

133. See Lowenthal & Feder, *supra* note 21, at 545–68. For example, the U.S. Court of Appeals for the Eighth Circuit has interpreted the tolling rule of *American Pipe* as a principle of federal common law that applies by its own force in federal court (including in diversity cases) regardless of the applicable state law on tolling. See *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 915 (8th Cir. 2004) (“[T]he federal interest in ‘the efficiency and economy of the class-action procedure’ outweighs any state interest and therefore justifies tolling in diversity cases where the otherwise-applicable state law provides no relief.”) (quoting *Adams Pub. Sch. Dist. v. Asbestos Corp.*, 7 F.3d 717, 718–19 (8th Cir. 1993)).

134. *Casey v. Merck & Co., Inc.*, 653 F.3d 95, 100 (2d Cir. 2011) (noting that “the majority of our sister courts that have addressed the issue” have reached this conclusion). See also *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 907 (E.D. La. 2007) (“In diversity cases, where state law provides the rules of decision, ‘a federal court should apply not only state statutes of limitations but also any accompanying tolling rules.’ Indeed, it has been recognized that *American Pipe* does not apply by its own force in diversity cases.” (quoting *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1145 (5th Cir. 1997))); *Orleans Parish Sch. Bd. v. U.S. Gypsum Co.*, 892 F. Supp. 794, 805 (E.D. La. 1995) (“The limitations periods of *American Pipe* and *Crown, Cork* were derived from federal statutes. Here we are dealing with Hawaii’s limitation statutes. Because none of them provide for tolling in a situation such as exists here, it is doubtful that either *American Pipe* or *Crown, Cork* can be treated as applicable precedent.”).

obvious impact of the majority view is that it exponentially complicates the tolling inquiry for transferee courts.¹³⁵

Looking to state law then, one finds that many states have adopted class action tolling as a matter of state law, often offering no other justification for doing so beyond those announced by the Supreme Court in *American Pipe*.¹³⁶ That said, some states have not adopted class action tolling,¹³⁷ and states often take different views with respect to “cross-jurisdictional” class action tolling—that is, whether a class action filed in federal court or in a different state’s court system tolls the statute of limitations for an individual that subsequently files suit in state court in the forum state.¹³⁸

135. See, e.g., *In re Vioxx*, 478 F. Supp. 2d at 902 (“Given that this MDL currently contains cases transferred from every State in the Union, and that federal jurisdiction in these cases is premised on diversity of citizenship, the Court could conceivably be faced with the task of applying each state’s statute of limitations in this multidistrict litigation.”).

136. See, e.g., *Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340, 355 (Md. Ct. App. 2006) (“We adopt the *American Pipe* class action tolling rule, and its extension in *Crown, Cork & Seal*.”); *Ling v. Webb*, 834 N.E.2d 1137, 1141–42 (Ind. Ct. App. 2005) (relying on *American Pipe* to conclude that “the commencement of a class action lawsuit tolls the applicable statute of limitations during the period between the filing of the action and the trial court’s ruling on the question of class certification”); *Am. Tierra Corp. v. City of W. Jordan*, 840 P.2d 757, 762 (Utah 1992) (adopting class action tolling “to avoid duplication of litigation, promote justice, do equity, and generally further the judicial efficiency and economy that class actions are designed to promote”); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 370 (Tex. Ct. App. 1987) (relying on *American Pipe* and *Crown, Cork & Seal* to hold that “the filing of the class action suspends the applicable statute of limitations as [to] all purported members of the class”); *White v. Sims*, 470 So. 2d 1191, 1193 (Ala. 1985) (“[W]e hold that the commencement of a class action tolls the statute of limitations until such time as an independent action is filed, or until the denial of class certification, whichever may first occur.”); see also, e.g., *Wade v. Danek Med., Inc.*, 182 F.3d 281, 286–87 (4th Cir. 1999) (collecting authorities); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 963–64 (N.J. Super. Ct. App. Div. 1999) (collecting authorities).

137. See *Wade*, 182 F.3d at 287 (noting that Virginia has not adopted the class action tolling doctrine); *Highland Park Ass’n of Bus. & Enters. v. Abramson*, 91 F.3d 143 (6th Cir. 1996) (unpublished table decision) (recognizing that Kentucky has never adopted the *American Pipe* doctrine).

138. Compare *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002) (allowing a putative class action filed in federal court to toll the statute of limitations for a plaintiff that subsequently filed an individual lawsuit in Ohio state court), with *Quinn v. Louisiana Citizens Property Ins. Corp.*, 118 So. 3d 1011, 1020 (La. 2012) (holding that “the suspension of prescription” provided by Article 596 of the Louisiana Code of Civil Procedure “applies only to petitions brought on behalf of a class in the state courts of Louisiana”) (internal quotation omitted), *Casey v. Merck & Co., Inc.*, 722 S.E.2d 842, 845 (Va. 2012) (“[T]here is no authority in Virginia jurisprudence for the equitable tolling of a statute of limitations based upon the pendency of a putative class action in another jurisdiction.”), *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 945 (Pa. Super. Ct.

Moreover, tolling itself operates in different ways in different states and it is well established that “when federal courts look to state law to provide the limitations period, they must also do so to determine the effect on that limitations period once class certification has been denied.”¹³⁹ Therefore, if an MDL transferee court determines that the applicable state law recognizes class action tolling, the court must then also determine how that tolling actually functions. Under state law, “[t]hree general tolling effects are possible: 1) suspension, 2) extension, and 3) renewal or revival.”¹⁴⁰

Under suspension, the plaintiff must file suit within the amount of time left in the limitation period on the day tolling took place. . . . The extension rule establishes fixed periods during which the plaintiff may file suit without regard to the length of the original limitation period or the amount of time left when the tolling began. . . . [Finally,] tolling may renew or revive the limitation period, giving the plaintiff the benefit of an entirely fresh time period.¹⁴¹

Although a detailed discussion of these various tolling effects is beyond the scope of this Article, the important points are that (1) state law governs tolling in personal injury cases and (2) that body of law consists of a complicated patchwork of tolling principles that differ from state to state. In short, MDL transferee courts must recognize that class action tolling is alive and well as a matter of

2002) (holding that “the filing of a class action in another state does not toll the statute of limitations as to a subsequent action filed in Pennsylvania’s state court system”), *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 807–08 (Tenn. 2000) (noting that Tennessee will not toll its statutes of limitations “pending a judicial outcome in a foreign jurisdiction”), and *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1103–05 (Ill. 1998) (rejecting cross-jurisdictional class action tolling). For a broad overview of cross-jurisdictional class action tolling, see generally David Bober, *Cross-Jurisdictional Tolling: When and Whether a State Court Should Toll Its Statute of Limitations Based on the Filing of a Class Action in Another Jurisdiction*, 32 SETON HALL L. REV. 617 (2002).

139. Lowenthal & Feder, *supra* note 21, at 544 (discussing the Supreme Court’s holding in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983)).

140. Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 689 (1985).

141. *Id.* at 689–90 (internal citations omitted). See also *Barasich v. Shell Pipeline Co.*, No. 05-4180, 2008 WL 6468611, at *6 n.7 (E.D. La. June 19, 2008) (recognizing that “[t]he denial of class certification has the effect of re-starting the running of prescription, and at this point, putative class members may choose to file their own suits, provided that those actions are instituted within the time that remains on the limitations period, or may elect to intervene as plaintiffs in the pending action”).

state law in various jurisdictions and should take steps to ensure that the class action tolling doctrine does not frustrate the fair and efficient resolution of modern mass tort litigation.

C. Class Action Tolling Can Undermine Efforts to Resolve Mass Tort Litigation

Although some states have established specialized statutes of limitations for specified causes of action (such as medical malpractice claims and wrongful death claims), most states utilize one-, two-, or three-year statutes of limitations for personal injury claims,¹⁴² though a few states employ longer limitations periods for such claims.¹⁴³ As the Supreme Court explained long ago, “such statutes ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.’”¹⁴⁴ Thus, statutes of limitations are premised on the idea “that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”¹⁴⁵ Class action tolling obviously frustrates this basic policy.

142. See, e.g., LA. CIV. CODE ANN. art. 3492 (2011) (establishing one-year prescriptive period for personal injury and wrongful death claims); TENN. CODE ANN. § 28-3-104 (Westlaw 2013) (establishing one-year limitations period for personal injury claims premised on theories of negligence and strict liability); KY. REV. STAT. ANN. § 413.140(1)(a) (Westlaw 2013) (establishing one-year limitations period for personal injury claims); 42 PA. CONS. STAT. ANN. § 5524(2) (Westlaw 2013) (establishing two-year limitations period for personal injury and wrongful death claims); 735 ILL. COMP. STAT. ANN. 5/13-202 (West 2011) (establishing two-year limitations period for personal injury claims); ALA. CODE § 6-2-38 (Westlaw 2013) (establishing two-year limitations period for personal injury claims); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2002) (establishing two-year limitations period for personal injury claims); CAL. CIV. PROC. CODE § 335.1 (West 2006) (establishing two-year limitations period for personal injury and wrongful death claims); IND. CODE ANN. § 34-1-2-2 (Westlaw 2013) (establishing two-year limitations period for personal injury claims).

143. See, e.g., FLA. STAT. ANN. § 95.11(3)(a) (Westlaw 2013) (establishing four-year limitations period for personal injury claims founded on negligence); MO. ANN. STAT. § 516.120(4) (Westlaw 2013) (establishing five-year limitations period for personal injury claims); N.D. CENT. CODE ANN. § 28-01-16(5) (Westlaw 2013) (establishing six-year limitations period for personal injury claims); ME. REV. STAT. ANN. tit. 14, § 752 (Westlaw 2013) (establishing a general six-year limitations period for all civil actions).

144. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944)).

145. *Id.* (quoting *Telegraphers*, 321 U.S. at 348–49); see also Wasserman, *supra* note 120, at 811–12 (discussing other interests that statutes of limitations serve).

In both *American Pipe* and *Crown, Cork & Seal*, the Supreme Court was concerned that its failure to adopt a class action tolling rule would lead to a “needless multiplicity of actions”¹⁴⁶ and would “deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the [class action] procedure.”¹⁴⁷ In short, the Court’s tolling rule was premised on the view that the class action device might obviate the need for individualized litigation—Thus, until class certification was denied, individuals were encouraged to sit tight and not burden the courts with “unnecessary filing of repetitious papers.”¹⁴⁸ But with the demise of personal injury litigation classes in the wake of *Amchem* and the emergence of multidistrict litigation, bellwether trials, and private mass tort settlements (not to mention electronic filing of court documents), the justification for class action tolling relied upon by the Supreme Court in 1974 has vanished in the personal injury context. Today, class action tolling for putative members of putative personal injury class actions actually threatens to undermine the laudable goal of “litigative efficiency.”¹⁴⁹

In contemporary mass tort litigation, requiring personal injury claimants to come forward individually in a timely fashion is not inefficient. At worst, if such plaintiffs file cases in local courts around the country, the JPML must order them transferred to the federal MDL forum as “tag-along” actions and the transferee court’s clerk’s office will be required to create new dockets for each individual case that comes into the MDL.¹⁵⁰ Alternatively, the transferee court (with the agreement of the defendant(s)) may allow individual plaintiffs to file cases directly into the federal MDL, regardless of venue constraints.¹⁵¹ Direct filing into an MDL “avoids the expense and delay associated with plaintiffs filing in

146. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351 (1983).

147. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

148. *Id.* at 550.

149. *Id.* at 556.

150. See Heyburn, *supra* note 7, at 2233 n.41 (“Panel Rule 1.1 defines *tag-along action* as ‘a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407.’”).

151. See *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 903–04 (E.D. La. 2007) (discussing a pretrial order that recognized the defendant’s agreement not to assert “any objection of improper venue” as to “cases filed directly in the Eastern District of Louisiana that emanate from districts outside the Eastern District of Louisiana”); see also *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Dec. 17, 2010) (Pretrial Order No. 20), available at <http://www.laed.uscourts.gov/OilSpill/Orders/PTO20.pdf> (authorizing direct filing “to eliminate the delays associated with transfer of cases filed in or removed to other U.S. District Courts, and to promote judicial efficiency”).

local federal courts around the country after the creation of an MDL and waiting for the [JPML] to transfer these ‘tag-a-long’ actions” to the transferee court.¹⁵² Or defendants may be willing to enter into tolling agreements with individual plaintiffs that eliminate the need for such plaintiffs to file lawsuits altogether.¹⁵³ The key point is that, whichever method is utilized, requiring individual plaintiffs to come forward does not burden the transferee judge or create inefficiencies in modern practice.

Moreover, this “multiplicity of actions” is essentially a prerequisite to the successful implementation of aggregate non-class settlements, which themselves are becoming increasingly ubiquitous.¹⁵⁴ As previously explained, “private mass tort settlements are only open to ‘eligible’ plaintiffs—that is, plaintiffs with pending claims as of a date certain, often the date on which the initial contract between plaintiffs’ liaison counsel and the defendant(s) is announced.”¹⁵⁵ It is perhaps obvious, but in order to make an appropriate aggregate settlement offer, the defendant needs to know approximately how many plaintiffs are asserting claims (and will therefore be dividing the aggregate settlement fund). Similarly, in order to be comfortable with making an aggregate settlement offer in the first place, most defendants will insist on some degree of certainty regarding the likelihood of future claims being filed after the settlement is announced.

For example, in the *Vioxx* pharmaceutical MDL, Merck first filed a motion for summary judgment seeking a definitive ruling on the applicability of *American Pipe* tolling on September 22, 2006—several months before the transferee court and several coordinating state court judges suggested that the parties begin settlement discussions. The transferee court denied Merck’s motion on March 22, 2007, in light of the “existence of factual disputes regarding both the triggering and tolling of the various limitations periods.”¹⁵⁶ Seven months later, in late October 2007, Merck filed three additional motions for summary judgment again seeking guidance concerning whether various states’ statutes of limitations would be found to have run out or instead been tolled by the class action tolling doctrine. In subsequent hearings and conferences, Merck’s

152. *In re Vioxx*, 478 F. Supp. 2d at 904.

153. “For example, in the *Vioxx* litigation, thousands of individuals had entered into ‘tolling agreements’ with Merck which tolled the statute of limitations and allowed individual claims to be ‘on file’ with the defendant without requiring plaintiffs to file an actual lawsuit, and those individuals were eligible to participate in the *Vioxx* Settlement.” Grabill, *supra* note 10, at 156.

154. *See supra* Part II.B.2.a.

155. Grabill, *supra* note 10, at 156.

156. *In re Vioxx*, 478 F. Supp. 2d at 901.

counsel left no doubt that such guidance was critical to Merck's settlement calculus. On November 8, 2007, recognizing that "the litigation [had] matured," the transferee court resolved Merck's renewed motions and held that various statutes of limitations had expired; in doing so, the court made clear that it would take a circumscribed approach to class action tolling—only applying the doctrine in limited circumstances that had been specifically authorized by the applicable state courts.¹⁵⁷ One day later, on November 9, 2007, the landmark \$4.85 billion private mass tort settlement in the *Vioxx* litigation was publicly announced.

Private mass tort settlements tend to occur after several years of litigation, during which time the applicable statutes of limitations should be running on potential claimants, such that defendants can theoretically take comfort in knowing in which states the door is "closed" before announcing a settlement offer. But class action tolling allows potential claimants who would otherwise have waited too long to file suit an extended period of time to come forward and thereby prevents defendants from having any such comfort.¹⁵⁸ In an era where litigation classes are no longer certified, the resulting uncertainty about the scope of a defendant's future liability cannot be justified and is likely to either delay or completely frustrate settlement efforts.

IV. MDL TRANSFEREE COURTS SHOULD SHORT-CIRCUIT THE CLASS ACTION TOLLING DOCTRINE

All is not lost, however, and MDL transferee courts need not wait for the Supreme Court and/or state courts of last resort to revisit their class action tolling holdings. Instead, by expeditiously issuing a short pretrial order that relies on the national trend rejecting certification of personal injury litigation classes,¹⁵⁹ transferee courts can short-circuit the class action tolling doctrine and maximize the chances for a fair and efficient resolution of mass tort multidistrict litigation without limiting the settlement approaches that can be

157. See *In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 801 (E.D. La. 2007) (noting that "[i]t is now clear that the factual disputes identified by the plaintiffs regarding when they knew or could have been put on notice of potential claims against Merck are baseless disputes"); *In re Vioxx Prods. Liab. Litig.*, 2007 WL 3353404 (E.D. La. Nov. 8, 2007); *In re Vioxx Prods. Liab. Litig.*, 2007 WL 3334339 (E.D. La. Nov. 8, 2007).

158. See, e.g., Cervený, *supra* note 140, at 704 ("In effect, the filing of an ineffective class action exposes the defendant to a universe of claimants beyond the presumed reasonable time period provided under the original statute of limitations.").

159. See *supra* notes 3–4; see also *supra* Part II.A.

employed once the litigation has matured. This Part begins by offering a proposed structure for such an “omnibus class action pretrial order” and explains why this type of order will not have collateral estoppel effect on a subsequent request for certification of one or more settlement classes. The Part then concludes by discussing several associated issues that may arise under the Class Action Fairness Act (CAFA) in connection with the issuance of an omnibus class action pretrial order.¹⁶⁰

A. Omnibus Denial of Class Action Status for Putative Litigation Classes

In light of the persistence of the class action tolling doctrine, the common-sense triage approach of transferee courts to defer consideration of class action issues in mass tort MDLs carries the unintended consequence of possibly delaying or completely preventing a successful resolution of such litigations by injecting uncertainty about both the current and future plaintiff populations. Accordingly, transferee courts should reexamine their current tendency to defer consideration of class action issues in mass tort MDLs and instead issue an omnibus class action pretrial order at the inception of any MDL that contains at least one putative personal injury class action. That omnibus order should do at least four things: (i) strike all current and future personal injury class allegations from all current and future complaints in the MDL; (ii) deny all current and future requests for personal injury claims to be certified as litigation classes; (iii) explicitly provide that the purpose of the order is to suspend any and all tolling of the applicable statute(s) of limitations that might otherwise occur as a result of the class action tolling doctrine; and (iv) make clear that the parties are not precluded from subsequently seeking certification of one or more settlement classes.

Although an omnibus class action pretrial order could be crafted in many different ways to accomplish these central purposes, some exemplary language is set forth below by way of illustration:

This Order shall govern all cases (1) transferred to this Court by the Judicial Panel on Multidistrict Litigation (“JPML”) pursuant to its Order of [*insert date of initial JPML Order creating the MDL proceeding*]; (2) any tag-

160. Given that putative single-state class actions may remain in state court under CAFA’s exceptions, *see infra* note 172, state courts should also strive to strike personal injury class allegations as soon as possible after such allegations are filed and/or otherwise deny class action status to putative personal injury class actions in an expeditious fashion.

along actions subsequently transferred to this Court by the JPML pursuant to Rule 7.4 of the Rules of Procedure of that Panel; and (3) all related cases originally filed in this Court or otherwise transferred or removed to this Court.

To facilitate the efficient and effective management and prosecution of the coordinated actions in this MDL and to minimize any potentially harmful impacts of the class action tolling doctrine,

(i) IT IS HEREBY ORDERED that, in light of the overwhelming weight of authority rejecting the certification of personal injury claims as class actions for purposes of adjudication pursuant to Fed. R. Civ. P. 23, (a) paragraphs of the complaint in [*insert paragraph references and case captions for any complaints filed in cases currently in the MDL that contain personal injury class action allegations*] which contain personal injury class action allegations, are hereby STRICKEN and (b) any similar paragraphs containing personal injury class action allegations in complaints in any tag-along actions subsequently transferred to this Court by the JPML pursuant to Rule 7.4 of the Rules of Procedure of that Panel or any related cases that are subsequently originally filed in this Court or otherwise transferred or removed to this Court are DEEMED STRICKEN by operation of this Order as of the date that such tag-along actions or related cases join this MDL.

(ii) IT IS FURTHER ORDERED that, in light of the overwhelming weight of authority rejecting the certification of personal injury claims as class actions for purposes of adjudication pursuant to Fed. R. Civ. P. 23, (a) the requests for class certification contained in [*insert references to any pending motions in cases currently in the MDL for certification of personal injury claims as litigation classes, regardless of whether those motions were filed before or after the cases joined the MDL*] are DENIED, (b) any similar motions for certification of personal injury claims as litigation classes that may be filed in this Court in the future in any tag-along actions subsequently transferred to this Court by the JPML pursuant to Rule 7.4 of the Rules of Procedure of that Panel or any related cases that are subsequently originally filed in this Court or otherwise transferred or removed to this Court are DEEMED DENIED by operation of this Order as of the date that such motions are filed, and (c) any similar motions for certification of personal injury claims as litigation classes that are, or may already have been, filed in any tag-along actions

subsequently transferred to this Court by the JPML pursuant to Rule 7.4 of the Rules of Procedure of that Panel or any related cases that are subsequently originally filed in this Court or otherwise transferred or removed to this Court prior to any such tag-along actions or related cases joining this MDL are DEEMED DENIED by operation of this Order as of the date that such tag-along actions or related cases join this MDL.

(iii) IT IS FURTHER ORDERED that this Order does not preclude any party from subsequently seeking certification of one or more settlement classes pursuant to Fed. R. Civ. P. 23.

The provisions of this Order are provisional and may be modified in the interests of justice, expedience, or judicial economy on the Court's own motion or upon motion by any party for good cause shown.

Prior to issuing an omnibus class action pretrial order along these lines, the transferee court should consider asking liaison counsel to review the complaints and dockets in all cases that comprise the MDL (including all pending cases that were transferred by the JPML to the transferee court in the JPML's initial order creating the MDL and all pending cases that were originally filed in or otherwise transferred or removed to the transferee court) to ensure both that (i) any paragraphs in those complaints containing personal injury class action allegations and (ii) any motions for class certification that may have been filed in any such cases are referenced in the applicable provisions of the omnibus class action pretrial order. Of course, in addition to relying on liaison counsel, the transferee court may also wish to conduct its own review of these materials prior to issuing an omnibus class action pretrial order.

Although the omnibus class action pretrial order proposed above could be entered by transferee courts *sua sponte*, MDL defendants would be well advised to make a habit of requesting such relief to ensure that the pendency of personal injury class allegations is immediately brought to the attention of transferee courts.¹⁶¹ Notably, the U.S. Court of Appeals for the Sixth Circuit recently held that the fact that a "motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's

161. See *Barasich v. Shell Pipeline Co.*, No. 05-4180, 2008 WL 6468611, at *2 (E.D. La. June 19, 2008) (noting that courts "may dismiss class allegations via a motion for judgment on the pleadings under Rule 12(c) and/or via a motion to strike under Rule 12(f)").

decision reversibly premature.”¹⁶² Indeed, the Supreme Court has recognized that although class certification issues generally involve “considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action . . . [s]ometimes the issues are plain enough from the pleadings.”¹⁶³ Today, based on a long line of well-reasoned precedent, it is “plain enough” that personal injury claims cannot be certified as litigation classes.

B. Parties Can Subsequently Seek Certification of Settlement Classes

Given that mass tort litigation continues to occasionally be resolved via class action settlements, MDL transferee courts must be careful not to prematurely cut off the parties’ ability to use the class action device to achieve global resolution if it is desired and appropriate. Provided that it is structured properly, however, the omnibus class action pretrial order proposed above will not have preclusive effect nor prevent the parties from seeking certification of (or the court from certifying) a subsequent settlement class for two reasons.¹⁶⁴

First, as an initial matter, Rule 23(c)(1)(C) provides that “[a]n order that grants or denies class certification may be altered or amended before final judgment.”¹⁶⁵ Thus, it has been argued that “as

162. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011) (affirming district court order granting defendants’ motion to strike class action allegations). *See also* *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 941 (9th Cir. 2009) (“A defendant may move to deny class certification before a plaintiff files a motion to certify a class.”); *Salvant v. Murphy Oil USA, Inc.*, No. 06-8700, 2007 WL 2344912 (E.D. La. Aug. 13, 2007) (granting defendant’s Rule 12(c) motion for judgment on the pleadings on plaintiffs’ request for certification of a personal injury class action in a case alleging exposure to sulfur dioxide fumes released from an oil refinery).

163. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

164. Issue preclusion prevents “successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.” *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001). Typically, “[i]t is the duty of the second trial court—which knows both what the earlier finding was and how it relates to a later case—to independently determine what preclusive effect a prior judgment may be given.” *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1339 (M.D. Fla. 2008). Of course, in MDL proceedings, the transferee court will likely issue the initial omnibus class action pretrial order *and* subsequently determine its preclusive effect.

165. *FED. R. CIV. P. 23(c)(1)(C)*. *See also* *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 n.7 (2013) (Ginsburg, J. and Breyer, J., dissenting) (“[A] certification order may be altered or amended as the case unfolds.”); *Falcon*, 457 U.S. at 160 (“[E]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.”); *Coopers &*

a nonfinal decision that can be reviewed at any time during the proceeding, [such an order] cannot be afforded the ‘definiteness’ of preclusion.”¹⁶⁶ Second, even if the omnibus class action pretrial order could be considered final, it would have no preclusive effect on later efforts to certify a settlement class because the Rule 23 inquiry for settlement classes differs from the inquiry for litigation classes.¹⁶⁷

The Supreme Court’s recent decision in *Smith v. Bayer* is instructive on this point and leaves no doubt that an omnibus class action pretrial order crafted along the lines proposed above would not prevent the subsequent certification of a settlement class.¹⁶⁸ In *Smith*, the Supreme Court held that a federal court’s denial of class certification under Rule 23 does not preclude the same putative plaintiff class from subsequently seeking certification in state court under a state-law analog of Rule 23 (provided that the state-law analog is not identical to Rule 23).¹⁶⁹ Given that the Rule 23 analysis is different for litigation and settlement classes, the Supreme Court’s reasoning in *Smith* suggests that an order denying certification of a litigation class would not prevent the exact same putative class from later seeking certification of a settlement class. Thus, regardless of the increasing rarity of class action settlements in mass tort litigation, MDL transferee courts can issue an omnibus class action pretrial order without prematurely cutting off the parties’ subsequent ability to seek to use the class action device to implement a global settlement.

C. CAFA Considerations

As noted above, there is a general prohibition against “stacking” class actions for purposes of tolling.¹⁷⁰ In other words, it is typically only the first putative class action that is filed that can toll the applicable statute(s) of limitations for putative members of that class—Any subsequent related putative class actions that are filed are generally irrelevant for purposes of tolling. Therefore, it is at least theoretically possible that the operative putative class action for tolling purposes in any given MDL (i.e., the first such case to be

Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978) (“[A] district court’s order denying or granting class status is inherently tentative.”).

166. Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023, 1036 (2012).

167. *See supra* Part II.B.2.b.

168. 131 S. Ct. 2368 (2011).

169. *Id.* at 2382.

170. *See supra* note 130.

filed) may remain in state court for jurisdictional reasons and not be subject to the omnibus class action pretrial order proposed above. However, CAFA has largely minimized the potential harm associated with this theoretical possibility.

CAFA's expanded minimal diversity provisions ensure that most multistate and nationwide putative class actions are now removable to federal court and, thus, subject to MDL consolidation.¹⁷¹ In very general terms, the only putative class actions likely to remain in state court in the mass tort context post-CAFA are single-state class actions—that is, putative classes defined to include only individuals from the forum state.¹⁷² Thus, in the post-CAFA world, it is extremely unlikely for any putative class action with the potential to toll the applicable statutes of limitations for mass tort plaintiffs from multiple states to remain in state court. Rather, the more likely scenario is that, for a given mass tort, plaintiffs from several states may enjoy the benefits of tolling by virtue of the filing of a single-state putative class action in their home state that is not removable under CAFA—provided, of course, that the relevant state courts do not immediately strike such personal injury class allegations or otherwise expeditiously deny class action status to those cases.¹⁷³

171. See 28 U.S.C. § 1332(d)(2)(A) (2006) (expanding diversity jurisdiction to putative class actions where the amount in controversy exceeds \$5 million and “any member of a class of plaintiffs is a citizen of a State different from any defendant”). CAFA also expands diversity jurisdiction to “mass actions,” which are defined as civil actions “in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” *Id.* § 1332(d)(11)(B)(i). It should be noted, however, that CAFA prohibits MDL consolidation of cases removed to federal court under the “mass action” provision, unless “a majority of the plaintiffs in [the mass action] request transfer pursuant to section 1407,” the mass action is “certified pursuant to [R]ule 23 of the Federal Rules of Civil Procedure,” or “plaintiffs propose that the [mass] action proceed as a class action pursuant to [R]ule 23 of the Federal Rules of Civil Procedure.” *Id.* § 1332(d)(11)(C)(i)–(ii). Citing these provisions, the JPML recently refused to order MDL consolidation of several cases that had been removed to federal court on the basis of CAFA’s mass action provision. See *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, 923 F. Supp. 2d 1376, 1380 (J.P.M.L. 2013).

172. See 28 U.S.C. § 1332(d)(4) (2006) (providing that CAFA’s expanded minimal diversity provisions do not apply when more than two-thirds of the putative class members and the primary defendants are citizens of the forum state); *Id.* § 1332(d)(3) (providing that courts have discretion to decline jurisdiction when more than one-third but less than two-thirds of the putative class members and the primary defendants are citizens of the forum state).

173. As far as theoretical possibilities go, it is conceivably possible that the omnibus class action pretrial order proposed above could be neutralized if separate single-state putative class actions are filed in each of the state court systems that authorize the use of class actions *before* any multistate or nationwide class actions

Finally, it should also be noted that transferee courts need not worry that, by issuing an omnibus class action pretrial order, they may unwittingly lose subject matter jurisdiction over putative class actions in the MDL that have been filed or removed solely upon the basis of CAFA's minimal diversity provisions. Shortly after CAFA was enacted, some district courts initially concluded that because CAFA's expanded minimal diversity provision applies "to any class action before or after the entry of a *class certification order* by the court with respect to that action"¹⁷⁴ and given that a "class certification order" is defined as "an order issued by a court *approving* the treatment of some or all aspects of a civil action as a class action,"¹⁷⁵ then the subject matter jurisdiction conferred by CAFA must be lost after denial of class certification because the case is "no longer a class action."¹⁷⁶ But the federal courts of appeals have now weighed in and made clear that the denial of class certification does not strip courts of subject matter jurisdiction under CAFA.¹⁷⁷ As Judge Posner explained, this is because "jurisdiction attaches when a suit is filed as a class action, and that invariably precedes certification."¹⁷⁸ Accordingly, the issuance of an omnibus

are filed in connection with a given mass tort. But that remote possibility should not deter transferee courts from making a habit of issuing an omnibus class action pretrial order at the inception of any MDL that contains at least one putative personal injury class action.

174. 28 U.S.C. § 1332(d)(8) (2006) (emphasis added).

175. *Id.* § 1332(d)(1)(C) (emphasis added).

176. *Ronat v. Martha Stewart Living Omnimedia*, No. 05-520, 2008 WL 4963214, at *7 (S.D. Ill. Nov. 12, 2008). *See also* *McGaughey v. Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at *3 (S.D.N.Y. Jan. 4, 2007).

177. *See* *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1092 (9th Cir. 2010) ("If a defendant properly removed a putative class action at the get-go, a district court's subsequent denial of Rule 23 class certification does not divest the court of jurisdiction, and it should not remand the case to state court."); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806–07 (7th Cir. 2010) (holding that "federal jurisdiction under [CAFA] does not depend on certification"); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009) (noting that "jurisdictional facts are assessed at the time of removal" and that "post-removal events (including non-certification, de-certification, or severance) do not deprive federal courts of subject matter jurisdiction"); *see also* G. Shaun Richardson, *Class Dismissed, Now What? Exploring the Exercise of CAFA Jurisdiction After the Denial of Class Certification*, 39 N.M. L. REV. 121, 135 (2009) (arguing that "CAFA cannot be read to require certification of a class or the continuing presence of a class as a prerequisite to the exercise of CAFA jurisdiction").

178. *Cunningham Charter*, 592 F.3d at 806 ("All that section 1332(d)(1)(C) [which defines 'class certification order'] means is that a suit filed as a class action cannot be *maintained* as one without an order certifying the class. That needn't imply that unless the class is certified the court loses jurisdiction of the case.").

class action pretrial order will not undermine an MDL transferee court's jurisdiction over putative class actions.

V. CONCLUSION

Notwithstanding that personal injury claims are no longer certified as litigation classes, the pesky persistence of the class action tolling doctrine allows potential mass tort plaintiffs' individual statutes of limitations to be tolled in many jurisdictions by virtue of nothing more than the filing of a putative personal injury class action in a related case—provided that courts do not immediately strike such class allegations or otherwise deny class action status to personal injury claims as soon as they become aware of them. And in contemporary multidistrict litigation, which is increasingly being resolved by non-class aggregate settlements, it is simply not the case that “a little tolling never hurt anyone.” Rather, by permitting and/or encouraging potential plaintiffs to sit in the shadows and not come forward to assert their claims, the class action tolling doctrine can delay and altogether undermine efforts to resolve modern mass tort litigation by creating disabling uncertainty about current and future plaintiff populations.

Accordingly, this Article has proposed that transferee courts should reexamine their current tendency to defer consideration of class action issues in mass tort MDLs. Instead, transferee courts should issue an “omnibus class action pretrial order” at the inception of any MDL that contains at least one putative personal injury class action. That omnibus order should do at least four things: (i) strike all current and future personal injury class allegations from all current and future complaints in the MDL; (ii) deny all current and future requests for personal injury claims to be certified as litigation classes; (iii) explicitly provide that the purpose of the order is to suspend any and all tolling of the applicable statute(s) of limitations that might otherwise occur as a result of the class action tolling doctrine; and (iv) make clear that the parties are not precluded from subsequently seeking certification of one or more settlement classes. Such an order would short-circuit any harmful impact that the class action tolling doctrine might otherwise impose without precluding the parties from subsequently seeking to use the class action device to implement a global settlement, and it is a modest modification of current MDL practice that should be implemented in mass tort cases.