Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements

L. Elizabeth Chamblee
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I. INTRODUCTION

The potential for attorneys to collude in reaching a settlement agreement arises in any large-scale aggregation of mass torts. In the 1990s, attorneys settled seventy-four percent of the mass tort cases consolidated for transfer by the Judicial Panel on Multidistrict Litigation. ¹ Even though most mass tort litigation settles, the judicial

<table>
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<th>Predominant Mode of Resolution</th>
<th>Motion Granted</th>
<th>Motion Denied</th>
<th>Total</th>
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<td>Group Settlement, Outside of Class Actions</td>
<td>9 (29%)</td>
<td>1 (8%)</td>
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<td>2 (6%)</td>
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<td>12 (39%)</td>
<td>2 (17%)</td>
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<td>Individual Litigation</td>
<td>8 (26%)</td>
<td>9 (75%)</td>
<td>17 (40%)</td>
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Deborah R. Hensler, The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation, 31 Seton Hall L. Rev. 883, 902 (2001). This table indicates that transferee courts dispense with seventy-four percent of multidistrict litigation through settlements. Hensler's findings are consistent with previous observations about the remand rate to transferor courts. See Patricia D. Howard, A Guide to Multidistrict Litigation, 124 F.R.D. 479, 480 (1989) (noting that the Panel remanded only 2,600 out of 16,700 total actions brought before it in the 1980s); Judith Resnik, Aggregation, Settlement, and Dismay, 80 Cornell L. Rev. 918, 928 (1995). In 1997, Judge Weigel observed that the remand rate to transferor courts was only five percent. Stanley A. Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575,
system ensures the fairness and integrity of settlements only in the bankruptcy and class action contexts. Consequently, the fairness of the settlement can vary depending on how the judicial system aggregates the claims. Only thirty-nine percent of aggregated claims resulted in class action settlements. Two percent received bankruptcy protections. Approximately forty percent of the mass tort settlements settled outside the scope of judicial review and received no procedural assurances of fairness.

A traditional understanding of mass tort litigation views all aggregation as class action. As this view holds, class actions deserve special procedural safeguards because they include absent class members. Other forms of litigation allocate autonomy to the individual to make decisions about the conduct of litigation, the course of settlement negotiations, and other decisions conventionally in the scope of the lawyer-client relationship. In non-class litigation, the conventional view assumes that clients protect their own interests by monitoring attorney conduct, choosing when and how to settle, and determining whether to proceed to trial. In class actions, class counsel has a duty to protect the interests of the class as a whole, and counsel’s decisions bind all class claimants. The individual in a class action has little authority over the conduct of the action, yet remains bound by the ultimate decision. Therefore, judges must approve settlement terms and attorneys’ fees as well as ensure that attorneys adequately represent claimants.

Although this traditional understanding appropriately differentiates between class actions and individual representation, it

583 (1978).
3. See Hensler, supra note 1. Thirty-four percent of settlements after consolidation occurred outside of the class action context.
4. See Hensler, supra note 1.
5. See Hensler, supra note 1. Seventy-four percent of the mass tort litigation resulted in settlement. Thirty-nine percent of those settlements were not class actions.
8. See Cramton, supra note 7, at 822 (“Collective justice also departs from the normal lawyer-client relationship in which the client makes decisions concerning objectives and the client’s lawyer makes tactical and procedural decisions.”).
10. See id.; see also Cramton, supra note 7, at 822 (“Class action law even permits class counsel to submit a settlement to the court that some or all of the class representatives oppose.”).
fails to recognize that not all large-scale aggregation satisfies the requirements for class certification. A fluid ground exists between individual representation and class actions. With the rise of mass torts, courts aggregate claims through party joinder, statewide aggregation, bankruptcy, consolidation, and federal multidistrict litigation transfer. Yet, because many of the prerequisites to joinder require only common facts—not the predominance of common facts required for Rule 23(b)(3) class status—courts validly aggregate many claims that fail to meet the requirements of Federal Rule of Civil Procedure 23.

The concerns and symptoms of settlement collusion in class actions are nearly identical to those in post-aggregation settlements: a few attorneys who specialize in representing mass tort victims and defendants have repeated contact with one another and with the transferee judge who handles the factually similar claims. Allowing aggregation of these claims in a single forum combined with "repeat player" attorneys presents opportunities for collusion. Also, mass

11. The Supreme Court's decisions in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997), and Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295 (1999), made it more difficult to certify cases for settlement purposes only. See infra Part V.A.

12. See Judith Resnik, Litigating and Settling Class Actions: The Prerequisites of Entry and Exit, 30 U.C. Davis L. Rev. 835, 861 (1997) ("All of us who think about class actions or other forms of aggregation must confront that aggregates range in size, in kinds and values of claims, in dimensions of legal and factual complexity not easily mapped in the current iterations; and moreover the variations are always and unendingly changing.").


14. See, e.g., Cal. Civ. Proc. Code § 404 (2004) (permitting coordination of cases containing common questions of fact); Fla. R. Civ. P. 1.270 (allowing the court to consolidate actions involving a common question of law or fact for joint hearings, trials, or other motions that "may tend to avoid unnecessary costs or delay"); Ga. Code Ann. § 9-11-42 (2004) (allowing the court, with party consent, to order a joint hearing or trial of any or all issues to avoid unnecessary costs or delay).

15. See infra Part V.B.


20. See generally Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985) ("Because of the potential for a collusive settlement, a sellout of a highly meritorious claim, or a settlement that ignores the interests of minority class members, the district judge has a heavy duty to ensure that any settlement is 'fair, reasonable and adequate' . . ."); see also infra Part II.B.
tort claimants have an attenuated attorney-client relationship with their lawyer and exercise little or no meaningful control over their case.\textsuperscript{21} In any type of aggregated mass tort litigation, federal judges feel a mounting pressure, be it real or perceived, to efficiently dispose of the cases, which encourages them not to question the settlement terms.\textsuperscript{22} In short, collective representation, without the judicial supervision incorporated into the class action and bankruptcy schemes, permits collusion and inequitable settlement allocations that lead to second-class justice for mass tort claimants.\textsuperscript{23} Consequently, the judicial system should permit transferee judges to approve post-aggregation settlements using some of the same protective mechanisms contained in Rule 23.

Even though legal literature contains an abundance of information about class action settlements, the aspect of collusion in non-class post-aggregation settlements has largely gone unnoticed.\textsuperscript{24} Accordingly, Part II creates a framework for understanding the variations between types of mass torts and explains how collusion can occur within various methods of aggregation. Part II.A defines the different categories of mass torts and highlights the effects of the recent Multiparty, Multiforum Trial Jurisdiction Act of 2002 on single-event mass accidents.\textsuperscript{25} Because the category of dispersed/personal injury mass torts has been the most visible, this article primarily uses those as examples even though the article's analysis applies to all types of mass torts. Part II.B pinpoints three primary conditions that contribute to collusion—repeat attorneys specializing in mass torts, a single forum, and an overburdened court—and illustrates how collusion occurs in mass tort settlements through reverse auctions and issue preclusion. Part II.C considers the methods for and limits on aggregation, including removal, the All Writs Act,\textsuperscript{26} class actions, consolidation, and change of venue. In discussing the methods for aggregation, this Part incorporates and analyzes the 2003 amendments to Rule 23. Part III expands the initial framework in Part II to include the historical purpose and function of the Judicial Panel on Multidistrict Litigation (the Panel).

\textsuperscript{21} Counsel directs his or her loyalty to the group as a whole, not the individual. Individual consent to the settlement terms is illusory since claimants must choose between settlement and the costs of funding separate litigation against defendant corporations.

\textsuperscript{22} See infra Part III; see also Resnik, supra note 1, at 937–39.

\textsuperscript{23} See Erickson, supra note 6, at 525.

\textsuperscript{24} Several commentators have discussed the ethical problems caused by aggregated settlements. See id. at 519; Paul D. Rheingold, Ethical Constraints on Aggregated Settlements of Mass Tort Cases, 31 Loy. L.A. L. Rev. 395 (1998).


\textsuperscript{26} See supra note 150.
By identifying the need to streamline the federal courts’ approach to mass torts as the Panel’s primary objective, this Part begins to flesh out the origins of a push toward expediency without a counterbalance for fairness.

Part IV develops this impulse toward efficiency by examining two recent Congressional proposals. Part IV.A analyzes the Multidistrict Litigation Restoration Act of 2004, which if passed, will reverse the Supreme Court’s decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*. The *Lexecon* Court rejected the long-standing practice of permitting the transferee court (the court that would receive mass tort litigation from the Panel) to transfer jurisdiction to itself for trial purposes. Allowing the transferee court to retain trial jurisdiction increases the pressure on defendants to settle, which in turn may inflate the number of inadequate settlements. Part IV.B explains and questions the Class Action Fairness Acts, which purport to limit the role of the Panel by preventing it from transferring certain litigation removed from state courts. Even though the bill limits consolidation of actions that do not allege class status, nothing in the bill prevents the court from transferring venue to the court with the majority of similar litigation, then consolidating the actions under Federal Rule of Civil Procedure 42(a). This aggregation also encourages settlement by threatening defendants with more claims.

Part V contrasts the mounting pressure by Congress and the lower courts to streamline mass torts with the Supreme Court’s concern about fairness. Part V.A assesses the Court’s recognition of the potential for collusion in settlements through its rejection of two asbestos class action settlements, *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.* This Part argues that had the Court focused on efficiency, it could have affirmed the settlements and eradicated much of the asbestos litigation. Yet, the Supreme Court concentrated not on streamlining cases, but on fairness. Part V.B considers the fairness aspects of using bankruptcy as an alternative to class actions by examining the Dalkon Shield litigation. Part V.C raises the concern that aggregation “blackmails” defendants into settlement and questions whether success is appropriately measured by settlement. By raising the conflicting goals of the tort system, this Part emphasizes the need to reach a balance between fairness and efficiency.

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Part VI proposes that Congress amend the multidistrict litigation statute to permit judicial oversight of post-aggregation settlements. Part VI.A. begins by critiquing past proposals to change the mass tort system and observes that many of these proposals mirror the urgency felt by the lower courts and Congress in response to anomalies like the asbestos litigation. Upon concluding that these proposals do not recognize or resolve the potential problems with collusion in aggregated settlements, Part VI.B. recommends that Congress amend the multidistrict litigation statute to permit the Panel to endow the transferee court with the power to oversee and authorize settlements outside the class action mechanism. Part VI.C. identifies features of a valid non-class aggregated settlement by applying pertinent characteristics of a legitimate class action settlement and suggesting factors that probe the fairness of settlements.

II. THE LANDSCAPE OF MASS TORTS AND CONSOLIDATION

Traditional tort law never imagined the possibility of collusion between attorneys because they argued ardently for their clients and the system incorporated a balanced method for redressing wrongs through the dual notions of fairness and efficiency. In individual cases, the traditional adversarial system continues to preserve the integrity of the tort system. In the mass tort setting, however, the adversarial system breaks down as collective representation replaces individual representation and collective settlement replaces trial. Attorneys specializing in certain types of mass torts may represent hundreds of claimants and the attorneys’ decisions to settle or litigate affect all of their clients as well as similarly situated claimants. Consequently, the notions of fair play and substantial justice envisioned in the traditional adversarial process—that counsel prevents coercion and adversaries promote reliability—collapses. This section begins by describing the differences between categories of mass torts. It then explains how the complex nature of mass torts leads to specialization and collusion in settlements. Finally, it

32. Mary J. Davis, Toward the Proper Role for Mass Tort Class Actions, 77 Or. L. Rev. 157, 159 (1998); see also Diana E. Murphy, Unified and Consolidated Complaints in Multidistrict Litigation, 132 F.R.D. 597, 598 (1991) (identifying the promotion of efficiency as one of the most important factors for transferee judges).

33. See Paradise v. Wells, 686 F. Supp. 1442, 1444 (M.D. Ala. 1988) ("It is equally well established, however, that the settlement process is more susceptible that [sic] the adversarial process to certain types of abuse and, as a result, a court has a heavy, independent duty to ensure that the settlement is 'fair, adequate, and reasonable,' for example, the interests of the class lawyer and the class may diverge, or a majority of the class may wrongfully compromise, betray, or 'sell-out' the interests of a minority.").
illustrates and elaborates on the procedural mechanisms that courts use to aggregate claims and efficiently handle mass torts.

A. Separating and Defining Mass Torts

Any measured approach to mass torts first requires an identification and definition of the general term "mass torts," a calculation of when a tort transforms into a mass tort, and a classification of the general categories of mass torts. The broad term mass tort can refer to anything from an airplane crash, to a chemical spill, to a defective product affecting a considerable number of people. One definition, proposed by the American Bar Association (ABA) Commission on Mass Torts, limits "mass tort litigation" to "at least 100 civil tort actions arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of $50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property."34 By confining the definition of mass torts to an arbitrary number of claims,35 the ABA unnecessarily excluded accidents typically considered mass torts, such as hotel fires or airplane crashes with less than a hundred claimants.36

34. American Bar Association Commission on Mass Torts, Report to the House of Delegates 12 (1989) [hereinafter ABA Report]. Given that the amount in controversy requirement increased to $75,000, the ABA probably would amend the $50,000 to $75,000. See 28 U.S.C. § 1332(a) (2000) (requiring at least $75,000). Paul Rheingold, a dissenting member of the ABA Commission, proposed a definitional threshold of at least "10,000 present and reasonably to be expected cases." ABA Report, supra note 34, at 8e.


36. As the Manual for Complex Litigation noted, "Courts have long recognized the need for special case-management practices in single incident mass torts, such as a hotel fire, the collapse of a structure, the crash of a commercial airliner, a major chemical discharge or explosion, or an oil spill." Manual for Complex Litigation (Fourth) § 22.1, at 343–44 (2004); see also William W. Schwarzer et al., Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts, 73 Tex. L. Rev. 1529, 1542 (1995). Litigants often seek to consolidate these types of claims through multidistrict litigation, even when the accidents include as few as eleven claims. For example, the Judicial Panel on Multidistrict Litigation consolidated eleven claims arising out of the 721 Dupont Plaza, Puerto Rico Fire. Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation, at 2 of the Summary by Docket of Multidistrict Litigation Pending as of September 30, 2003 or Closed Since October 1, 2002 (2003), available at http://www.jpml.uscourts.gov/StatisticalAnalysis2003.pdf.
The Advisory Committee on Civil Rules and the Working Group on Mass Torts set forth a better working definition of the broad category, stating, "Mass tort litigation emerges when an event or series of related events injure a large number of people or damage their property." Consequently, the general definition of mass torts need not reach an arbitrary threshold of claimants. Instead, the operational issue is whether a particular group of claims needs special judicial management.

The nature and types of claims calling for special judicial management fall into four rough categories: mass accidents, dispersed/personal injury mass torts, property damage mass torts, and economic loss torts. A brief examination of each category and its unique issues helps explain the failure of sweeping legislative tort reforms in response to anomalous mass torts with over 1,000 claims such as asbestos, Agent Orange, or Dalkon Shield. The distinct issues of causation and injury that arise in different categories make it impossible to implement rigid reforms directed toward mass torts as a general category. Without including flexibility that permits judges to use judicial discretion in managing a mass tort according to its unique characteristics, reforms that purport to overhaul the system of mass torts have not succeeded.

1. Mass Accidents

One of the most newsworthy categories of mass torts is mass accidents. Mass accidents, or single incident/single-event mass

38. Professor Edward H. Cooper noted that the "mass" in mass torts is not so easily defined. He observed:
   It is possible to pick a numerical threshold and that may be desirable for reform legislation. The number is likely to be rather high. Two hundred and fifty actions arising from common facts, or one thousand, may be handled by the collective resources of state and federal courts without significant disruption. But something more than the impact on the judicial system must affect the choice of a number. It must also take account of the impact on the tort claims.
41. See infra Part IV.A.
42. See infra Part IV.A.
43. For example, the Panel transferred the September 11 terrorist attack litigation to Judge Richard C. Casey in the Southern District of New York on
torts, usually involve one catastrophic event that causes harm to a readily identifiable group of putative plaintiffs. As the Working Group on Mass Torts indicated:

Typically, plaintiffs in a single event mass tort share the common characteristics of time, place, and cause of injury. Liability is usually governed by the law of a single forum, although damages might not be. Issues of science are usually resolved with existing knowledge and with the kind of expert testimony conventionally employed in tort litigation. What is different from the ordinary two- or three-party tort is the number of people affected and the stakes involved, not the facts or the law.

Typical cases involve fires, airplane crashes, or environmental hazards such as oil spills or major chemical discharges.

Litigants may aggregate single-event torts in federal court under the new Multiparty, Multiforum Trial Jurisdiction Act (MMTJA) of 2002. This Act grants federal courts original jurisdiction over “any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location.” Minimal diversity exists “if any party is a citizen of a State and any adverse party is a citizen of another state . . . .” Congress created an exception to the removal of single-event torts that requires federal courts to abstain from hearing a case in which “(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also

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45. Id.
49. Id. § 1369(c)(1).
citizens; and (2) the claims asserted will be governed primarily by the laws of that State." 50

The Act defines neither "primary defendant," which could lead to substantial litigation in the event of an airplane crash involving suits against both the product manufacturer and the airline, nor "substantial majority," which leaves courts a wide margin of discretion for either accepting or declining jurisdiction. 51 Presumably, plaintiffs could defeat minimum diversity and federal jurisdiction by excluding defendants with their primary place of business in the state of the crash site. This furthers plaintiffs' current practice of adding non-diverse defendants to defeat federal jurisdiction and encourages them to add a "substantial majority" of intrastate defendants should they wish to remain in state court. The MMTJA requires district courts to notify the Judicial Panel on Multidistrict Litigation when a party brings a claim under the Act, 52 and its legislative history specifically exempts mass tort injuries such as asbestos and breast implants. 53

Before the MMTJA and the use of the class action as a procedural device to aggregate this type of tort, many courts followed the 1966 Advisory Committee Note to Federal Rule of Civil Procedure 23 that advised courts not to certify mass accidents as class actions because they may present "significant questions, not only of damages but of liability and defenses of liability,... [which] affect the individuals in different ways." 54 Until the late 1980s, appellate courts reversed most district courts that certified mass tort actions. 55 Yet, as noted by the Fifth Circuit, "[t]he courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters." 56 In the wake of the asbestos litigation (a type of dispersed/personal injury mass tort), a number of courts disregarded the advisory committee's recommendation and certified single-event mass torts when the common event satisfied Rule 23(b)(3)'s

50. Id. § 1369(b).
53. H.R. Rep. No. 107-14, at 29 (2001) ("This does not deal with cases like the asbestos case. This is a single-accident case, again, such as a plane crash or a train wreck.").
56. Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986).
predominance requirement.\textsuperscript{57} Mass accidents present courts with less variation as to legal claims, which makes class treatment more appropriate.\textsuperscript{58} Even if a judge determined that the single-event claims did not meet the prerequisites for class certification, the cases may qualify for federal jurisdiction according to the MMTJA, and then consolidation pursuant to either the procedures for multidistrict litigation or Federal Rule of Civil Procedure 42(a).\textsuperscript{59}

2. Dispersed/Personal Injury Mass Torts

Dispersed mass torts comprise a middle ground between mass accidents and mass personal injuries caused by similar products or exposure to analogous substances.\textsuperscript{60} Commentators often refer to dispersed mass torts as "personal injury mass torts." This type of tort typically arises from exposure to or use of a certain product or substance.\textsuperscript{61} Two kinds of injuries exist within the group of dispersed/personal injury mass torts: injuries that appear within a year or two of a product’s use and latent injuries that may take decades to identify. Examples of readily apparent injuries, in which symptoms appear within a few years of the product’s use, include pharmaceutical drugs or medical devices that the manufacturer may take off the market


\textsuperscript{58} Coffee, supra note 55, at 1358.


\textsuperscript{60} “The common distinction between ‘single event’ and ‘dispersed’ mass torts identifies prototypes, not a neat division that separates mass torts into two tidy categories that can be managed by distinctive means.” Working Group on Mass Torts, supra note 35, at 11.

\textsuperscript{61} See, e.g., Anne E. Cohen, Mass Tort Litigation After Amchem, SC57 ALI-ABA 269, 276 (1998).

after numerous complaints. Litigation examples include the Baycol and Inter-Op Hip Prosthesis cases.

Latent injury cases, on the other hand, strain current procedural mechanisms and judicial resources due to the sizable number of claimants, uncertain number of future claimants and defendants, inordinate amounts of time before potential claimants ascertain injury and severity, lack of awareness about exposure, and indefinite causation. The asbestos cases serve as the most prominent example of latent injury torts. Other examples include Dalkon Shield intrauterine devices, silicone gel breast implants, and morning sickness drugs. Most efforts to reform the system's handling of

63. The anti-cholesterol drug, MER/29 serves as an example of how the mass marketing of a prescription drug turned into a mass tort. See Paul D. Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation, 56 Cal. L. Rev. 116 (1968).


67. The Fifth Circuit noted, "the universe of potential plaintiffs is unknown and many times is seemingly unlimited, and the number of potential tortfeasors is equally obtuse . . . ." In re Chevron U.S.A., Inc., 109 F.3d 1016, 1018 (5th Cir. 1997); see also Francis E. McGovern, An Analysis of Mass Torts for Judges, 73 Tex. L. Rev. 1821, 1839-40 (1995).

68. Some injuries may take decades to recognize. Manual for Complex Litigation (Fourth), supra note 36, § 22.1, at 344.

69. Id. § 22.1, at 345; Working Group on Mass Torts, supra note 35, at 11. For example, in the DES cases, babies exposed to the drug in the womb may develop adenosis. In re DES Cases, 789 F. Supp. 552, 558 (E.D.N.Y 1992) (observing that babies exposed to the drug in the womb may develop diseases late in their adult years); see generally In re TMI Litig., 193 F.3d 613, 643 (3d Cir. 1999) (noting that the latency period for problems with radiation exposure may vary from eight to ten years).


mass torts begin in response to latent injury cases. However, the current multidistrict litigation docket reveals that this type of mass tort comprises only about fifteen percent of total mass tort litigations.\footnote{See infra note 484, accompanying text, and pie chart.}

3. Property Damage Torts and Economic Loss Torts

Property damage mass torts include compensation claims for "replacement or repair of allegedly defective products" or parts of products that failed to perform as the manufacturer intended.\footnote{Id.} Often the alleged failure causes damage to the product, property, or the person using the product.\footnote{In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986).} The school asbestos litigation serves as a well-known example of property damage mass torts.\footnote{Cohen et al., supra note 61, at 276.}


B. Mass Torts as Fodder for Collusion in Settlements

Despite significant variations among types, all mass torts share three key features that contribute to the potential for collusion in
settlements: "repeat player" attorneys who routinely represent mass tort plaintiffs or defendants; aggregation before a single court; and a judge who wants to dispose of burdensome mass tort litigation. Due to the cost of developing scientific evidence and skills to litigate particular types of mass tort cases, most plaintiff attorneys in the mass tort business specialize. A handful of repeat player law firms, for both plaintiffs and defendants, handle the majority of mass tort cases.\footnote{85} Because of their specialty and expertise, plaintiff attorneys accumulate a catalog of claimants with factually similar claims. In mass settlements, the plaintiffs' counsel can include weak claims that would not pass muster in a trial and receive a contingency fee on each individual claim.\footnote{86} With the rise of technology, the Internet, and nationwide law firms, plaintiffs' attorneys in New York and California could target mass tort victims in even the smallest towns.\footnote{87}

Representing catalogues or inventories of claimants often leads to conflicts of interest that attorneys may not be able to foresee at the beginning of litigation, such as differences among bargaining positions, clients' divergent desires to settle or litigate, or the extent of latent injuries.\footnote{88} These repeat players may adjust their litigation

\footnote{85. Coffee, supra note 55, at 1358–59. For example, attorney Don Lough specializes in handling class actions at Ford Motor Co. Greg Burns & Michael J. Berens, The Class Action Game, Chi. Trib., Mar. 7, 2004, at A1. He stated, "[w]e tend to see the same lawyers frequently," and "[w]e find ourselves defending the same cases over and over and over again." Id.}

\footnote{86. See Coffee, supra note 55, at 1358–59.}

\footnote{87. A "Google" search for "law firms specializing in representation of asbestos victims" revealed a number of firms that advertise nationwide service. Lewis & Scholnick's website boasts that they "offer nationwide legal representation to victims of mesothelioma and asbestos-related diseases," and have "handled well over 1,000 asbestos personal injury and wrongful death cases." It provides potential clients with a toll-free number. Lewis & Scholnick, Attorneys at Law, at http://www.lsasbestoslaw.com/lawfirm.html (last visited Oct. 21, 2004). The search also produced the New York law firm of Belluck & Fox that claims to provide "individualized legal representation of serious injury cases" and allows potential clients to fill out a four-lined form so that they can have their personal injury claim evaluated without missing their state's filing deadline. Belluck & Fox, at http://www.belluckfox.com/asbestos.html (last visited Oct. 21, 2004).}

\footnote{88. See Erichson, supra note 6, at 569; see generally Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805 (1997). Professor John Coffee identified four basic structural conflicts that may arise in mass torts: (1) internal conflicts that exist within the class—typically, because subcategories of class members are competing over the allocation of the settlement; (2) external conflicts that arise because class members (or their attorneys) have some extraneous reason for favoring a settlement that does not truly benefit the interests of all class members; (3) risk conflicts that arise because class members or class counsel have very different attitudes about the level of risk they are willing to bear; and (4) conflicts over...
tactics according to an expectation that they will meet again, and settlements may reflect past traditions and the need for future negotiations rather than the merits of the claims. This same phenomenon of familiarity also occurs in individual tort litigation where attorneys and insurance companies interact on a similar basis and may adjust their behavior accordingly. Yet, mass torts amplify the ramifications and potential for this type of conduct because the litigation takes place in a common forum before a single judge and affects numerous cases.

In all types of aggregated actions, lawyers representing similar claims necessarily prepare the litigation on a group basis with little personal client involvement. A small number of specialized and well-funded lawyers may dominate the representation of certain types of mass tort claimants through referrals, reputation, marketing, and networking, and may litigate those claims before a limited number of specialized judges. For example, in the Dalkon Shield litigation, six attorneys represented 8,039 claimants (an average of 1,340 each), and forty-three attorneys represented the remaining 13,174 claimants. In the asbestos litigation, only a relative handful of law firms represent the majority of asbestos plaintiffs, and asbestos defense attorneys organized a single consortium to negotiate common settlement plans.

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control of the litigation.


89. Cooper, supra note 38, at 1951–52.

90. See id.

91. See Erichson, supra note 6, at 533.

92. When a law firm receives a client through referral, it must pay a forwarding fee. When clients come directly to the firm, the firm may keep the entire legal fee. Consequently, the law firm may favor its direct clients so it can keep a larger portion of the settlement funds. See id. at 572.


94. Cooper, supra note 38, at 1951; Erichson, supra note 6, at 535.


One of the main, but inadvertent, contributors to collusion is the court. Because of the sizable number of the first atypical cases such as asbestos, Agent Orange, and Dalkon Shield, mass torts pressured courts to employ streamlined methods of resolution to prevent a backlog of cases. At one point, mass tort claims comprised over twenty-five percent of the entire civil caseload in some courts, and in 1990, asbestos litigation represented seventy-five percent of all new federal product liability claims. Although the crisis really arose only in the isolated setting of asbestos, some judges thought that salvaging the federal docket warranted extreme case management methods that might normally appear ill-conceived or short-sighted.

Defendants, plaintiffs, and the judiciary began to consolidate mass tort cases through various means before a single court. Individual judges exercised control over thousands of factually similar cases. The most prominent examples include Judge Jack Weinstein of the Eastern District of New York, who resolved over 240,000 Agent Orange claims; Virginia's Eastern District judge, Robert Merhige, who presided over 195,000 Dalkon Shield claims; and Judge Charles Wiener of the Eastern District of Pennsylvania, who oversaw approximately 106,696 asbestos claims. Bringing all factually similar cases before the same judge combined with "repeat player" attorneys and the need to resolve thousands of claims creates fertile ground for the possibility of collusion between attorneys in

98. See generally Resnik, supra note 12, at 855 (noting that the judge "is not the disengaged arbiter coming fresh to the question of the quality of the outcome" but "is often a participant in framing both the conditions under which negotiations have occurred and sometimes proposing terms for the settlement itself"); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 379 (1982). A number of judges have taken active roles in producing settlement. See generally Peter A. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1987) (describing the active role that Judge Jack Weinstein took in resolving the Agent Orange litigation); Sobol, supra note 72 (describing Judge Robert Merhige's active participation in the Dalkon Shield litigation).

99. Coffee, supra note 55, at 1359; Cramton, supra note 7, at 815.
102. Coffee, supra note 55, at 1364.
103. Part II.C. further develops the methods for consolidation.
105. Sobol, supra note 72, at 106.
reaching a settlement. Even though the majority of mass torts do not threaten to gridlock the judicial system as did the asbestos, Dalkon Shield, and Agent Orange cases, the visceral reaction caused by these anomalies continues to influence the handling of all mass torts. Although these latent injury claims are the most visible, the three prerequisites for collusion—repeat players, common forum, and the court’s perception that mass torts may cause a caseload backlog—may arise in any mass tort category.  

In the past, collusion in class settlements appeared in the form of a “reverse auction,” in which defendants, as the auctioneers, found the lowest plaintiffs’ bidder and settled with that particular attorney. Increased judicial scrutiny of class action settlements helps minimize the effect of the reverse auction in class actions. However, the concept of issue preclusion still affects defendants’ incentives to settle or litigate and the reverse auction continues in post-aggregation settlements.

Issue preclusion, or collateral estoppel, aims to avoid relitigating issues. A new plaintiff who seeks to borrow a past finding of liability against a particular defendant and apply it to the current action may assert collateral estoppel offensively against the same defendant. As the Supreme Court recognized in Parklane Hosiery Co. v. Shore, “offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.”

Since federal courts permit nonmutual issue preclusion, a mass torts defendant who faces a growing number of cases arising out of similar facts sees the first trial as a must win situation. Otherwise, a court might allow similar plaintiffs to rely on the liability established in the first trial to avoid relitigating the same issue. Even if the defendant loses subsequent trials, courts generally do not allow plaintiffs to borrow the previous finding of liability where

107. Judges may also pursue settlement because they are disillusioned with trial and the adversarial system. Resnik, supra note 1, at 939.

108. See Coffee, supra note 55, at 1370.


110. Id. at 326 n.4, 99 S. Ct. at 649 n.4.

111. See id. at 330–32, 99 S. Ct. at 651–52. Nonmutual means that a plaintiff who was not a party to the first action could borrow the finding from the first action against the defendant and reapply it to that defendant.

112. The Supreme Court, in Parklane Hosiery Co. v. Shore, provided trial courts with the discretion to allow issue preclusion based on analysis of whether the nonparty could have joined the prior litigation, whether the subsequent litigation was foreseeable at the time of the first suit so that the defendant could vigorously defend the action, whether prior judgments against the same defendant are consistent, and whether the defendant has different procedural opportunities in the second action. Id. at 322, 99 S. Ct. at 652.
inconsistent judgments exist.\textsuperscript{113} Once plaintiffs establish a scientific causal link between, for example, a disease and exposure to a certain product, then the settlement value of similar claims increases.\textsuperscript{114}

Due to the high stakes of the first trial for the defendant, the initial plaintiffs can exert more pressure on the defendant to settle.\textsuperscript{115} The Prozac cases against manufacturer Eli Lilly provide an extreme example of the lengths to which a defendant will go to avoid an adverse judgment. In a secret quasi-settlement deal,\textsuperscript{116} Eli Lilly

\begin{itemize}
\item \textsuperscript{113} See id. at 330–32, 99 S. Ct. at 651–52; State Farm Fire & Cas. Co. v. Century Home Components, 550 F.2d 1185, 1191 (Or. 1976); Restatement (Second) of Judgments § 29(4) (1982). Courts have refused to permit the use of offensive collateral estoppel in a number of mass product defect cases because the issue factually differed from the issue adjudicated in the first action. Roger H. Trangsrud, \textit{Joiner Alternatives in Mass Tort Litigation}, 70 Cornell L. Rev. 779, 813 (1985). To succeed on offensive estoppel in such a case, the plaintiff must show that the products were similar, as were the defects and the circumstances surrounding its purchase and use. \textit{Id.}.
\item \textsuperscript{114} Coffee, \textit{supra} note 55, at 1359.
\item \textsuperscript{115} One empirical study of four district courts showed that a race to file “might be inferred from multiple filings of related claims.” Thomas E. Willging, Laural L. Hooper, & Robert J. Niemic, \textit{An Empirical Analysis of Rule 23 to Address Rulemaking Challenges}, 71 N.Y.U. L. Rev. 74, 97–98 (1996). The study observed, “the frequency and size of intradistrict consolidations, the frequency and size of multidistrict litigation consolidations, and the frequency with which we found related cases represent potential races to the courthouse.” \textit{Id.} at 98.
\item \textsuperscript{116} Many times litigants will premise a settlement on the inclusion of a confidentiality agreement and/or order that prohibits the other side from disclosing the terms and amounts of the settlement. Courts agree to confidentiality because it encourages settlements and clears the court’s docket. Proponents of confidentiality favor settlement over trials. Those against confidentiality favor public access to court records. In response to this debate, some state legislatures attempted—with little success—to enact rules and statutes that create presumptions in favor of public access to court records. \textit{See, e.g.}, Fla. Stat. § 69.081 (2003) (stating “no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.”). Texas defined “court records” to include unfilled settlement agreements that “have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.” Tex. R. Civ. P. 76(a) (governing the sealing of court records). Even with broad statutes such as these, litigants could privately contract for confidentiality and enforce the confidentiality clause in a separate suit for breach of contract. These settlements occur without judicial review or approval for fairness. \textit{See} Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994); Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932, 936–37 (9th Cir. 1993). Much of the information in this footnote comes from Laurie Kratke Doré, \textit{Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement}, 74 Notre Dame L. Rev. 283 (1999), which provides a comprehensive overview of confidentiality in settlement agreements and sealed records. For more information on confidentiality in
\end{itemize}
reportedly paid twenty-eight plaintiffs not to introduce damaging evidence at trial and not to appeal. The deal resulted in a favorable verdict for Eli Lilly, positive press coverage, and a discouraging effect on potential future claimants.

The collusive aspect of settlements in the aggregation setting can arise when a state court class action settlement precludes litigation and settlement of a federal court class action. If a state’s class action laws provide for less judicial oversight in the settlement context and that settlement precludes litigation of the same issues or settlement in federal court, then the notion of the reverse auction returns. Defendants can again search for the lowest bidder. The Panel cannot aggregate corresponding state court actions, only factually similar federal court actions. If the state court class action settled the litigation and the class representative in that action released all of the claims against the defendant, then that release may have a broader effect than even an adverse judgment in state court that set the bar for other claims. The release could bar any federal claims that the party referred to in state court. After the release, plaintiffs cannot relitigate the same issues—including the fairness of the settlement—in federal court.

Federal courts must use state law to determine whether prior state court litigation precludes federal litigation of an issue and must


119. See Erichson, supra note 117, at 958.

120. A defendant cannot certify a class under Federal Rule of Civil Procedure 23(b)(1)(A) simply because collateral estoppel might bind the defendant on issues of liability if a plaintiff wins a suit against the defendant. See In re Bendectin Prod. Liab. Litig., 749 F.2d 300 (6th Cir. 1984).


123. For more information on state court releases, see Eggen, supra note 121, at 1714.

124. See Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1562 (3d Cir. 1994); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 32 (1st Cir. 1991) ("The release contained in the Dana settlement, by its terms, met all the criteria necessary to engage the gears of the release defense for purposes of this suit: it (1) applied to appellants, (2) encompassed the claims asserted below, and (3) was legally enforceable. Since further prosecution of appellants' federal suit is foreclosed by the release defense . . . it would be pointless to discuss at any length whether their action is also claim-precluded."); Lowenschuss v. Resorts Int'l, Inc., 1989 WL 73254, at *5 (E.D. Pa. June 29, 1989), aff'd without opinion 947 F.2d 936 (3d Cir. 1991).
give state court determinations full faith and credit.\textsuperscript{125} Thus, plaintiffs cannot bring issues decided by a state court in federal court.\textsuperscript{126} With judicial oversight in class actions, judges can identify factors suggesting the reverse auction practice and can take measures to ensure a just result. In non-class aggregated settlements, judges have no authority to reject the settlement or inquire into its fairness.

C. The Current Piecemeal Approach to Consolidation

The potential for collusion, gauged in terms of repeat players, a single forum, and a willing court, varies with the level of aggregation and type of mass tort. Consolidation within a single district under Rule 42(a) could include repeat players and a single forum, but may not exert as much pressure on the court as would multidistrict transfer by the Panel. In short, the higher the number of mass tort claims, the higher the chances of encountering specialized repeat players and increasing the pressure on the court. Yet, collusion can occur at any level of aggregation absent a judicial duty to inquire into the settlement terms. Aggregation occurs on various levels within district courts through civil procedure rules,\textsuperscript{127} and across district courts through the Judicial Panel on Multidistrict Litigation.\textsuperscript{128} Although types of aggregation differ, courts attempt to centrally manage mass torts because of the considerable number of potential claimants,\textsuperscript{129} complex subject-matters,\textsuperscript{130} costs of litigation,\textsuperscript{131} delay in the judicial system,\textsuperscript{132} forum-shopping,\textsuperscript{133} fraudulent joinder,\textsuperscript{134} repetitive discovery,\textsuperscript{135}

\begin{thebibliography}{9}
\bibitem{127} See Fed. R. Civ. P. 42(a).
\bibitem{129} Working Group on Mass Torts, \textit{supra} note 35, at 11. The high numbers of claimants constitute one of the main reasons for implementing a comprehensive aggregative procedure. \textit{Id}.
\bibitem{130} \textit{Id}.
\bibitem{131} \textit{Id}. The transaction costs of litigation may siphon limited funds available for compensation away from plaintiffs and place the funds in the hands of the attorneys or in the costs of discovery.
\bibitem{133} Working Group on Mass Torts, \textit{supra} note 35, at 11. Forum shopping may result in a "reverse auction" where a defendant uses competing plaintiff attorneys to reach the most favorable settlement terms then seeks a court that will approve the settlement, \textit{Id}.
\bibitem{134} \textit{Id}.; James F. Jorden, \textit{Selected Issues Concerning Removal and MDL
coercion to settle despite weak evidence,\textsuperscript{136} difficult choice-of-law issues,\textsuperscript{137} and limited compensation funds.\textsuperscript{138} Because tort law developed from judicial efforts to resolve cases on an individual basis,\textsuperscript{139} the procedural mechanisms for aggregation reflect the effort to tailor the process to individuals. Creative judges have stretched procedural mechanisms such as removal,\textsuperscript{140} Federal Rule of Civil Procedure 42, Federal Rule of Civil Procedure 23, and aggregation and/or consolidation through the Judicial Panel on Multidistrict Litigation\textsuperscript{141} in an attempt to manage mass torts. However, this piecemeal approach lacks the safeguards to prevent settlement collusion.

\section*{1. Federal Jurisdiction}

A number of mass tort cases reach federal court through the removal process.\textsuperscript{142} Because plaintiffs select the initial forum, they frequently prefer to file in state court due to a perception of prejudice against corporate defendants, a relaxed approach to class certification, and jurors willing to return large monetary verdicts against the defendant.\textsuperscript{143} Although federal judges read removal statutes narrowly and resolve doubts in favor of not removing a case,\textsuperscript{144} a defendant may remove the case or cases to federal court.

\begin{footnotesize}
\textsuperscript{135} Working Group on Mass Torts, \textit{supra} note 35, at 11 (1999); Schwarzer et al., \textit{supra} note 36, at 1550. On one hand premature consolidation may lead to too little discovery by precluding innovative individual attempts. On the other hand, delayed consolidation can result in repetitive discovery and inconsistent pretrial motions on issues such as admissibility and privilege.

\textsuperscript{136} Working Group on Mass Torts, \textit{supra} note 35, at 11. Defendants may feel coerced into settlement even when weak scientific evidence of causation exists because of the sheer number of plaintiffs. \textit{See infra} Part V.C.


\textsuperscript{138} Working Group on Mass Torts, \textit{supra} note 35, at 11.

\textsuperscript{139} Dobbs, \textit{supra} note 132, at 1095.


\textsuperscript{141} \textit{Id.} § 1407.

\textsuperscript{142} \textit{See id.} § 1441.

\textsuperscript{143} Jorden, \textit{supra} note 134, at 135.

if: (1) the plaintiff could have originally filed the claim case in federal court as a question under a federal statute,\textsuperscript{145} (2) if diversity exists,\textsuperscript{146} or (3) even to join claims validly in federal court.\textsuperscript{147} Plaintiffs may attempt to overcome removal by including a non-diverse defendant, waiving claims in excess of $75,000, and explicitly renouncing all federal claims.\textsuperscript{148} Defendants tend to counter these efforts by alleging fraudulent joinder, aggregating the damages to calculate the amount in controversy, and realigning the parties with their real interests in the case.\textsuperscript{149}

In the past, federal courts used the All Writs Act\textsuperscript{150} to remove state cases to federal court and to enjoin parallel state court proceedings that hindered the federal judge's ability to finalize a global settlement in mass tort cases.\textsuperscript{151} The Second Circuit employed the All Writs Act to remove additional Agent Orange litigation to federal court when a group of veterans brought claims in state court alleging that they did not discover their injuries until after the federal class action settlement date.\textsuperscript{152} Subsequently, the

\textsuperscript{677} F.2d 571, 576 (7th Cir. 1982).

145. 28 U.S.C. § 1331 (2000) (granting district courts original jurisdiction over disputes arising out of the laws of the United States); \textit{Id.} § 1441(b) (allowing removal where original jurisdiction exists).

146. \textit{Id.} § 1332 (diversity jurisdiction); \textit{Id.} § 1441(c) (removal). District courts have original jurisdiction where the amount in controversy exceeds $75,000, and the controversy arises between citizens of different states, citizens of a state and citizens or subjects of a foreign state, citizens of different states and in which citizens or subjects of a foreign state are additional parties, or a foreign state is a plaintiff and citizens of a state or of different states.

147. \textit{Id.} § 1452, title twenty-eight, governs bankruptcy removal. Section 1446, title twenty-eight, sets forth the procedure for removing claims.


149. \textit{Id.} Judges created the doctrine of fraudulent joinder to prevent plaintiffs from joining a non-diverse defendant where the plaintiff has no possibility of proving a cause of action against that defendant. \textit{Id.} at 141.

150. 28 U.S.C. § 1651 (2000). This Act states:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.


152. \textit{See} Agent Orange, 996 F.2d at 1425. The court also relied on the
Second Circuit dismissed their claims as barred by the previous settlement and denied a motion to remand the action to state court. In its denial, the court invoked its “All Writs” authority to retain jurisdiction over an otherwise non-removable state court action to “effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.”

The Supreme Court, in *Syngenta Crop Protection, Inc. v. Henson*, ended this practice of using the All Writs Act to remove cases to federal court that did not qualify for original federal jurisdiction. Now federal courts may remove state court cases to prevent frustration of orders only if the federal court would have had original subject-matter jurisdiction over the case. The Court also held that a federal court’s retention of jurisdiction over settled class action suits did not give it the authority to remove parallel state court actions under its ancillary jurisdiction even when a previously agreed to settlement provision required the case’s dismissal. If future state court cases frustrate the settlement of mass torts in federal courts, the federal court must find a means by which it can assert original jurisdiction before enjoining the state court action.

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153. *Agent Orange*, 996 F.2d at 1439.
154. *Id.* at 1431 (quoting *United States* v. N.Y. Tel. Co. 434 U.S. 159, 172 (1977)). After the Supreme Court issued the *Syngenta Crop Protection, Inc. v. Henson* decision, the Court remanded the Agent Orange litigation for reconsideration in light of its decision. On remand, Judge Weinstein upheld the removal and dismissal of the claims. In re *Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 442 (E.D.N.Y. 2004). Rather than finding original jurisdiction through diversity or federal question, Judge Weinstein determined that original federal jurisdiction was proper under the federal “officer removal” statute. *Id.* The officer removal statute, 28 U.S.C. § 1442(a) (2000), requires a defendant to demonstrate that it is a “person” within the meaning of the statute, that a causal connection exists between the charged conduct and the asserted official authority, and a colorable claim to a federal-law defense. *Id.* at 446. Because the defendants acted under federal officers within the meaning of the officer removal statute when they manufactured and delivered the herbicide to the Department of Defense and raised a government contractor defense, the federal district court claimed jurisdiction. *Id.* at 445.
156. *Id.*
157. *Id.* at 33, 123 S. Ct. at 370.
158. *Id.* at 34, 123 S. Ct. at 371. The Court reiterated its statement in *Peacock v. Thomas*, 516 U.S. 349, 355, 116 S. Ct. 862, 867 (1996), that a “court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims.” *Henson*, 537 U.S. at 34, 123 S. Ct. at 371. Consequently, ancillary jurisdiction could not provide the original jurisdiction that the parties needed to qualify for removal under 28 U.S.C. § 1441. *Id.*
Once a federal court retains proper jurisdiction over one case that relates factually to a larger mass tort action, the court can exert supplemental jurisdiction over the related claims so long as they form part of the same case or controversy under Article III.\(^{159}\) Supplemental jurisdiction permits federal diversity jurisdiction if one plaintiff meets the $75,000 minimum.\(^{160}\) After a single plaintiff meets the minimum amount in controversy requirement, putative class members may “piggyback” on that claim even through their individual claims do not meet the minimum requirement.\(^{167}\)

2. Aggregation

Once federal courts have jurisdiction over one mass tort case, aggregation of factually similar cases can occur through three means. First, the litigants, usually the plaintiffs, can move to certify a class action under Federal Rule of Civil Procedure 23.\(^{162}\) Second, if actions are pending in multiple federal courts, the Judicial Panel on Multidistrict Litigation can, on its own motion or a motion by a party, consolidate and transfer cases “involving one or more common

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160. Id. § 1332.
questions of fact" to a single district court for pretrial purposes.163 Third, if multiple, but related, actions are pending in a single federal district, then that court may use Federal Rule of Civil Procedure 42(a) to consolidate, for pretrial and trial, actions “involving a common question of law or fact” to avoid “unnecessary costs or delay.”164 Each method of aggregation contains unique prerequisites.165 A district court may consolidate actions under Rule 42(a) if they

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</tr>
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165. Methods of Consolidation and Their Requirements:
involve "a common question of law or fact." 166 Similarly, the Panel may consolidate pending actions if they concern "one or more common questions of fact." 167 Yet, for the parties to consolidate mass torts under the class action mechanism of Rule 23(b)(3), the common questions of law or fact must predominate over questions affecting only individual class members and the class action procedure must provide the superior mechanism for resolution. 168 Despite the variance in consolidation requirements, aggregating mass torts generally produces the same principal effect: settlement. 169

Although aggregation frequently produces the uniform effect of settlement and, consequently, the consistent danger of collusion, federal judges can supervise and validate only settlements with certified classes. 170 Data indicates that most mass tort claimants do not allege class status. 171 Overall, torts account for less than one-fifth of class action activity in the United States. 172 Only about forty-one percent of multidistrict litigation motions involving product liability mass torts alleged class status. 173 One study, which traced forty-three mass product defect and mass accident cases brought before the Panel in the 1990s found that litigants collectively settled sixty percent of

168. Fed. R. Civ. P. 23(b)(3); Fed. R. Civ. P. 23(b)(3) advisory committee’s note. Like the vast majority of the law, determining the superior consolidation method for mass torts depends largely upon subjective opinion. Because the consolidation mechanisms convey various concerns, the policies underlying the class action mechanism shed light on when it becomes the superior method for resolution of certain types of mass torts. As Parts IV and V further discuss, Congress and the courts may derogate in practice from effectuating these policy concerns in settlements. Rule 23 mirrors the overall tort goals of fairness and efficiency. The 2003 revisions to Rule 23(e) implicitly recognize that impending certification most often results in settlement and attempts to balance the resulting impulse toward expediency and efficiency with a countervailing requirement of fairness. See Fed. R. Civ. P. 23(e), (f).
169. See Cramton, supra note 7, at 819; See McNeil & Fanscal, supra note 19, at 489.
170. See Fed. R. Civ. P. 23(e), (g)(2)(a).
171. Hensler, supra note 1, at 900. "Since the panel’s inception, about thirty-five percent of all the motions decided included cases with class status claims; in mass product defect cases, the fraction with class claims was somewhat higher, at forty-one percent." Id.
172. Id. at 893.
173. Id. at 900. Only about thirty-five percent of all the motions brought before the Panel alleged class status. Id. Despite a hesitancy, that stems perhaps from the 1966 advisory committee warning that the class action mechanism may not appropriately resolve mass accidents, the class action mechanism may provide a good fit for addressing the needs of non-latent personal injury type of dispersed mass torts. See Davis, supra note 32, at 163. Product liability actions can include latent injury/personal injury mass torts, property damage mass torts, and economic loss mass torts.
those cases. Yet, only about half of those settlements occurred within the protections of the class action framework. Mass torts, particularly dispersed mass torts with latent effects like asbestos, may not qualify for class treatment since common issues may not predominate or certification may not provide the superior means for resolution.

For mass torts that do fit within the class action framework, the 2003 amendment to Rule 23(e) and (g) ensures greater judicial scrutiny of settlements. By encouraging the court to designate interim counsel during the pre-certification period to protect the interests of the putative class, the new Rule 23 advisory committee’s note explicitly recognized that “[s]ettlement may be discussed before certification,” and that “an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.” Revised Rule 23 allocated additional power to the judiciary to oversee the conduct of the class action

174. See Hensler, supra note 1.
175. Id.
176. To determine whether common questions of law or fact predominate over individual issues, the Manual for Complex Litigation (Fourth) recommends that the court:
   - determine whether the alleged injuries arose from a single incident and therefore might be more likely to have common issues predominate than in a dispersed mass tort;
   - focus “on the legal or factual questions that qualify each class member’s case as a genuine controversy”;
   - look for variations in individual factual issues that may arise out of different levels and timing of exposure, different types of injuries and levels of damages, and different issues of causation; and
   - consider whether “[d]ifferences in state law . . . compound [any] disparities.”
Manual for Complex Litigation (Fourth), supra note 36, § 22.921, at 452 (internal citations omitted).
177. To evaluate whether the class action mechanism provides the superior means, as compared to other available methods, for the fair and efficient resolution of the actions, the Manual for Complex Litigation (Fourth) recommends that the judge consider:
   - whether the proposed settlement is manageable;
   - whether, given the individual stakes for members of the proposed class, potential class members have an interest in “individually controlling the prosecution . . . of separate actions,” recognizing that as the amount of damages at stake increases, a class member’s interest in individual control typically increases; and
   - whether other settlements have been presented to other courts, and if so, the status of those actions and whether any determinations in other courts might preclude certification of the class proposed.
Id. § 22.921, at 452–53 (internal citations omitted).
178. See Fed. R. Civ. P. 23(e), (g).
179. Fed. R. Civ. P. 23(g) advisory committee’s note.
settlement and contemplated the now commonplace practice of filing a proposed class action simultaneously with motions to certify the class for settlement purposes only.\textsuperscript{180} However, the revisions also clarified and seemingly limited the court's authority to scrutinize settlements that it does not actually certify. The Manual for Complex Litigation (Third) advised that "[a]pproval is required of the settlement of any action brought as a class action, regardless of whether the settlement occurs prior to certification, and even if the only claims being settled are those of the individual plaintiffs;"\textsuperscript{181} however, the new advisory committee's note indicated that Rule 23(e) only requires scrutiny of certified class settlements.\textsuperscript{182} Presumably, the amended rule still permits courts to approve non-certified settlements at its discretion.

Litigants may agree on settlement terms at various times during the course of the class action such as after certification, after pretrial discovery and pretrial motions, but before the certification hearing, or after parties move to certify the class for settlement at the same time as they move to approve the specified settlement terms.\textsuperscript{183} The court must make two determinations when reviewing any proposed settlement in the class action context. First, it must decide whether the proposed settlement class meets the certification criteria in Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation)\textsuperscript{184} as well as one of the three subdivisions under

\begin{itemize}
\item Fed. R. Civ. P. 23(e) advisory committee's note ("Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.").
\item Fed. R. Civ. P. 23(e) advisory committee's note.
\item Manual for Complex Litigation (Fourth), \textit{supra} note 36, § 22.9021, at 450.
\item Federal Rule of Civil Procedure 23(a) specifies four requirements for every class action:
\begin{enumerate}
\item the class is so numerous that joinder of all members is impracticable,
\item there are common questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
\end{enumerate}
\item Fed. R. Civ. P. 23(a).

The 1966 revision of this rule adopted a pragmatic approach to class treatment and listed four functional reasons for the class action: (1) preventing serious litigation-related unfairness for both defendants and class members, (2) ensuring remedial efficacy, (3) promoting law enforcement, and (4) facilitating litigation efficiency. Robert G. Bone & David S. Evans, \textit{Class Certification and the Substantive Merits}, 51 Duke L. J. 1251, 1259–60 (2002). Adequacy of class representation has also developed into a heavily litigated area. The analysis to determine whether class representation is adequate asks first "whether any substantial conflicts of interest exist between the representatives and the class," and second "whether the representatives will adequately prosecute the action." In re
23(b). Second, according to Rule 23(e), the court must conduct a hearing to verify the fairness, reasonableness, and adequacy of the settlement terms. The first criterion of meeting the requirements of Rule 23(a) and (b) becomes particularly important in "certify-to-settle" cases, where a party simultaneously files a motion for certification and a motion for settlement approval. In this situation, the court may not have sufficient information to make the required findings under Rule 23(e).

Because of the court's duty under Rule 23(e) to protect absent class members, the parties cannot settle a class action without judicial

Healthsouth Corp. Sec. Litig., 213 F.R.D. 447, 460–61 (N.D. Ala. 2003). To defeat a party's claim to class certification, the conflict must be "fundamental" and targeted at the specific issues in controversy. 7A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1768, at 326–27 (2d ed. 1986). When certain class claims are harmed by the same conduct that benefits others, a fundamental conflict exists. Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003).

185. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 2248 (1997). Plaintiffs may opt to use Rule 23(b)(1) where a multitude of individual plaintiffs might create inconsistent standards or impair the interests of nonparties. A court may certify a class action under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class," which would make injunctive or declaratory relief applicable to the entire class. Fed. R. Civ. P. 23(b)(2). Plaintiffs should not employ this type of action if they seek monetary damages since the drafters envisioned this section as a suitable means for adjudicating civil rights, consumer rights, and patent rights. Rule 23(b)(3) applies when questions of law or fact common to the entire class predominate over questions affecting individual class members and the class action is the superior method for adjudication. Mass torts litigants typically attempt to certify a class under Rule 23(b)(3).

To determine the superiority of a class action under Rule 23(b)(3), the court must make specific findings to determine:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). The courts have not clarified the amount of proof needed to satisfy the certification requirements; however, courts should at least require a preponderance of the evidence. L. Elizabeth Chamblee, Comment, Between "Merit Inquiry" and "Rigorous Analysis:" Using Daubert to Navigate the Gray Areas of Federal Class Action Certification, 31 Fla. St. Univ. L. Rev. 1041.


187. See Amchem, 521 U.S. at 620, 117 S. Ct. at 2248.

188. The Supreme Court, in Amchem Products, Inc. v. Windsor, id., and in Ortiz v. Fibreboard Corp., 527 U.S. 815, 831-32, 119 S. Ct. 2295, 2307-08 (1999), highlighted the need for the judge to determine the adequacy of the representation. Consequently, the judge should examine the motives and interests of the various groups, including future claimants, and decide whether counsel has any conflicting interests.
To counterbalance the impulse toward efficiency by all of the key players (plaintiff, defendant, and judge), Rule 23(e) imposes the countervailing requirement that the court conduct an inquiry into the fairness, reasonableness, and adequacy of the proposed settlement. Where parties seek simultaneous certification and settlement approval, courts "must be even more scrupulous than usual" and apply heightened scrutiny when examining the proposed settlement's fairness. Consequently, the class certification process provides more security for mass tort claimants who may have little motive or ability to monitor their attorneys during settlement because of their nominal attorney-client relationship and/or because they have experiences only the initial symptoms of injury.

This relative security of aggregation through the class certification framework disappears when the court refuses to certify the class and either a court consolidates cases through Federal Rule of Civil Procedure 42(a) or the Panel transfers cases for "coordinated or consolidated pretrial proceedings." Rule 42 promotes the goal of efficiency by allowing a court to consolidate actions within its district (including different divisions) when the actions involve common questions of law or fact and consolidation "may tend to avoid unnecessary cost or delay." To consolidate under Rule 42, the actions need not contain identical issues since the court may choose to consolidate only the common questions then allow the actions to proceed individually on distinct issues. Some courts have used Rule 42(a) to require plaintiffs to file one unified complaint to promote a simplified management system, streamline judicial management, and reduce the proliferation of papers typically filed in consolidated

190. In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 805 (3d Cir. 1995) ("Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims.").
191. Amchem, 521 U.S. at 620, 119 S. Ct. at 2248; see also Gen. Motors Corp. Pick-Up Truck Fuel Tank, 55 F.3d at 805.
193. Fed. R. Civ. P. 42(a). The court may, under 28 U.S.C. § 1404(b), transfer cases, motions, or hearings pending in the same district to a single division. Part V.B. more thoroughly discusses the criteria for evaluating the fairness of settlements. For more information on the history of Rule 42(a) and how it worked in conjunction with section 1407 and 1404 before the Supreme Court's Lexecon decision, see Gregory R. Harris, Note, Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a), 22 Hastings L.J. 1289 (1971).
194. See Masterson v. Atherton, 223 F. Supp. 407, 408–10 (D. Conn.) (granting request for consolidation of wrongful death and personal injury actions arising from the same event), aff'd, 328 F.2d 106 (2d Cir. 1963).
cases. To decide whether to exert their discretionary powers of consolidation, courts typically engage in a balancing test that weighs the time and effort saved for the parties, witnesses, and the court against any inconvenience, delay, or additional expense that litigants would incur by having to attend the same trial. Judges generally decline to consolidate cases when it would confuse the jury or prejudice one or more of the parties.

Judge Carl B. Rubin used Rule 42 to consolidate more than five hundred cases for trial in the Bendectin litigation (a morning sickness drug that allegedly caused birth defects). After discovery, the court consolidated the cases for trial on all common issues of liability. If the plaintiffs established liability, then the court would remand the cases to the transferor district for damages. However, the court eventually decided to trifurcate the trial and submit only the question of causation to the jury. Should the plaintiffs prove causation, then the jury could hear the issue of liability. After a jury was assembled, some of the parties requested that the court certify a mandatory class for settlement purposes only under Rule 23(b)(1), the limited fund provision. With a settlement offer on the table, the court recessed

195. Murphy, supra note 32, at 597–98 ("One of the important factors for any transferee judge, and one of the primary reasons multidistrict cases are consolidated for pretrial purposes, is to promote efficient use of judicial and other resources . . . . The unified complaint guarantees a simplified management system and avoids the problems of selecting one lead case to be representative of all cases filed."); see also Katz v. Realty Equities Corp., 521 F.2d 1354, 1358–62 (2d Cir. 1975); In re Equity Funding Corp. of Am. Sec. Litig., 416 F. Supp. 161, 176–78 (C.D. Ca. 1976).


197. See, e.g., Dupont v. S. Pac. Co., 366 F.2d 193, 196 (5th Cir. 1996) (requiring the district court to ensure that rights of the parties are not prejudiced by consolidation); Bradley v. Soo Line R.R. Co., 88 F.R.D. 307 (E.D. Wis. 1980) (stating that where the prejudicial effect outweighs the probative value, courts should not consolidate).


199. In re Bendectin Litig., 857 F.2d 290, 295 (6th Cir. 1988). The court also appointed a Lead Counsel Committee and selected only some of the plaintiffs attorneys. Id. at 297.

200. Id.

201. Id. at 296.

202. A limited fund is a fund "from which the plaintiffs could be compensated for their claims and therefore adjudications by earlier plaintiffs could "as a practical matter be dispositive of the interests of the other members [of the class] not parties to the adjudications." In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984). A number of courts endorsed the limited fund theory under Rule
the trial and certified the class for settlement purposes only. The Sixth Circuit reversed the certification decision because the district court did not conduct a fact-finding inquiry into whether a limited fund would subvert some of the plaintiffs’ rights. After the Sixth Circuit decertified the class, the district court rescheduled the trial in the same trifurcated manner. The jury held that the plaintiffs did not establish causation. On appeal, the Sixth Circuit approved the consolidated trial and noted, "to have broadened the issues beyond that of causation would have occasioned a real risk of over-encumbering the jurors and impairing their ability to reach a knowledgeable and intelligent verdict based upon the evidence . . . ." A number of the cases proceeded individually in state and federal courts. Although one firm represented most of the plaintiffs, they lost the majority of the cases because they still put forth only weak scientific evidence of causation.

Litigants and courts may use Rule 42(a) in conjunction with title 28, section 1404(a) or section 1406 to transfer cases to other federal districts. Under these statutes, a court in which an original action was filed may transfer cases to another district for trial if the transferee forum satisfies the personal jurisdiction and venue requirements. Once the original courts transfer multiple cases to

203. Bendectin, 749 F.2d at 302.
204. Id. at 306. In its order, the Sixth Circuit observed:
Although we shall issue the writ [vacating the certification order], we realize that the district judge has been faced with some very difficult problems in this case, and we certainly do not fault him for attempting to use this unique and innovative certification method. On pure policy grounds, the district judge’s decision may be commendable, and several commentators have argued that Rule 23 should be used in this manner. Id. at 307; see also Note, Class Certification of Mass Accident Cases Under Rule 23(b)(1), 96 Harv. L. Rev. 1143 (1983).
205. Bendectin, 857 F.2d at 296.
206. Id. at 326.
207. See Paul D. Rheingold, Mass Tort Litigation § 5:15 (2003).
209. See, e.g., Nat’l Union Fire Ins. Co. v. Turtur, 743 F. Supp. 260, 263 (S.D.N.Y. 1990); Cote v. Wadel, 796 F.2d 981, 984 (7th Cir. 1986); Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970); Dubin v. United States, 380 F.2d 813 (5th Cir. 1967). Even if plaintiffs consent to the change of forum, a court cannot transfer the proceedings if the transferee court does not have personal
a single district, the parties may request consolidation pursuant to Rule 42(a).

More commonly, however, the Panel orders the aggregation and/or consolidation of pending cases in multiple district courts under title 28, section 1407. Although section 1407 gives the transferee court jurisdiction for pretrial purposes only, as a practical matter, the transferee court does not have to remand the overwhelming majority of cases since most terminate after consolidation. Statistics show that after the Panel aggregates cases for pretrial purposes, parties settle seventy-four percent of them, and litigate only twenty-six percent.

III. HISTORICAL PURPOSE AND FUNCTION OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

Although aggregation through multidistrict litigation (MDL) now provides the predominant method for coordinating complex litigation in general, and mass torts in particular, the Panel did not utilize section 1407's full potential until the 1990s. This section traces the development of the Panel and explains the purposes, functions, and goals intended by both the judiciary and Congress. It also begins to map the lower courts' budding need for increased efficiency in response to mass tort litigation.

A. Initial Policy Concerns

Conceptually, the Panel developed from the creation of a Coordinating Committee by the Judicial Conference of the United


210. Rheingold, supra note 24, at 398.

211. See Hensler, supra note 1; see also Howard, supra note 1, at 480 (noting that the Panel remanded only 2,600 out of 16,700 total actions brought before in the 1980s); Resnik, supra note 1, at 928. In 1997, Judge Weigel observed that the remand rate to transferor courts was only five percent. Weigel, supra note 1, at 583.

212. Hensler, supra note 1.

At the Conference's request, Chief Justice Earl Warren instituted the Committee in 1962 to streamline the judicial response to an avalanche of electrical equipment antitrust cases and to dispel fears that duplication of pretrial efforts would create lengthy discovery delays. The Judicial Conference and Chief Justice Warren asked the committee to efficiently and economically resolve the nearly 2,000 separate antitrust actions filed against the electrical equipment manufacturers in thirty-six different courts. In response, the Committee scheduled a unified national discovery and transferred the consolidated cases for trial. The Committee reduced the 2,000 cases to nine trials, only five of which continued until judgment.

As evidenced by his later remark to the American Law Institute in 1967, "[o]ur alarm was understandably great and makes equally understandable the measure of my satisfaction in being able to report . . . that every single one of those cases has been terminated." Chief Justice Warren was primarily concerned with expeditious resolution. Despite the speed of resolution, the Coordinating Committee process, which often required thirty or more judges to convene in one location, did not fulfill the corresponding need for efficiency. Consequently, when the Committee drew on its experience to draft, for the Judicial Conference, the statute that created the Judicial Panel on Multidistrict Litigation, it endeavored to improve the efficiency of pretrial proceedings. Yet, at that time, the Committee concluded that the existing mechanisms of transfer under title 28, section 1404(a) and consolidation pursuant to Federal Rule of Civil Procedure 42(a) sufficiently addressed the

214. The Coordinating Committee included Alfred P. Murrah, Chairman, then Chief Judge of the Tenth Circuit; Sylvester J. Ryan, then Chief Judge of the Southern District of New York; Thomas J. Clary, then Chief Judge of the Eastern District of Pennsylvania; Roszel C. Thomsen, then Chief Judge of the District of Maryland; Joe E. Estes, then Chief Judge of the Northern District of Texas; Judge William B. Burns of the Central District of California; Chief Judge William H. Becker of the Western District of Missouri; Judge George H. Boldt of the Western District of Washington; and Judge Edwin A. Robson of the Northern District of Illinois. McDermott, supra note 213, at 215.


217. Id.

218. Id. at 215–16.


220. See Rhodes, supra note 213, at 714.

221. See id.
problems of multiple trials after the completion of pretrial proceedings.\footnote{222}

In the House Report on the bill, which became title 28, section 1407,\footnote{223} the Judiciary Committee explained that the policy behind the statute served dual functions:

The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the "just and efficient conduct" of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management.\footnote{224}

Section 1407 implicitly assumes, by coordinating pretrial discovery, that transfer will avoid delay, repetition, and duplication and will instead resolve related claims efficiently and economically.\footnote{225} Congress concluded that the statute would promote both justice and efficiency though streamlined, less repetitive discovery.\footnote{226} Although the House Report and the text of the statute itself purport to "promote the just and efficient conduct" of the action,\footnote{227} the primary motive prompting the passage of section 1407—the need to prevent an overburdened federal docket—indicates that the actual scale tips toward efficiency rather than justice. This same desire for efficiency and prompt resolution makes settlement a welcome alternative to multiple adjudications of difficult choice-of-law issues and complex scientific evidentiary issues that often arise in mass torts.\footnote{228}

\footnote{222}{McDermott, \textit{supra} note 213, at 216.}
\footnote{223}{The text of the multidistrict litigation statute reads in part:
(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: \textit{Provided, however}, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.
\textbullet 28 U.S.C. § 1407(a) (2000); \textit{see also} Comment, Conduct of Multidistrict Litigation, \textit{supra} note 213, at 1011.
\footnote{224}{H.R. Rep. No. 1130, at 2–3 (1968); \textit{see also} S. Rep. No. 454 (1968).}
\footnote{225}{McDermott, \textit{supra} note 213, at 217.}
\footnote{226}{\textit{See, e.g.}, In re Multidistrict Civil Antitrust Actions Involving the Distrib. of Scotch Whiskey, 299 F. Supp. 543 (J.P.M.L. 1969).}
\footnote{227}{28 U.S.C. § 1407(a) (2000).}
\footnote{228}{For information on the use of the \textit{Daubert} inquiry during class certification,
B. Consolidation Discretion

Ideally, Panel members should counterbalance the impulse toward expediency. The Chief Justice of the United States designates seven circuit and district court judges as Panel members. The Panel does not act simply as a judicial steering committee that reroutes claims to certain districts. Instead, the judges exercise considerable discretion over whether to aggregate and/or consolidate a group of cases proposed for multidistrict litigation and may transfer cases on their own initiative or by request of one of the parties. Unlike district courts that consolidate cases under Rule 42, the Panel is not limited by venue requirements since the transfer applies only to pretrial proceedings. The two criteria for deciding to transfer cases are whether the transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”

As interpreted by the Panel in light of Congress’s intent, a transfer order should eliminate duplicative discovery, prevent conflicting rulings, minimize litigation costs, and reduce time and effort of the claimants, attorneys, witnesses, and courts. The legislative history of section 1407 imparts additional advice for when the Panel should order transfer and states:

If only one question of fact is common to two or three cases pending in different districts there probably will be no order

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229. 28 U.S.C. § 1407(d) (2000) (“The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit.”). The original panel members included: Judge Alfred P. Murrah, then Chief Judge of the Tenth Circuit; Judge John Minor Wisdom of the Fifth Circuit; Judge Edward Weinfeld of the Southern District of New York; Chief Judge Edwin Robson of the Northern District of Illinois; Chief Judge William H. Becker of the Western District of Missouri; Chief Judge Joseph S. Lord III of the Eastern District of Pennsylvania; and Judge Stanley A. Weigel of the Northern District of California. McDermott, supra note 213, at 217.

230. 28 U.S.C. § 1407(c)(i), (ii) (2000). The Panel typically only initiates transfer proceedings for “tag-along” cases. The Panel may also order consolidation and transfer based on the request of a person who is not even a party to the litigation. See, e.g., In re Equity Funding Corp. Sec. Litig., 375 F. Supp. 1379, 1390 n.4 (J.P.M.L. 1974). For more information on the criteria for consolidating cases, see Comment, Embryonic Guidelines, supra note 213, at 793–96.


for transfer, since it is doubtful the transfer would enhance the convenience of the parties and witnesses or promote judicial efficiency. It is possible, however, that a few exceptional cases may share unusually complex questions of fact, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings.235

Because the history and text of section 1407 supply little in the way of specific guidance, Congress endowed the Panel with great discretion over consolidation and transfer as well as selection of the transferee court.236 The test for transfer involves a three-part analysis that requires the Panel to consider the existence of common questions of fact, the convenience for the parties and witnesses, and the justice and efficiency of the proceedings.237 In selecting the transferee court, the Panel often considers which court has the majority of factually similar pending cases,238 where discovery has occurred or will occur,239 where related cases progressed the furthest and quickest, which court would provide the highest cost savings at the least inconvenience,240 where common factual occurrences took place, and which judges have the experience and skill to handle complex cases.241 The courts of appeal may review the Panel’s refusal to

236. See Plumbing Fixture, 298 F. Supp. at 488 (noting that the Panel should use its discretion). The transferee court must consent to the transfer of such actions to the court. 28 U.S.C. § 1407(b) (2000). The Panel is limited only by the requirement that the transfer serve “the convenience of the parties and witnesses” and promote “the just and efficient conduct” of litigation. Id. § 1407(a). Although litigants debate the most appropriate forum, the Panel generally transfers the claims to the forum where the majority of those cases are pending, to a district where similar cases progress more rapidly, or to a district with a strong nexus with the litigation (either because the occurrence of events took place in that district or because the corporation’s headquarters and records are in that district). See In re Master Key Antitrust Litig., 320 F. Supp. 1404 (J.P.M.L. 1971); In re Mid-Air Collision Near Fairland, Ind. Litig., 309 F. Supp. 621 (J.P.M.L. 1970); In re Mid-Air Collision Near Hendersonville, N.C., 297 F. Supp. 1039 (J.P.M.L. 1969); In re Admission Tickets Antitrust Litig., 302 F. Supp. 1339 (J.P.M.L. 1969).
238. See Comment, Conduct of Multidistrict Litigation, supra note 213, at 1025 (“[D]espite the weight of many typical choice-of-forum factors which favored the Eastern District of New York, the majority chose the Southern District of Florida because all of the issues and most of the parties would be subject to a decision on the merits there.” (internal citations omitted)); Kaminsky, supra note 208, at 825. 239. See Kaminsky, supra note 208, at 826.
240. See id. at 827.
transfer only by extraordinary writ, which further enhances the Panel’s discretion.\(^{242}\)

Because the Panel retains a considerable amount of freedom in deciding whether to coordinate cases to promote “just and efficient conduct of multidistrict actions,”\(^{243}\) section 1407 also allocates authority to the Panel to ensure fairness in its decision to aggregate. Yet, the Panel interpreted its role in light of congressional intent to promote just and efficient conduct by “eliminat[ing] the potential for conflicting contemporaneous rulings by coordinate district and appellate courts”\(^{244}\) and by centralizing “to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings (such as those regarding class certification), and conserve the resources of the parties, their counsel and the judiciary.”\(^{245}\) Given this interpretation of its goals, the Panel promotes fairness for both plaintiffs and defendants only by preventing inconsistent pretrial rulings and avoiding duplicative discovery. The Panel seemingly ignores the promotion of “justice” as a separate requirement and presumes that justice is best served by streamlining discovery and increasing cost savings. For the most part, efficiency seems to serve as a proxy for both justice and fairness.

This approach fails to recognize that the practical consequence of transfer translates into a non-opt out class action for pretrial purposes and produces settlement as would class certification. Yet,
neither the Panel nor the transferee courts have the authority to ensure fair and adequate settlement outcomes, as would a court in a real class action. Without this oversight and assurance, the defendants could settle the plaintiffs' attorney's inventory of cases with nominal compensation to each claimant but with what would amount to a large contingency fee for the attorney. 246 Plaintiffs' counsel could also blackmail a defendant into settling cases with weak evidence of causation just by bringing a large number of claims against it. 247 Consequently, efficiency through procedural devices, without the balance of fairness, does not necessarily correlate into just outcomes. 248

Although the text and legislative history of section 1407 indicate congressional concern for both justice and efficiency, these same documents also suggest that neither Congress nor the Coordinating Committee anticipated that aggregation would generate one of the preconditions for collusion in settlements, a single forum. During the passage of section 1407 in 1968, none of the preconditions for collusion—repeat players, single pretrial forums, or a greater willingness by the court to clear its docket through settlement—existed to the extent that they do today. 249 Although only five of nine trials in the electrical equipment cases went to judgment, 250 nothing in the electrical equipment case context warned the Committee of the state of things to come. Consequently, even though section 1407 aims to effectuate the goal of "just conduct," nothing in the statute permits the Panel to ensure fairness, reasonableness, or adequacy in settlements or to endow the transferee court with the authority to oversee settlements. If settlement after transfer could occur only with consent of the Panel or the transferee courts, then section 1407 would appropriately balance the value of efficiency with the counterweight of fairness.


247. See infra Part V.C.


However, in line with Congressional intent, which largely emphasized expediency, the Panel has continually placed paramount importance on efficiency.\textsuperscript{251} As Judge Weigel observed in one of his concurrences, "coordinating and consolidation may impair, not further, convenience, justice and efficiency . . . neither the convenience of witnesses and parties nor the just and efficient conduct of actions are served, ipso facto, by transfer just because there are common questions of fact in the civil actions involved."\textsuperscript{252}

To further the goal of expediency, the Panel used to encourage the transferee courts to transfer cases to themselves for trial under title 28, section 1404 rather than remanding the cases back to their original district courts as contemplated by title 28, section 1407.

C. Lexecon Limits

Despite the Panel’s broad range of authority to transfer actions for pretrial purposes, the transferee judge cannot “self-transfer” the cases to that particular court for trial. Before the Supreme Court’s

\begin{itemize}
\item \textsuperscript{252} In re “East of the Rockies” Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring). Judge Weigel set forth a number of questions that the Panel should consider before ordering transfer:
\begin{itemize}
\item How many common questions of fact are there? What is their nature?
\item How many cases are presently and prospectively involved? What is the geographical location of the districts in which the cases pend? If it is anticipated that further cases will be filed, in what districts? Who are the principal witnesses in the cases and where do they reside? What detriment, financial or otherwise, will be imposed upon any of the parties by ordering transfer? Will transfer result in substantial saving of duplicative work? Will transfer usefully avoid conflicting rulings in the pretrial proceedings of the cases involved? Can many of the disadvantages of transfer be worked out by cooperation among counsel without transfer? Are pretrial proceedings already far along in any one or more of the cases? Will transfer hasten or delay progress in the cases? What is the availability of a judge or judges in the proposed transferee court or courts? Will the advantages of transfer overcome the normal desirability of having the same judge who conducts the trial also conduct pretrial proceedings? Will transfer impede or promote the prospect of settlements? Will transfer serve any ulterior motive of any party or parties, such as forum shopping? If class actions are involved, will transfer make for complexity or for simplification? Will transfer unjustly delay or deny any party’s right to provisional remedies such as injunctive relief? What is the status and possible effect of any appeals pending in any of the cases? Will transfer operate to eliminate or avoid an undesirable multiplicity of appeals on similar issues?
\end{itemize}
\end{itemize}

\textit{Id.} at 255–56.
decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*,\(^\text{253}\) transferee judges typically followed the Panel’s procedural rule 14(b) and transferred the cases to their own court for trial pursuant to title 28, sections 1404 or 1406.\(^\text{254}\) In *Lexecon*, the Court held that a transferee court conducting pretrial proceedings pursuant to section 1407 had no authority to invoke section 1404(a) to assign the cases to itself for trial purposes.\(^\text{255}\) Self-transfer violated section 1407’s requirement that the Panel remand consolidated cases to their original transferor districts “at or before the conclusion of such pretrial proceedings.”\(^\text{256}\)

The legislative history of section 1407 indicates that both Congress and the Coordinating Committee agreed that “trial in the originating district is generally preferable from the standpoint of the parties and witnesses,”\(^\text{257}\) so they designed the statute to “maximize the litigant’s traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials.”\(^\text{258}\) Congress recognized that adjudicating all cases in one massive trial could subvert the rights of the parties and may not serve the ends of fairness, so it chose to limit consolidation to pretrial proceedings. Although the legislative history of section 1407 emphasized the rights of plaintiffs as individuals, the Supreme


\(^{254}\) See Manual for Complex and Multidistrict Litigation, supra note 208, § 5.3, at 89 (“Section 1404(a) and Section 1407 are not mutually exclusive remedies but are cumulative, and may both be employed in respect to a given case.”); Comment, Conduct of Multidistrict Litigation, supra note 213, at 1018, 1031; John F. Nangle, From the Horse’s Mouth: The Workings of the Judicial Panel on Multidistrict Litigation, 66 Def. Couns. J. 341, 344 (1999); Suggested Procedures for Multidistrict Litigation, supra note 242, at 600. The Panel’s Rule 14(b) provided that “[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.” *Lexecon*, 523 U.S. at 32–33, 118 S. Ct. at 960–61.

\(^{255}\) *Lexecon*, 523 U.S. at 28, 118 S. Ct. at 959. In its holding, the Supreme Court invalidated Rule 14(b), which the Panel created pursuant to its rule-making authority as prescribed in 28 U.S.C. § 1407(f). *Id.* The Court noted that “out of the 39,228 cases transferred under § 1407 and terminated as of September 30, 1995, 279 of the 3,787 ultimately requiring trial were retained by the courts to which the Panel had transferred them.” *Id.* at 33, 118 S. Ct. at 961.


Court's *Lex econ* decision made no mention of this policy concern and instead strictly interpreted the plain text of section 1407.259

In deciding *Lex econ* squarely on section 1407's language, the Court limited the question, noting, "[t]he relevant question for our purposes is whether a transferee court, and not a transferor court, may grant such a [change of venue for trial] motion."260 Because the Court resolved the case on such narrow grounds, it seems that nothing in the decision would prevent the transferor court from making an end run around section 1407 and the *Lex econ* holding by directly sending the cases to the designated transferee court for trial pursuant to section 1404(a).261 Section 1404(a) contains no specific language requiring the court to transfer the actions only upon a party's motion.262 Consequently, federal courts can transfer cases under section 1404(a) without the parties' motion, stipulation, or consent.263 As long as the court provides an opportunity for the parties to address the issues relating to transfer, the court may exercise its own authority to transfer the cases without unfairness to the parties.264 Section 1404(a) does, however, limit the transfer to another district where the cases might have been brought,265 whereas

259. Although the Supreme Court made no mention of harm to individual cases and to the rights of the plaintiffs, Judge Kozinski's dissent in the Ninth Circuit's review of *Lex econ* attacked the circuit's majority opinion and the federal judiciary for allowing § 1404(a), a statute designed to protect a plaintiff's choice of forum, to effect self-transfers. In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1546–48 (Kozinski, J., dissenting).


261. *See generally* Manual for Complex and Multidistrict Litigation, *supra* note 208, § 5.4, at 89 ("[C]onsideration should be given to transfer, under § 1404(a), of all cases to a single transferee district; or to initiation by the court or by the parties of a proceeding before the Judicial Panel on Multidistrict Litigation for a transfer for pretrial purposes only under § 1407, Title 28, U.S.C. Thereafter the trial procedures set forth in Section 5.1 of the *Manual* should be employed.").


265. 28 U.S.C. § 1404(a) (2000). By restricting transfer to a district where the cases might have been brought, section 1404(a) invokes the general venue requirements of section 1391. Section 1391 states that civil actions founded upon diversity jurisdiction may be brought only in:

(1) a judicial district where any defendant resides, if all defendants reside
the Panel may transfer the actions to any district for pretrial purposes under section 1407.266

Once the cases changed venues under section 1404(a), the transferee court could then consolidate the cases under Rule 42(a).267 To transfer under section 1407 or to consolidate under Rule 42(a), the court need only find common questions of fact.268 In Lexecon, the problem was that the transferee court retained jurisdiction over cases the Panel transferred to it according to its section 1407 authority. The Panel might avoid this problem by designating a district court that meets the venue requirements of section 1391 as the trial court to which other districts could transfer their cases. Either method of aggregation, section 1404(a) or 1407, supplies the prerequisites for collusion by bringing similar specialized mass tort cases before a single court and thereby increasing the likelihood of repeat players and a judge who feels pressured to resolve the mounting cases on his or her docket.

Although the Panel has not attempted to conduct an end run around the Lexecon decision by appointing a district court and strongly suggesting that transferor courts transfer factually similar cases to that district, the Panel has urged legislative change. It proposed that Congress amend section 1407 to reinstate the practice of allowing the transferee court to transfer cases to itself for trial.269 Allowing the transferee court to retain jurisdiction for trial permits the judge to strong arm or at least emphatically encourage defendants to settle.270 The proposal itself acknowledges, "historical data indicate that the overwhelming majority of cases consolidated and transferred by the Judicial Panel to transferee judges settle or are adjudicated on pretrial motion."271 The proposal

in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

_id_ § 1391(a). The same requirements apply to actions brought as federal questions with the exception that the actions may be brought in "a judicial district in which any defendant may be found, if there is no district in which the action may be otherwise brought." _id_ § 1391(b).

266. _See id._ § 1407.
269. _See Nangle, supra_ note 254, at 346.
270. Settling cases may be a valid goal if the Panel uses its discretion in consolidating them and if the settlements are fair. _See infra_ Parts V.C., IV.B., & IV.C.
also admits that the *Lexcon* change might have diminished the trial court's power to coerce settlements, stating, "the transferee judge's ability to facilitate a global settlement of the consolidated cases is probably somewhat greater if he or she is empowered to try the consolidated cases if it becomes necessary."\(^{272}\) The proposal indicated that "[t]he empirical significance of this observation is hard to measure, but the principle that a judge has greater power to facilitate settlement if, later on, he or she might also serve as the trial judge, seems right."\(^{273}\) The Chairman of the Panel, Judge John F. Nangle, concluded that the proposal was "sound and will promote efficient and fair adjudication."\(^{274}\) Yet, this proposition assumes that the Panel made its initial decision to transfer the cases only after a thorough inquiry into whether the transfer promoted just and efficient conduct and served to convenience the parties and witnesses.\(^{275}\)

\(^{272}\) Id.

\(^{273}\) Id.

\(^{274}\) Id.

\(^{275}\) A number of critics have argued that the Panel is too quick to find common facts. *See Comment, Conduct of Multidistrict Litigation, supra* note 213, at 1026; Chesley & Kolodgy, *supra* note 251, at 519; Benjamin W. Larson, *Comment, Lexcon, Inc. v. Milberg Weiss Bershad Hynes & Lerach: Respecting the Plaintiff's Choice of Forum*, 74 Notre Dame L. Rev. 1337, 1344 (1999).

### Number and Percentage of Mass Tort Motions Made to the Panel and Number of Motions Granted

<table>
<thead>
<tr>
<th>Case Type</th>
<th>1968-69</th>
<th>1970s</th>
<th>1980s</th>
<th>1990s</th>
<th>Final Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M</td>
<td>G</td>
<td>M</td>
<td>G</td>
<td>M</td>
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<tr>
<td>Air Crash</td>
<td>6 (83%)</td>
<td>5 (89%)</td>
<td>56</td>
<td>50</td>
<td>52</td>
</tr>
<tr>
<td>Accident</td>
<td>1 (100%)</td>
<td>1 (58%)</td>
<td>7</td>
<td>7</td>
<td>30</td>
</tr>
<tr>
<td>Products</td>
<td>0 (0%)</td>
<td>0 (56%)</td>
<td>16</td>
<td>9</td>
<td>20</td>
</tr>
</tbody>
</table>

M=motions; G=granted

Data come from Hensler, *supra* note 1, at 898. This chart demonstrates that the Panel has granted the majority of transfer requests. In an earlier article, Hensler observed that the Panel granted almost three-quarters of the mass tort motions for transfer. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 187 (2001).
IV. CONGRESSIONAL PRAGMATISM: EFFICIENCY AS A PROXY FOR FAIRNESS?

A. Multidistrict Litigation Restoration Act of 2004

The Multidistrict Litigation Restoration Act of 2004, now pending in the House of Representatives, provides the Panel’s requested Lexecon “fix.”\(^2\)\(^7\)\(^6\) This Act is one of several bills that Congress has attempted to pass since the 1998 Lexecon decision.\(^2\)\(^7\)\(^7\) The House Report quoted Panel Chairman John F. Nagle stating that transfer back to original transferor courts was “cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient, and a wasteful utilization of judicial and litigant resources.”\(^2\)\(^7\)\(^8\) The bill proposes to amend part of title 28, section 1407(a) to read: “Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated or ordered transferred to the transferee or other district under subsection (i).”\(^2\)\(^7\)\(^9\) It then adds a new subsection at the end of title 28, section 1407(a) that explicitly entitles the Panel to transfer cases for trial purposes.\(^2\)\(^8\)\(^0\) This subsection also permits the

\(^{276}\) H.R. 1768, 108th Cong. (2004); H.R. Rep. No. 108-416, at 4 (2004). Congress has already overruled Lexecon to a limited extent with its passage of the Multidistrict, Multiparty Multiforum Jurisdiction Act of 2002, 28 U.S.C. § 1369. The Act grants federal courts original jurisdiction over “any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location.” 28 U.S.C. § 1369 (2000). This Act addresses only mass accidents, and does not apply to other types of mass torts such as personal injury mass torts, economic loss mass torts, or property damage mass torts. For more information on this Act, see supra Part II.A.1.


Congress considered a provision to overturn the result in Lexecon. Section 310 of the Federal Courts Improvement Act of 1999, 106 H.R. 1752, would have amended s 1407 by allowing that: “Any action transferred under this section by the panel may be transferred by the transferee judge for trial purposes to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.” Vairo, supra note 51, at B7. Congress also included a Lexecon “fix” in the MMTJA; however, that portion of the bill did not pass. The MMTJA provided a more controversial fix than simply allowing the transferee court to retain jurisdiction for trial purposes because it expanded federal jurisdiction at the expense of state courts.


\(^{279}\) Id. at 2.

\(^{280}\) Id. This new subsection reads:

(i)(1) Subject to paragraph (2) and except as provided in subsection (j) [exempting antitrust actions brought by the United States], any action
Panel to remand the cases to another district entirely so long as it serves "the interest of justice" and "the convenience of the parties and witnesses."

As noted by the sponsor of the bill, House Chairman James F. Sensenbrenner, Jr., "[w]hile the bill allows a transferee court to retain a case for trial on liability issues and, when appropriate, on punitive damages, it creates a presumption . . . that the trial of compensatory damages will be transferred [back to the transferor court]." Consequently, the Chairman felt that this presumption "ensure[d] that plaintiffs will not be unduly burdened in the pursuit of their claims." It is true that many plaintiffs would not feel the effects of a Lexecon "fix" since transferee courts dispose of almost seventy-five percent of all multidistrict litigation cases before trial through settlement. The House passed the bill unanimously on March 24, 2004; however, the Senate must approve the bill before it becomes law.

B. Class Action Fairness Acts: An Altered Role for the Judicial Panel on Multidistrict Litigation

In his recommendation that the House pass the Multidistrict Litigation Restoration Act of 2004, Chairman Sensenbrenner contrasted the Act's "narrow breadth" with what he viewed as the "broader and . . . more troubling legislation to expand Federal court jurisdiction such as the alleged class-action reform." The controversial Class Action Fairness Acts may soon amplify the need for judicial efficiency and economy by placing an additional burden on the already overtaxed transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

Id. This practice of self-transfer has been criticized on a number of grounds. See Comment, Conduct of Multidistrict Litigation, supra note 213, at 1036–40.

282. Id. at 19.
283. Id.
284. See Hensler, supra note 1; see also Comment, Conduct of Multidistrict Litigation, supra note 213, at 1029 ("Many multidistrict cases have been terminated by settlement in section 1407 transferee courts.").
federal judiciary. Although federal judges stringently oppose the concept of the acts since the federal courts already lack sufficient operational resources, Congress continues to introduce various forms of the bill each year. Each version of the act differs, but the core provision in each implements a concept of "minimal diversity."  

1. Effects on Federal Jurisdiction  

Minimal diversity expands federal court jurisdiction over large interstate class actions by requiring that only one plaintiff and one defendant reside in different states. In the most recent version of the act, if minimal diversity exists and the aggregate amount in controversy exceeds $5,000,000, any defendant or any plaintiff may remove the action from state to federal courts without the consent of all the defendants or all the plaintiffs. The district court may, however, "in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction" if more than one-third but less than two-thirds of the proposed class plaintiffs and the "primary defendants are citizens of the State in which the action was originally filed." Yet, before refusing jurisdiction, the court must consider a laundry list of factors including whether the claims "involve matters of national or interstate interest," "will be governed by laws of the State in which the action was originally filed or by the laws of the other states," "[have] been plead in a manner that seeks to avoid Federal jurisdiction," "[were] brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants," contain a number of proposed plaintiffs from one state, and whether plaintiffs, during the three-year period prior to the filing of that class action, filed one or more other class actions asserting similar claims.

291. See id.
293. Id.
294. Id.
2. Effects on the Multidistrict Litigation Panel

The Senate’s most recent bill, the Class Action Fairness Act of 2004, aims to ameliorate certain types of settlements and purports to limit the authority of the Panel by restricting its ability to transfer actions removed pursuant to the act. Although the revised Federal Rule of Civil Procedure 23 provides protection against unfair settlements, this class action bill prohibits federal courts from approving (1) a proposed “coupon” settlement (giving coupons to plaintiffs typically redeemable for the defendant’s products) absent a finding that the settlement is fair, reasonable, and adequate; (2) a proposed settlement that results in a net monetary loss for class members unless the loss is substantially outweighed by other nonmonetary benefits; and (3) a proposed settlement that provides those geographically closer to the court with more money or benefits. The proposed bill also specifically limits the authority of the Panel by including a provision that states, “Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.” Yet, the next portion of the bill undercuts this limitation by applying the restriction only to cases that contain no federal class action allegations.

The bill defines “class action” to mean:

any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any

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298. Id. Congress makes no mention of how a court might possibly conduct an inquiry into the fairness, reasonableness, and adequacy of a settlement and find that a settlement allocating additional funds to those closer in geographical proximity to the court could be deemed “fair.”

299. Id.

300. Id. This section states, “(ii) This subparagraph will not apply—(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or (II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.” Id.
civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.\textsuperscript{301}

Regardless of whether the defendant removed the class action to federal court, because plaintiffs probably brought the suit as a class action of some type they may seek to certify it under Rule 23. A number of states have rules of civil procedure governing class actions that resemble Federal Rule of Civil Procedure 23.\textsuperscript{302} Others have more relaxed rules.\textsuperscript{303} If the parties certified a class action in a state with relaxed class action rules, it may not be a viable federal class action. Although the bill may prevent the Panel from consolidating these types of actions under some circumstances, it does not prevent parties from requesting a change of venue under title 28, section 1404(a) then consolidation pursuant Rule 42(a).

C. The Potential Interaction Between the Acts and Possible Effects

Realistically, the Multidistrict Litigation Restoration Act and the Class Action Fairness Act could interact as follows: The plaintiffs would file an action in state court under a state class action statute. The defendants may then decide to remove the action to federal court, a jurisdiction that many defendants view as

\begin{itemize}
\item \textsuperscript{301} Id.
\item \textsuperscript{302} See, e.g., Fla. R. Civ. P. 1.220; N.Y. C.P.L.R. 901 (McKinney 2004) (resembling Federal Rule of Civil Procedure 23(b)). The prerequisites in Florida’s rule resemble Federal Rule of Civil Procedure 23(a). Florida’s rule states: Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class. Fla. R. Civ. P. 1.220(a).
\item \textsuperscript{303} See, e.g., 735 Ill. Comp. Stat. 5/2-802 (2004) (permitting certification where “(1) The class is so numerous that joinder of all members is impracticable, (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members, (3) The representative parties will fairly and adequately protect the interest of the class, (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy”).
\end{itemize}
less plaintiff friendly, based on a number of positive and negative factors. Federal court may provide an attractive option for defendants if Rule 23 provides more stringent certification requirements than does its state class action counterpart and if no other factually similar claims are pending against it in other federal courts. If plaintiffs in other districts filed factually similar claims that alleged class status under Rule 23, then the Panel could transfer all cases to a single district in which case the actions probably would settle. Because Rule 23(e) requires court approval of any certified class settlement, the federal court could require the defendant to pay more than if the defendant settled the actions under a state class action statute that did not provide for judicial supervision. From the plaintiffs’ perspective, removal to federal court may dampen the hopes for a large state court jury verdict and require travel to an inconvenient forum, yet could increase the chance of settlement and ensure that the settlement is fair, reasonable, and adequate. If settlement did not occur, the plaintiffs may then face the possibility of litigating the action in the transferee forum.

In any case, a litigant could aggregate factually similar claims to promote settlement. Removing claims to federal court frequently provides a single forum, increases the probability of encountering repeat players, and amplifies the need for the court to approve a settlement to dispense with the extra burden of state-based class action claims. Consequently, the Class Action Fairness Act supplies all of the preconditions for collusion in settlements.304 Although the revised Rule 23 provides protections for federal class actions, if the plaintiffs do not meet the prerequisites for certification under Rule 23 and the defendants achieve joinder through section 1404(a) and Rule 42, then judges do not have the authority to scrutinize settlements.305 By potentially passing both the Multidistrict Litigation Restoration Act, which strengthens the power of the transferee court to induce settlements and thereby promote efficiency, and the Class Action Fairness Act, which increases the potential for aggregation and intensifies the pressure on the federal courts to lighten their overburdened dockets, Congress may enhance the potential for collusion in settlements.

304. See supra Part II.B. (describing the prerequisites for collusion). The preconditions for collusion are repeat players, a single forum, and a willing judge. Collusion in settlements need not necessarily have a willing judge since judges have little authority to prevent settlement collusion outside of class actions and bankruptcy.
Although Congress’s proposals prioritize efficiency while increasing the burden on the federal courts, the Supreme Court’s decisions evaluating the by-product of quick class action settlements prize justice and fairness over efficiency. In *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, the Court conditioned approval of settlement-only class certifications upon satisfaction of Rule 23 criteria and disapproved a Rule 23(b)(1)(B) mandatory “limited fund” settlement of asbestos injuries. Even though these decisions occurred in the class action and asbestos context, they recognized the potential for collusion in settlements and provided a framework for considering fundamental characteristics of fair settlements.

A. The Supreme Court’s Concern about Fairness

1. *Amchem Products, Inc. v. Windsor: Rule 23(b)(3) & Future Claimants*

*Amchem Products Inc. v. Windsor* presented the Court with an opportunity to end a number of the asbestos claims that continue to inundate the federal court system. The global settlement was a

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306. The lower courts and Congress took a proceduralist view of mass torts. This view “is concerned with the generic effect of a particular procedure on the fairness and efficiency of the judicial system, not with its effect on the underlying substantive rule in issue.” Davis, *supra* note 32, at 157.


309. Before these two decisions, a 1996 study of class actions in four district courts found that the courts certified fifty-nine (thirty-nine percent of all class certifications) cases for settlement purposes only. Willging et al., *supra* note 115, at 112. In twenty-eight of those cases, attorneys filed a proposed settlement with the court before, or simultaneously with, the first motion to certify. *Id.* The courts approved twenty-four of the twenty-eight (eighty-six percent) without any changes. *Id.* at 113. These findings may indicate that the Supreme Court, in *Amchem* and *Ortiz*, intended to send a message to all district courts that they needed to further inquire into the fairness of these suspicious settlements.

310. By any measure, the asbestos claims represent a mass tort anomaly. The asbestos litigation has more claims by far than any other mass tort and, as a latent injury mass tort, it presents a number of difficulties with timing. Even the Supreme Court urged Congress to adopt a legislative approach to asbestos claims instead of judicial resolution. *Amchem*, 521 U.S. at 591, 117 S. Ct. at 2234. For in depth information on the asbestos cases, see Griffin B. Bell, Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve the Asbestos Crisis (2002); Carroll et al., *supra* note 66; Hensler et al., *supra* note 100; Thomas E. Willging, Trends in Asbestos Litigation (Fed. Jud. Ctr. 1987); Thomas E. Willging, Asbestos Case Management: Pretrial and Trial Procedures (Fed. Jud. Ctr. 1985).

311. 521 U.S. at 591, 117 S. Ct. at 2234.
Asbestos cases have plagued the courts since the 1970s when the flood of lawsuits began and plaintiffs first requested that the Multidistrict Litigation Panel consolidate the cases. When the number of claimants multiplied to 26,639 in 1991, the Panel consolidated and transferred the cases to Judge Weiner in the Eastern District of Pennsylvania. Once aggregated, the plaintiff and defense attorneys formed steering committees and started settlement negotiations. After the plaintiffs' attorneys agreed to bind both inventory and potential plaintiffs, the plaintiffs and defendants filed their joint motion for conditional class certification and proposed settlement agreement on January 15, 1993. Approving the proposed settlement would help rid the federal courts of the largest mass tort action ever filed. Yet, the settlement lacked the requisite and fundamental aspects of fairness and adequacy.

The core of the Court's Amchem decision held that a class action attorney could adequately represent only a class with sufficient cohesion. The Court affirmed the Third Circuit's disapproval of a comprehensive class settlement, with fragmented classes, that purported to settle both present and future claims even though future claimants had no attorney-client relationship with the lawyers. Litigants simultaneously filed a class action complaint, answer, proposed settlement, and a joint motion for class certification pursuant to Rule 23(b)(3). The Rule 23(b)(3) "opt-out" Amchem settlement

312. See id. at 600, 117 S. Ct. at 2238 (noting that "the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases").

313. In re Asbestos Prod. Liab. Litig. (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991); see also Amchem, 521 U.S. at 598, 117 S. Ct. at 2237–38 ("[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s . . . . The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991)).


315. Id. at 424; see also Amchem, 521 U.S. at 599, 117 S. Ct. at 2238.

316. Amchem, 521 U.S. at 599-600, 117 S. Ct. at 2238 ("Ronald L. Motley and Gene Locks—later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action—cochaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee.").

317. Id. at 601-02, 117 S. Ct. at 2239.

318. Id. at 623, 117 S. Ct. at 2249; see also Coffee, supra note 88, at 374.

319. Amchem, 521 U.S. at 611, 117 S. Ct. at 2243.

320. Id. at 591, 117 S. Ct. at 2234.
enjoined class members from separately pursuing asbestos-related personal injury suits in any court, bound absent and unknown future claimants, did not sufficiently represent divergent intra-class interests, provided inadequate funding, and included an allocation system that limited compensation and liability.

The Supreme Court observed that since the 1966 revisions of Rule 23, "class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one," and that this proliferation of class actions "reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue." Although the Court ultimately approved this expanded use of the class action for settlement purposes only, the settlement class could not skirt all the requirements of Rule 23. The Court recognized that "a district court need not inquire whether the case, if tried, would present intractable management problems" when litigants filed a settlement-only class certification request. Commonly known as "manageability," this factor in Rule 23(b)(3) class actions often prevents lower courts from certifying nationwide classes that would require them to apply numerous state laws to different claims. Doing so would defeat the superiority of the class action mechanism for resolving disputes.

After Amchem, trial courts need not evaluate the manageability factor in evaluating settlement classes because manageability relates only to trial issues. Yet, district courts cannot ignore all the

321. The Court pointed out that "counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants." Id. at 601, 117 S. Ct. at 2239.

322. See id. at 591, 627, 117 S. Ct. at 2234, 2251; see also Coffee, supra note 88, at 393.

323. Amchem, 521 U.S. at 617-18, 117 S. Ct. at 2247. At its inception, commentators considered the class action mechanism "the most adventuresome" innovation. Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969) (including a discussion by the Reporter of the Rules amendments regarding the Rule 23(b)(3) class).

324. Amchem, 521 U.S. at 620, 117 S. Ct. at 2248; see also Fed. R. Civ. P. 23(b)(3)(D) (factoring in "the difficulties likely to be encountered in the management of a class action.").

325. See, e.g., In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002).

326. See, e.g., id. (decertifying a class action because the court would have to apply the laws of all fifty states, thereby making the class unmanageable).

327. Amchem, 521 U.S. at 620, 117 S. Ct. at 2248 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." (internal citation omitted)).
prerequisites of class certification contained in Rule 23. These specifications were "designed to protect absentees by blocking unwarranted or overbroad class definitions" and consequently "demand undiluted, even heightened, attention in the settlement context." The settlement context does not afford the court the opportunity to adjust the class, as would a trial where the court could observe the proceedings unfold. If the district court only conducted a fairness inquiry under Rule 23(e) this would deprive class counsel of one of its main bargaining tools—the threat of litigation—and would require the court to rule on a settlement without the information uncovered by adversarial investigation.

The settlement class in Amchem was "sprawling" and it contained claimants that differed in terms of exposure and injury. Yet, the settlement did not separate claims into subclasses where representatives of that class could ensure that the settlement served the interests of the subgroup. Instead, the named parties, who suffered from diverse medical injuries, purported to represent one giant class. Because the proposed settlement did not meet the prerequisites of Rule 23(a) and (b) and the global settlement provided no structural assurance of fair and adequate representation for diversely affected individuals, the Court did not approve the settlement.

The Court's Amchem decision best serves as a warning that courts may certify settlement class actions, but should proceed with caution. In studying a set of cases for the Federal Judicial Center,

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Professor Jay Tidmarsh gleaned the following three basic propositions from the Court's decision: (1) "class actions can sometimes be used to resolve mass tort controversies,"336 (2) "a settlement class action . . . [in the mass tort context] must meet most but not all of the requirements of litigation class actions . . . but a court may take the settlement into account in determining whether a class action is a superior way to adjudicate the controversy,"337 and (3) the Amchem settlement failed because it did not satisfy the adequacy of representation requirement of Rule 23(a)(1) or the predominance requirement in Rule 23(b)(3).338

2. Ortiz v. Fibreboard Corp.: Rule 23(b)(1) & Insurance Funding

Two years after the Amchem decision, the same settling parties attempted to evade the decision by avoiding any set allocation amounts and resolving each claim through a post-approval arbitration procedure.339 Yet, the Supreme Court disapproved this Rule 23(b)(1)(B) mandatory (no provision allowing claimants to "opt-out" of the settlement) "limited fund" settlement of asbestos personal injury claims in Ortiz v. Fibreboard Corp.340 Despite the two-year decision gap, attorneys negotiated the Amchem and Ortiz settlements almost alongside one another.341 After Amchem, the Supreme Court remanded Ortiz to the Fifth Circuit for further consideration in light of that holding, but the Fifth Circuit affirmed its prior decision to uphold the Ortiz settlement because it was a limited fund settlement, under Rule 23(b)(1)(B), rather than a 23(b)(3) settlement.342 In fact, the two settlements shared a number of features: many of the same attorneys negotiated both settlements, both included side deals for plaintiffs with individual representation, both attempted to settle potential future asbestos


337. Id. at 26–27.
338. Id. at 27–29.
341. Cabraser, supra note 335, at 1195.
342. Ortiz, 527 U.S. at 830, 119 S. Ct. at 2307.
claims with unknown plaintiffs, and both settlements contained questionable fund allocation.\textsuperscript{343}

The Ortiz limited fund presented the Court with an unusual situation in which the proceeds of a settlement between Fibreboard and its insurance company supplied the money for the limited fund settlement that would compensate the asbestos claimants.\textsuperscript{344} Although the fund provided some $1.525 billion, Fibreboard contributed only $500,000.\textsuperscript{345} The Court focused on the lack of an evidentiary foundation for both the district and appellate courts' determination of the limited fund based on Fibreboard's assets and expressed dissatisfaction with the inquiry into whether the fund was fair and reasonable.\textsuperscript{346} The Court noted that settlement-only class actions required "heighten[ed] attention" at the certification stage "because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing."\textsuperscript{347} A fairness hearing "is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees.'"\textsuperscript{348} In effect, the limited settlement fund in Ortiz mirrored a bankruptcy result, but circumvented the fairness protections afforded by bankruptcy.\textsuperscript{349}

Had the Amchem and Ortiz settlements been less sprawling, dealt with a more isolated incident, and included only one defendant, as in the orthopedic bone screw litigation, the Supreme Court might have upheld the settlement. In approving a limited fund settlement under Rule 23(b)(1)(B), Judge Bechtle distinguished Amchem by noting that the orthopedic bone screw litigation was "defined and congruous," so it did not present the widespread intra-class conflicts inherent in the asbestos settlement.\textsuperscript{350} Unlike the latent injury asbestos settlement, no future claimants existed in the bone screw

\begin{thebibliography}{99}
\item 343. Cabraser, supra note 335, at 1196.
\item 344. Id.
\item 346. Ortiz, 527 U.S. at 853, 854, 119 S. Ct. at 2318. The court observed that "[f]air treatment . . . was characteristically assured by straightforward pro rata distribution of the limited fund." Id. at 855, 119 S. Ct. at 2319.
\item 347. Id. at 849, 119 S. Ct. at 2316.
\item 348. Id., 119 S. Ct. at 2316.
\item 349. The bankruptcy protections are described in detail in Part V.B. Bankruptcy gives the court an active role in protecting tort claimants and defendants and handles the pooling function much better than does the class action. Coffee, supra note 55, at 1383; see also infra Part V.B.
\end{thebibliography}
All claimants who had surgery knew soon after the surgery whether they had a claim against Acromed. Acromed Corporation was the only defendant. The settlement treated all claims equally and employed a post-approval claims administration process that evaluated claimants on an equal and independent basis.

Yet, the Supreme Court, in Amchem and Ortiz, faced a seemingly infinite number of future claims and a diversely injured group of present claimants so it stressed the need to ensure that absent class members, who might also be affected differently, must receive fair and equal treatment. In order to protect these absentees, the Court required strict compliance with Rule 23 to monitor (1) whether a fair basis existed for binding the claimants and (2) whether the attorneys adequately represented those absentees without conflicts of interest within the class. However, by raising the bar to class certification, the Court may have decreased fairness in aggregated settlements by forcing some types of mass torts further outside the protections of the class action.

A recent study conducted by the Federal Judicial Center, the Judicial Conference’s research agency, found that neither Amchem nor Ortiz significantly impacted whether attorneys filed their cases in federal or state court. However, it did find that federal judges were more than twice as likely as state court judges to deny class certification motions. Forty-three percent of the surveyed attorneys thought that the Amchem and Ortiz decisions made it harder to certify

351. See id. at 173.
352. Id.
353. See id. at 158.
354. See id.
356. Id. at 18. A 1996 study of class actions found that arguments addressing actual or potential conflicts of interest between class members and the class representative occurred with some frequency. Willging et al., supra note 115, at 124.
358. Willging & Wheatman, supra note 335, at 4.
359. Id. at 35.
and settle class actions. After these decisions, courts generally use settlement class actions on "a highly selective case-by-case basis." If the settlement does not meet the requirements for class certification, then the claimants receive no procedural protections of fairness, reasonableness, or adequacy absent judicial supervision through a bankruptcy proceeding.

B. The Bankruptcy Alternative

Because courts are less willing to certify mass tort class action settlements, a number of defendants turned to the only other alternative that facilitates a binding global resolution of pending and potential claims: bankruptcy. Bankruptcy's advantages include nationwide jurisdiction, the ability to construct a fair and equitable settlement and the absolute priority rule that prevents the debtor's shareholders from participating in the company's reorganization until all creditors are paid. Despite the relative advantage of satisfying tort claimants' claims ahead of shareholders, the bankruptcy process also includes a rule that restricts judges from confirming a Chapter 11 plan over the objection of a single claimant who would receive more in Chapter 7 liquidation than in Chapter 11 reorganization. The Bankruptcy Code compels judges to conduct a confirmation hearing and to make a determination of whether the proposed plan satisfies thirteen statutory requirements including feasibility. The court may confirm the plan even if a class of interests votes it down so long as the court finds that the plan satisfies all thirteen factors, does not unfairly discriminate, and is fair and equitable.

360. Id. at 6.
362. See generally Coffee, supra note 55, at 1386-87.
363. Despite the benefits, the drafters of the bankruptcy code did not have mass torts in mind when creating it, and it, like other procedural mechanisms, strains to respond to mass torts.
365. See 11 U.S.C. § 1129(a)(7). This rule is commonly known as the best interests of the creditor principle. For a discussion of this rule and the policy behind it, see Elizabeth Warren, Business Bankruptcy 139-40 (1993).
367. See 11 U.S.C. § 1129(b) (1)-(2); see also Warren, supra note 365, at 134-36. The term of art for this decision is "cram down." See Jeffrey Davis,
A recent study comparing the use of the limited fund class action settlements (before the 2003 revisions to Rule 23 of the Federal Rules of Civil Procedure) with bankruptcy reorganization concluded that bankruptcy provided the superior method for resolving mass torts in terms of fairness and effective judicial review. This section highlights the principles of fairness and justice inherent in the bankruptcy process that promote the view that bankruptcy provides a superior method for resolving mass torts. By examining the Dalkon Shield litigation, this section lays a foundation for incorporating these key fairness principles into the larger scheme of post-aggregation settlements.

Although the court can achieve and approve a limited fund class action settlement with more speed and efficiency and less cost than a mass tort bankruptcy reorganization, bankruptcy protects tort claimants by permitting them to vote against the plan and by appointing a future claims representative to act on behalf of future interests. Aggregation promotes settlement, but decreases individual autonomy. One of the principal determinations that must be made to evaluate the fairness of any process that purports to resolve claims en masse is whether the method—be it bankruptcy, class action, or other types of aggregation—provides individual claimants with a meaningful voice in the decision to accept the settlement. Providing claimants with a meaningful voice differs dramatically from a meaningful choice. Whenever individuals must choose between accepting the terms of a collectively negotiated settlement and funding individual litigation against large corporate defendants, most rational claimants will opt for the settlement.

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368. Gibson, supra note 355, at 5.
369. Id. at 5–6.
370. See Cramton, supra note 7, at 822 (“Collective action may also deprive individuals of meaningful control over their own legal claims, pushing them involuntarily into compensation grids and administrative claims-handling processes to whose ministrations they have not consented.”).
371. The Model Rule of Professional Responsibility that applies to aggregated settlements states, “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of or against the clients . . . unless each client gives informed consent, in a writing signed by the client.” Model R. of Prof’l Conduct 1.8(g). The Rule also requires the lawyer to disclose “the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” Id. Even clients informed of conflicts will most often choose to remain with their attorney when the choice is between waiving a conflict and finding a new attorney.
372. After studying the filings in four district courts, Thomas Willging, Laural Hooper, and Robert Niemic concluded that, based on levels of recovery, most class members would not pursue separate individual actions should the class certification
Rule 23(c) and (g) preserves some of the security inherent in individual attorney-client relationships through its notice provisions and selection of class counsel.\textsuperscript{373} Outside the class action, however, giving claimants a meaningful voice includes not only notifying them about upcoming court proceedings, but also supplying them with sufficient financial and other data to make informed judgments regarding the adequacy of the proposed settlement, allowing them an opportunity to voice their concerns with or opposition to the proposed settlement, and ensuring that the resolution process allocates sufficient weight to their concerns.\textsuperscript{374}

Scholars and commentators highlight the Dalkon Shield Claimants Trust as a paradigm of fairness and efficiency because it gave individuals a meaningful voice.\textsuperscript{375} The Dalkon Shield litigation began when A.H. Robins Company, Inc. marketed an intrauterine birth control device known as the Dalkon Shield.\textsuperscript{376} It caused numerous health problems including pelvic inflammatory disease and septic abortions. By 1975, A.H. Robins faced 286 complaints against it and, due to its aggressive marketing campaign, anticipated many more.\textsuperscript{377} In 1975, the Panel consolidated the cases and transferred them to the District of Kansas where Judge Frank Theis presided over pretrial discovery for four years.\textsuperscript{378} After four years, the Panel began remanding the cases to the transferor courts.

Judge Spencer Williams, of the Northern District of California, conditionally certified a nationwide class under Rule 23(b)(1)(B) on the issue of damages, and a Rule 23(b)(3) statewide class on liability and compensatory damages.\textsuperscript{379} All parties, aside from one plaintiff, opposed the certification.\textsuperscript{380} The Ninth Circuit reversed both fail. Willging et al., supra note 115, at 84.
\textsuperscript{373} Fed. R. Civ. P. 23(c), (g).
\textsuperscript{374} Gibson, supra note 355, at 14.
\textsuperscript{376} Gibson, supra note 355, at 187.
\textsuperscript{377} \textit{Id.} at 187–88.
\textsuperscript{378} In re N. Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 849 (9th Cir. 1982).
\textsuperscript{379} \textit{Id.}
\textsuperscript{380} \textit{Id.} at 849; Gibson, supra note 355, at 188.
certifications. The record did not support a Rule 23(b)(1)(B) class since the district court had not conducted a fact-finding inquiry into the extent of A.H. Robins assets in relation to its tort liability and the Rule 23(b)(3) class could not stand because it satisfied neither the typicality nor the superiority requirement. The Ninth Circuit also observed, in its evaluation of the superiority requirement, that efficiency qualified as a factor supporting class certification, as did litigation costs. Yet, the court was not concerned about fairness. Instead, the Ninth Circuit noted that the few issues that might be tried on a class basis weighed against the ones that needed individual attention. Consequently, class certification saved little actual time. This forced A.H. Robins to begin settling nearly eight cases a day, but it still faced approximately 6,000 unresolved claims. By 1985, the company and its insurer had paid $530 million to resolve 9,500 cases and faced serious financial difficulties. Eventually, the company filed for Chapter 11 reorganization.

The Dalkon Shield Claimants Trust formed an integral part of the Chapter 11 reorganization of A.H. Robins and resolved thousands of claims. A number of characteristics contributed to the success of the Trust and its acclaim as a fair process. In forming the Trust, the court included an estimation of necessary funding, a database of potential future claimants, a reorganization plan, disclosure of the

381. Dalkon Shield, 693 F.2d at 857.
382. Id.
384. Dalkon Shield, 693 F.2d at 856.
385. Id.
386. Gibson, supra note 355, at 189.
387. Id.; Sobol, supra note 72, at 47, 349 n.84.
388. Gibson, supra note 355, at 189; Sobol, supra note 72, at 47, 349 n.84.
389. Vairo, supra note 375, at 123. For more on the factual and procedural history of the Dalkon Shield litigation, see Sobol, supra note 72; Kenneth R. Feinberg, The Dalkon Shield Claimants Trust, 53 Law & Contemp. Probs. 79 (1990); Georgene M. Vairo, The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?, 61 Fordham L. Rev. 617 (1992); Vairo, supra note 375, at 123.
390. In 1997, the National Bankruptcy Review Commission proposed the following statutory definition of "mass future claim:"
[a] claim arising out of a right to payment or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if: (1) the act(s) or omission(s) occurred before or at the time of the order for relief; (2) the act(s) or omission(s) may be sufficient to establish liability when
reorganization plan to each tort claimant, arms length negotiation, active judicial supervision, a cap on attorneys fees, a court-appointed examiner, and a court-appointed database expert.

To adequately estimate the number of claimants, A.H. Robins conducted an extensive notification campaign and, with court-approval, set a date after which it would not consider new claims. The campaign produced an estimated number of 195,000 valid claims.

The court then appointed Professor Francis McGovern to compile a database of the claimants that included information about the seriousness of their claims based on a questionnaire asking about the gravity of injury and evidence of causation. After receiving evidence about the seriousness of claims, the court conducted an estimation hearing on the valuation of the claims and Judge Merhige, the primary bankruptcy judge, announced a value of $2.475 billion.

Injuries are ultimately manifested; (3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds; (4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and (5) the amount of such liability is reasonably capable of estimation.

National Bankruptcy Review Commission, Final Report: Bankruptcy: The Next Twenty Years (Oct. 20, 1997); see also Kathryn R. Heidt, Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough, 69 Am. Bankr. L.J. 515 (1995). Attorneys Ralph Mabey and Peter Zisser advocate the extensive use of bankruptcy to deal with future claims. See Ralph R. Mabey & Peter A. Zisser, Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments, 69 Am. Bankr. L.J. 487 (1995). They define a future claim as "a claim against a debtor for an injury or disease that has not yet become manifest at the time the debtor has filed for bankruptcy, but is based upon the occurrence, prior to the bankruptcy, of one or more material events, acts, or failures to act." Id. at 477–78 (quoting Ralph R. Mabey & Jamie Andra Gavrin, Constitutional Limitations on the Discharge of Future Claims in Bankruptcy, 44 S.C. L. Rev. 745, 749–50 (1993)).

Gibson, supra note 355, at 193. The campaign spent $4.5 million to air announcements on network and cable television, publish 233 newspaper ads, publish press releases in foreign newspapers, and notify public health officials and American embassies. Id.

Id. at 194.

Id. at 195. Compiling the database cost $5 million and took fourteen months. Id.

Id. at 196. Judge Merhige failed to provide an explanation for the final estimation. Consequently, the Fourth Circuit could not review the district court’s method for validity. Id. at 216. The Bankruptcy Code provides the authority to estimate the size and number of all present and future claims. 11 U.S.C. § 502(c) (2000). This section provides, "[t]here shall be estimated for purposes of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or (2) any right to payment arising from a right to an equitable remedy for breach of performance." Id. Parties may also request a jury trial to determine the actual
With a firm cap on tort liability, A.H. Robins accepted a merger offer by American Home Products that included a claims resolution facility and additional funding.\(^{395}\) The additional funding served as both a floor and a cap on the new company’s obligations to the tort claimants.\(^{396}\)

A.H. Robins sent the reorganization plan and all disclosure materials to each tort claimant in a 261-page statement.\(^{397}\) The plaintiffs’ counsel overwhelmingly disfavored the plan, yet ninety-four percent of the voting tort claimants voted for it.\(^{398}\) Almost three years after A.H. Robins filed for bankruptcy, the district court approved the reorganization plan.\(^{399}\)

The Claims Resolution Facility administered payments to Dalkon Shield victims through three options. Claimants could select Option 1, which paid $725 to all claimants and required them only to file a

amount of a claim for distribution purposes, 11 U.S.C. § 1141(a) (2000), and courts have used this process to estimate potential personal injury liability in mass torts. See A.H. Robins v. Piccinin, 788 F.2d 994, 1012-13 (4th Cir. 1986).

Richard Sobol, an attorney who wrote a book exclusively devoted to the Dalkon Shield litigation, criticized the implementation of the methodology for the evaluation process. He noted:

A serious shortcoming with the methodology concerned the identification of the claims in the sample to which historic value would be accorded. Ideally, in statistical sampling the pertinent information is determined concerning the sample and the assumption is made that the same factual pattern will be replicated in the universe. If 25 percent of the homes in a statistically valid sample are tuned to the “Cosby Show,” it is assumed that 25 percent of all the homes in the universe from which the sample was drawn are tuned to the “Cosby Show.” The comparable methodology for estimating the value of the universe of the Dalkon Shield claims would be actually to liquidate the claims in a sample, using the procedures that would be used to liquidate claims under the plan of reorganization, and to project the liquidated value of the sample to the universe.

Sobol, supra note 72, at 181.

395. Gibson, supra note 355, at 196.

396. See Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 697 (4th Cir. 1989); Gibson, supra note 355, at 196. The reorganization plan did not include a limit on attorneys fees, but did allow loss of consortium claims by family members. Gibson, supra note 355, at 197.

397. Gibson, supra note 355, at 196. The statement included a “thorough summary of the complex plan in terms that almost anyone could understand.” Menard-Sanford, 880 F.2d at 696; see also In re A.H. Robins Co., 88 B.R. 742, 748-49 (E.D. Va. 1988). However, the disclosure statement did not estimate how much each claimant might recover. Menard-Sanford, 880 F.2d at 696; Sobol, supra note 72, at 230. Yet, the Fourth Circuit held that “any specific estimates may well have been more confusing than helpful and certainly would be more calculated to mislead.” Menard-Sanford, 880 F.2d at 697.

398. Gibson, supra note 355, at 198.

399. This confirmation released all liability against the Robins family and its corporate officials in return for $10 million. Id.
single form, Option 2, which required claimants to present medical proof and allowed them to recover between $850 and $5,500, or Option 3, which allowed claimants with serious and provable Dalkon Shield injuries to engage in settlement talks with the Trust and if the individuals declined the offer they could go to binding arbitration or trial. The Dalkon Shield Claimants Trust distributed full payments to the claimants nine years ahead of schedule.

Both the court-appointed examiner, former bankruptcy judge Ralph Mabey, and Judge Merhige, who presided over the A.H. Robins bankruptcy case, played an integral role in overseeing the negotiations, settlement, and fund disbursement. By taking an active role in judicial management, Judge Merhige prevented collusion from occurring between the plaintiffs and defendants, defendants and their insurers (Aetna Casualty Co.), and defendants and their takeover company (American Home Products). After the administrators of the Trust realized that the Trust actually had extra funds, Judge Merhige placed a ten percent cap on attorneys' fees for the additional amounts that the Trust distributed to all claimants who did not initially select Option 1. He reasoned that because the attorneys did not exert any additional efforts, they should not receive extra fees. On appeal, the Fourth Circuit upheld the cap, calling it a "wonderful example of chutzpah." Although critics have condemned some aspects of judicial treatment, overall, close judicial supervision at each step of the process resulted in fair administration of hundreds of thousands of claims.

C. Is Settlement an Appropriate Measure of Success?

Courts and commentators alike place a high value on settlement because it prevents drawn out litigation and presumably allows defendants to remain solvent. Courts conduct aggregated litigation

400. Approximately 132,000 claimants selected this option. Id. at 199.
401. Approximately 18,000 claimants selected this option, which the plan designed for claimants with serious alternative causation problems. Id. at 200.
402. Approximately 49,000 claimants selected this option and most of them agreed to take the initial settlement offer. Id. at 200.
403. Id. at 199.
405. Id.
406. Id. at 377.
407. Gibson, supra note 355, at 215 (noting the criticism of Judge Merhige's refusing to allow a relatively inexperienced attorney whom he had appointed to represent future claimants hire outside counsel).
408. See, e.g., Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement."); Adams v. Robertson, 676 So. 2d 1265,
with a presumption against trial and a penchant toward efficiency.\textsuperscript{409} Chief Justice Warren praised the Coordinating Committee for the few number of electrical equipment cases that actually went to trial.\textsuperscript{410} The Panel wants to legislatively overrule the \textit{Lexecon} decision for fear that it could hinder the trial court’s ability to promote settlements.\textsuperscript{411} Even the Manual for Complex Litigation (Fourth) speaks of facilitating mass tort settlements.\textsuperscript{412} Yet, is settlement that comes at the price of blackmail a legitimate goal?

In individual litigation, settlement indicates that the parties resolved their differences without the need for or costs of litigation. In the mass tort setting, however, when a large number of potential claimants emerge and settlement of some sort becomes inevitable, the tort system has created an absolute liability for defendants. The clear assumption is that when plaintiffs emerge in droves alleging similar injuries from the same product, the defendant \textit{must} be liable. The defendant faces a “catch-twenty-two”: either quietly compensate aggregated weak claims through settlement or pay perhaps even more in attorneys’ fees, damaging press, and future claims. More and more frequently, absolute liability does not happen after class certification hearings filled with scientific experts and causation evidence, but after multidistrict aggregation that coerces defendants into quick settlements in hopes of avoiding the negative publicity and additional lawsuits.\textsuperscript{413}

The pressure to settle and the corresponding financial burdens stem not only from the need to sidestep negative publicity, but also from a fear that “[o]ne jury, consisting of six persons . . . will hold

\textsuperscript{1275} (Ala. 1995) (observing that the “judicial policy favoring settlement is particularly important in the context of class actions”); Cooper, \textit{supra} note 38, at 1979 (“Settlement seems to hold out the best promise for resolving large numbers of mass tort claims at one time, on consistent terms that achieve some measure of similar treatment for similar injuries and with substantial savings in litigation costs.”); Cramton, \textit{supra} note 7, at 819 (noting that “[t]he transfeeree judge often takes an active role in encouraging or pressing settlement); Resnik, \textit{supra} note 12, at 840 (noting that “the judicial policy favoring settlements is said to have special force in the class action context); Schwarzewt al., \textit{supra} note 36, at 1560–61.

\textsuperscript{409} See Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) (“Particularly in class action suits, there is an overriding public interest in favor of settlement); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (“It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation.”); Gaddis v. Campbell, 301 F. Supp. 2d 1310, 1313 (M.D. Ala. 2004) (“Judicial policy favors voluntary settlement of cases.”); Resnik, \textit{supra} note 98, at 395 (observing that judges manage litigation as a quest toward efficiency); Resnik, \textit{supra} note 12, at 840.

\textsuperscript{410} Rhodes, \textit{supra} note 213, at 714.

\textsuperscript{411} See \textit{supra} Part III.C.

\textsuperscript{412} Manual for Complex Litigation (Fourth), \textit{supra} note 36, § 22.91, at 447.

\textsuperscript{413} See McNeil & Fanscal, \textit{supra} note 19, at 489. For more information on the use of experts in class certification hearings, see Chamblee, \textit{supra} note 185.
the fate of an industry in the palm of its hand.\footnote{414} In the past, the rhetoric of "blackmail" centered on class certification. Once certified, plaintiffs tend to have an inequitable bargaining advantage over defendants that pressures defendants to settle.\footnote{415} Judge Posner, in \textit{In re Rhone-Poulenc Rorer, Inc.},\footnote{416} and Judge Easterbrook, in both \textit{West v. Prudential Securities, Inc.}\footnote{417} and \textit{In re Bridgestone/Firestone, Inc.}\footnote{418} commented disapprovingly on how the class action device has turned into a medium for blackmail.\footnote{419} Judge Posner demonstrated alarm over the weak proof of the plaintiffs' claims in the HIV hemophiliac litigation as compared to the tremendous litigation and liability risks for the defendant.\footnote{420} A transferee judge attempted to manage the litigation by certifying the class and setting a limited class-wide issue for trial.\footnote{421} The plaintiffs proposed a novel theory of tort liability: even though the outbreak of HIV occurred before anyone had heard of HIV, because Hepatitis B existed, the defendants failed to use due care with respect to that virus.\footnote{422} That due care, so the theory went, would have prevented transmission of the HIV/AIDS virus.\footnote{423} The defendants prevailed in the first twelve of

\footnote{414} In \textit{re Rhone-Poulenc Rorer, Inc.}, 51 F.3d 1293, 1300 (7th Cir. 1995).
\footnote{415} Davis, \textit{supra} note 32, at 218; Priest, \textit{supra} note 248, at 521 ("THE single most salient feature of the modern mass tort class action is the extraordinary power that derives from certification of a class alone. This power stems from the prospect that the tort claims of a large-numbered class might reach a jury that might render a large aggregate judgment."); Georgene Vairo, \textit{Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation}, 33 Loy. L.A. L. Rev. 1559, 1588 (2000); see also Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting) ("The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.").\footnote{rev'd, 417 U.S. 156, 94 S. Ct. 2140 (1974); Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). \textit{But see} Arthur R. Miller, \textit{Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"} 92 Harv. L. Rev. 664, 679–82 (1978–79); Charles Silver, \textit{We're Scared to Death:} Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357 (2003).

A 1996 study compared the outcomes of certified classes with the outcomes of non-certified cases to determine whether certifying a class coerces settlement. Willging \textit{et al., supra} note 115, at 143. The study found that, across four district courts, certified class actions were two to five more times likely to settle that cases containing class allegations that were not certified. \textit{Id.}

\footnote{416} 51 F.3d at 1294.
\footnote{417} 282 F.3d 935, 937 (7th Cir. 2002).
\footnote{418} 288 F.3d 1012 (7th Cir. 2002).
\footnote{419} \textit{But see} In \textit{re Visa Check/MasterMoney Antitrust Litig.}, 280 F.3d 124, 159 (2d Cir. 2001) (certifying a class despite its potential coercive effect).
\footnote{420} \textit{Rhone-Poulenc Rorer}, 51 F.3d at 1299.
\footnote{422} \textit{Rhone-Poulenc Rorer}, 51 F.3d at 1296.
\footnote{423} \textit{Id.}
thirteen cases that went to trial. Even if the defendants lost, they probably faced no more than $125 million in liability. Yet, with class certification, their liability could exceed $25 billion and cause bankruptcy. Judge Posner concluded that the plan to certify this class under Rule 23(c)(4)(A) "so far exceed[ed] the permissible bounds of discretion in the management of federal litigation as to compel [the Seventh Circuit] to intervene and order decertification." Judge Easterbrook voiced a similar concern that settlements "reflect [a] high risk of catastrophic loss" and force "defendants to pay substantial sums even when the plaintiffs have weak positions." Consequently, "[t]he effect of a class certification in inducing settlement to curtail the risk of large awards provide[d] a powerful reason to take an interlocutory appeal." Judge Easterbrook reiterated his position in In re Bridgestone/Firestone, Inc. by remarking that the consequence of aggregating millions of claims "makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."

The coercion aspects of aggregation also appeared in the breast implant litigation. The Panel consolidated the breast implant litigation in 1992 before Judge Sam Pointer, Jr. of the Northern District of Alabama. At the end of 1993, Dow Corning Corp., along with two other defendants, negotiated a settlement for nearly $4 billion. However, few verdicts existed upon which to base the settlement value and plaintiffs put forth weak scientific evidence of causation. Judge Pointer spread the fairness hearing on the

424. Vairo, supra note 415, at 1589.
425. Id.
426. Id.
427. Rhone-Poulenc Rorer, 51 F.3d at 1297.
429. Id.
430. In re Bridgestone/Firestone, Inc, 288 F.3d 1012, 1016 (7th Cir. 2002).
431. The Bendectin litigation serves as a counterexample to the breast implant litigation. After the Sixth Circuit decertified the class, most of the individual litigation failed due to problems with scientific causation. See supra notes 198–207 and accompanying text.
433. Tidmarsh, supra note 336, at 76; see McNeil & Fanscal, supra note 19, at
settlement out over three days, but no medical or legal experts testified.434 After revising the settlement several times, Dow Corning eventually filed for Chapter 11 bankruptcy reorganization. This prompted a characterization of plaintiffs as greedy and unmeritorious.435

Although the danger of blackmail exists with respect to class certification, the 2003 amendments to Rule 23 lessen this danger. Rule 23(e) requires that the court conduct a hearing prior to approving a settlement to inquire into the merits of the claims and to determine the fairness, reasonableness, and adequacy of the settlement.436 Rule 23(f) permits defendants or plaintiffs to appeal the trial court’s decision to certify the class even for settlement purposes only.437 The real danger inherent in the coercive aspect of settlements arises when parties negotiate settlements after multidistrict aggregation without the protection of appealing certification decisions. Absent a facially invalid agreement, the court typically enters consent judgments as presented by the parties.438 Judges have neither the obligation nor the authority to scrutinize the fairness or adequacy of settlements after aggregation and/or consolidation.439

To a great extent, whether post-aggregation settlement serves as an appropriate measure of success depends on the goal. If the goal is compensating tort victims,440 then the judicial system seems willing to regard considerations of fault, responsibility, and deterrence as peripheral so long as the settlement provides adequate compen-
sation. If tort law aims to deter undesirable behavior, then the absolute liability of defendants through coerced settlements does not achieve deterrence. Despite one commentator’s assertion that “optimal deterrence is achieved by threatening the defendant with the aggregate, average loss (pecuniary and nonpecuniary) attributable to its tortuous conduct,” when the judicial system effectively holds defendants absolutely liable by forcing them to settle—regardless of fault or negligence—then defendants have little incentive to take excessive precautionary measures. If the emphasis is on efficiently pushing mass tort cases through the judicial system, thereby reducing repetitive trials and disposing of cases, then settlement symbolizes a paradigm of success. Similarly, if the goal is to achieve closure for mass tort defendants, then a global settlement and bar on future claims also denotes success.

Yet, settlement as a measure of success, without judicial oversight and scrutiny, breaks down if the goal is fairness. When the tort system aims to provide individuals with meaningful control over their own legal claims without requiring them to choose between minimal compensation and costly litigation, then settlement does not accurately measure success. Nor does settlement measure the success of fairness when defendants feel pressure from all sides, including the judiciary, to compensate weak claims.

Critics of the Judicial Panel on Multidistrict Litigation claim that the

441. See Cramton, supra note 7, at 821.
442. See Dobbs, supra note 132, at 12; Rosenberg, supra note 440, at 417–19 (observing that “the systemic bias favoring the defendant subverts the goal of fully internalizing the costs of tortuous harm to prevent it from occurring in the first place”).
443. David Rosenberg, Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases, 71 N.Y.U. L. Rev. 210, 239 (1996). Rosenberg also argues that plaintiffs “are never made better off by being vested with a property right . . . to an inefficient day in court, to personal control over their claims, and to other anticollectivist procedures.” Id. at 257.
444. See generally Cooper, supra note 38, at 1950 (“Defendants frequently complain that there is no chance of winning on the merits—even a defendant willing to risk the full damages liability that would follow a fair adjudication of liability will settle for fear that the sheer mass of self-identified victims will overwhelm reason and force a finding of liability.”).
445. See generally Willging, supra note 361, at 15.; Priest, supra note 248, at 541 (“Efficiency is surely the most carefully elaborated objective of tort law . . . . it provides that a defendant be held liable in tort only in context where the harm to the plaintiff could have been prevented by a cost-effective investment of the defendant.”)
446. See generally Priest, supra note 248, at 543–44 (“[I]mplicit in both the efficiency and equity approaches to tort law, there is a benefit in achieving finality in litigation and proceeding with more normal life.”).
447. See generally Willging, supra note 361, at 17.
448. See id. at 10.
Panel finds the existence of common factual questions and orders aggregation of mass torts too quickly, before evaluating whether the aggregation promotes justice. If true, this—when combined with evidence that most aggregated claims settle—may indicate that early aggregation compels defendants to settle claims that they might otherwise successfully litigate.

The debate surrounding the conflicting aims of the tort system for individual litigation—compensating injured persons and deterring future undesirable behavior—has existed since its inception. The rise of mass torts in the asbestos cases further complicated the goals of the tort system by creating a judicial need, or at least a perceived need, for efficiency. The lower courts, Congress, and eventually the Judicial Panel on Multidistrict Litigation responded to the asbestos crisis by streamlining the process and experimenting with innovative class action techniques that ultimately did not survive the Supreme Court’s reactionary emphasis on fairness. The pressure to settle in the context of aggregation most often comes at the price of fairness when conducted outside the class action mechanism. Yet, the judicial system need not pursue one goal at the expense of the others when Congress can endow judges with the authority to supervise settlement of aggregated mass torts and to tailor their approval of settlements to the individual aspects of that particular litigation.

VI. A CONSERVATIVE PROPOSAL TO ADDRESS A MOUNTING PROBLEM

A. Prior Recommendations Tailored to Diverse Goals

Both academics and judges have created numerous proposals to reform the way the justice system manages mass torts. Past proposals aim to reform the class action system without regard to aggregated claims that do not qualify for class action status. The 2003 revisions to Rule 23 mooted a substantial number of these proposals. Additional plans addressed aspects of litigation, such as trial.

449. See, e.g., In re Willingham Pat. Litig., 322 F. Supp. 1019, 1021 (J.P.M.L. 1971) (Weigel, J., dissenting); (suggesting that the common facts were inadequate to justify a transfer in light of the burden on the parties, witnesses, and counsel); Stanley J. Levy, Complex Multidistrict Litigation and the Federal Courts, 40 Fordham L. Rev. 41, 48 (1971); Roberts, supra note 213, at 847; see also supra notes 251, 276.

450. See Dobbs, supra note 132, at 13.

451. The Supreme Court expressed its views on fairness in its Amchem and Ortiz opinions. See supra Part V.A.

452. Based on Judge Robert Parker’s use of statistical sampling in the Cimino
alternative dispute resolution,\textsuperscript{453} which occur only after settlement talks fail. Many of these proposals endeavored to further streamline the efficiency of the tort system without properly balancing fairness concerns.\textsuperscript{454}

Proposals for efficiency are often comprehensive and seem to fail because they aspire to change too much at once and focus primarily on litigation with over 1,000 claims. Comprehensive proposals include those authored by Professor Edward Cooper, the American Law Institute, and the American Bar Association Commission on Mass Torts. These schemes react to mass tort anomalies such as asbestos, Agent Orange, and Dalkon Shield,\textsuperscript{455} but intrude too extensively on state sovereignty to provide a reasonable solution to "everyday" mass torts that have far less than 1,000 claims and may lack the latent injury aspect of these anomalies.\textsuperscript{456} In addition,
Congress may feel more comfortable taking smaller steps toward change rather than implementing sweeping legislation. When the judicial system proposes too much at once, the changes rarely make it past Congress.\textsuperscript{457}

If Congress enacted an all-encompassing system designed to accommodate colossal mass tort litigation, which comprises only about fifteen percent of total mass tort litigations subject to multidistricting,\textsuperscript{458} it may encourage large-scale meritless lawsuits. Francis McGovern likened an extensive mass tort system to a "highway"\textsuperscript{459} or "Field of Dreams."\textsuperscript{460} The "highway" aphorism translates into a sensible anecdote: don't build the highway prematurely because it will promote a proliferation of frivolous mass tort claims.\textsuperscript{461} This recommendation suggests that a feasible solution should take into account the changing numbers and types of mass torts.\textsuperscript{462}

\begin{footnotesize}
\begin{enumerate}
\item number of proposals focus on the state-federal relationship in mass torts. Their guidance is certainly needed; however, this Article focuses primarily on multidistrict litigation by the Panel, which currently can aggregate only federal cases. One state court judge has proposed a revision of the multidistrict litigation statute. See Sandra Mazer Moss, \textit{Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge’s Perspective}, 73 Tex. L. Rev. 1573 (1995). A federal judge has also commented on revising the multidistrict litigation statute to permit state-federal coordination. See Schwarzer et al., \textit{supra} note 36, at 1529. Judge Schwarzer’s proposal allows limited removal of related state court cases where minimal diversity exists, allows the state court to retain jurisdiction to litigate the merits of the decisions, makes the litigation binding in all subsequent proceedings, and requires federal courts remand the cases to state court when the case is ready for trial or summary judgment. \textit{Id.} at 1533. For innovations on voluntary state-federal coordination, see James G. Apple et al., \textit{Manual for Cooperation Between State and Federal Courts} (1997); Schwarzer et al., \textit{supra} note 47, at 1700–07 (containing cases about voluntarily coordinated state-federal cases). For a discussion on the advantages of state-federal judicial cooperation as well as the disadvantages, see Francis E. McGovern, \textit{Rethinking Cooperation Among Judges in Mass Tort Litigation}, 44 UCLA L. Rev. 1851 (1997); Mark C. Weber, \textit{Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases}, 21 Hastings Const. L.Q. 215 (1994).
\item For example, a number of product liability reforms have failed. See, \textit{e.g.}, S. 640, 102 Cong., 2d Sess. (1992) (attempting to set national standards for product liability suits); S. 100, 99th Cong., 1st Sess. (1985) (failing to pass after the Senate Commerce Committee failed to pass a vote to send the bill to the Senate floor); S. 44, 98th Cong., 2d Sess. (1984) (failing after the Senate took no further action on the bill after the Commerce Committee approved it). Congressional attempts to legislate a comprehensive tobacco settlement also failed. See The Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997); S. 1530, 105th Cong. (1997).
\item See infra note 482 and accompanying pie chart.
\item McGovern, \textit{supra} note 67, at 1840.
\item See McGovern, \textit{supra} note 67, at 1840–45.
\item See id.
\end{enumerate}
\end{footnotesize}
Professor Cooper proposed a comprehensive approach derived from Rule 23. This approach intended to change the current jurisdictional framework by: (1) empowering one court with nationwide jurisdiction to control all litigation events, (2) providing statutory definitions of mass tort elements and administrative processes for compensation, (3) expanding personal jurisdiction to provide for a single court with nationwide personal jurisdiction, (4) joining all potentially liable defendants, (5) establishing a means to determine a single source of applicable law as selected by a mass torts panel of judges, (6) selecting counsel without controlling who the adversaries might be, (7) conveying notice "as good as can be managed" to identifiable claimants or appointing representatives for those without notice, (8) incorporating a cushion of time for claims to mature and to receive information from evolving scientific studies, and (9) tackling aggregate settlement issues such as disparate group representation, claimant participation, impartial judicial review, and information for objectors. 463 The recent Class Action Fairness Act comes close to Cooper's proposal to establish nationwide jurisdiction by implementing minimal diversity and removal to federal court. 464 By aggregating both federal and state claims in one court, 465 this proposal substantially raises the stakes of the litigation and the corresponding emphasis on settlement. Without providing a safety net to ensure the fairness of aggregated settlements, this proposal prioritizes efficiency without a counterweight to balance fairness concerns.

The American Law Institute (ALI) Complex Litigation Project provided an extensive proposal that concentrated on consolidation, choice-of-law, and transfer of multiforum, multiparty cases among state and federal systems. 466 The ALI project would create a statutory Complex Litigation Panel to replace the Judicial Panel on Multidistrict Litigation and would set standards for the panel to apply when deciding whether to consolidate cases within the federal


464. See supra Part IV.B.

465. Professor Cooper observes, in a later article, "effective aggregation presents severe challenges to received notions of federalism." Cooper, supra note 38, at 1952.

system. To order transfer and consolidation the panel must find that the order would "promote the just, efficient, and fair conduct" based on whether it would reduce costs, duplicative litigation, the likelihood of inconsistent adjudications, and burdens on the judiciary. The panel would also take into account factors such as the number of parties, the geographic dispersion of the cases, and the stages of litigation.

To organize the litigation, the proposal granted the transferee court broad discretionary power in identifying common issues for similar treatment, certifying classes for either the entire litigation or certain issues, preparing a preliminary plan for the conduct of litigation, severing issues for trial or remand, and transferring damages for a consolidated trial. Parties could petition the Complex Litigation Panel for review of the transferee court's decisions. The court of appeals of the circuit containing the transferee court would also have the authority to grant an interlocutory order to review liability decisions. Like Professor Cooper's approach, the ALI project contemplated nationwide jurisdiction to the fullest extent possible by the Constitution. This would authorize the panel to transfer and consolidate actions in a state court and to remove actions from state court that "arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, and share a common question of fact with that action." It would also require potential litigants to join pending proceedings or face possible issue preclusion from relitigating the issues decided in the consolidated proceedings. Even without considering the federalism problems with nationwide jurisdiction and the emphasis on efficiency, the

467. American Law Institute, supra note 62, at 78.
468. Id. at 36–38.
469. Id.; Mullenix, supra note 466, at 986 (observing that the ALI project fails to explain how this new panel would interact with Rule 23 and whether the panel would trump the class certification rules).
470. American Law Institute, supra note 62, at 103–07.
471. Id. at 129–30.
472. Id.
473. Id. at 147; Mullenix, supra note 466, at 981.
475. Resnik, supra note 1, at 932.
476. See id. ("The difference between the ALI 1990s proposal and the 1966 class action proposal is that what the ALI terms efficiency appears paramount in its conception, whereas for at least some of the kinds of class actions created by the 1966 amendments to Rule 23, enabling access was the prime concern."). The proposal "adopt[s] an intermediate approach under which federal courts would have jurisdiction over certain categories of tort cases but would apply state substantive law." Schwarzer et al., supra note 36, at 1540. Federal courts could exert jurisdiction over actions transactionally related to cases in federal court. Id. For more information on the division between state and federal courts and the general
proposal falls short in terms of settlement concerns. Although the transferee court has broad discretionary power to organize the litigation, the ALI project did not consider the need for judicial oversight of settlements.

The American Bar Association Commission (ABA) on Mass Torts also proposed a comprehensive plan to reform judicial handling of mass torts. As noted in Part II.A, the ABA limited its definition of "mass tort litigation" to a set of "at least 100 civil tort actions arising from a single accident or use of or exposure to the same product or substance, each of which involves a claim in excess of $50,000 for wrongful death, personal injury or physical damage to or destruction of tangible property."\(^{477}\) The ABA proposal called for a federal judicial panel that would identify torts meeting this definition and consolidate some or all of those actions "before a federal court empowered to resolve all issues including liability and damages."\(^{478}\)

By incorporating choice-of-law and punitive damages standards, the ABA hoped to include sufficient federal law to support federal jurisdiction while avoiding the question of federal substantive law.\(^{479}\) Like Professor Cooper's and the ALI project's proposals, the ABA proposal incorporated nationwide jurisdiction,\(^{480}\) but offered no assurance that the impending pressure to settle would result in fair settlements.

Relatively few multidistrict litigations have over one hundred claims, let alone over one thousand claims.\(^{481}\) Consequently, a viable proposal must incorporate enough flexibility to fluctuate between variable numbers and types of claims.\(^{482}\) To a certain extent, the

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**Table:**

<table>
<thead>
<tr>
<th>Case Type (Product Defect Allegation)</th>
<th>Number</th>
<th>Percent of Total</th>
<th>Number Granted</th>
<th>Percent Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Catastrophic Event</td>
<td>5</td>
<td>9</td>
<td>4</td>
<td>80</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>28</td>
<td>52</td>
<td>21</td>
<td>75</td>
</tr>
<tr>
<td>Property Damage</td>
<td>5</td>
<td>9</td>
<td>4</td>
<td>80</td>
</tr>
</tbody>
</table>

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\(^{477}\) ABA Report, \(supra\) note 34, at 26.

\(^{478}\) Id.

\(^{479}\) Schwarzer et al., \(supra\) note 36, at 1540.

\(^{480}\) ABA Report, \(supra\) note 34, at 40.

\(^{481}\) See infra notes 482–483 and accompanying pie chart.

proposed remedy must begin by defining the type of mass tort it targets. If mass torts are only those litigations that reach epic proportions of over 1,000 claims, then the solution should address only those torts. Mass torts of over 1,000 claims comprise only fifteen percent of current mass tort litigations subject to the multidistrict litigation statute.\textsuperscript{483} Litigation with a hundred or more claimants makes up only thirty-six percent.\textsuperscript{484} Forty-nine percent of current mass tort

<table>
<thead>
<tr>
<th>Name</th>
<th>Type</th>
<th>Circuit</th>
<th>Total Transferred</th>
<th>Total Filed in Transferee Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Rezulin</td>
<td>Product Liability</td>
<td>Second</td>
<td>996</td>
<td>13</td>
<td>1,009</td>
</tr>
<tr>
<td>2. Asbestos</td>
<td>Product Liability</td>
<td>Third</td>
<td>99,268</td>
<td>7,428</td>
<td>106,696</td>
</tr>
<tr>
<td>3. Orthopedic Bone Screw</td>
<td>Product Liability</td>
<td>Third</td>
<td>2,808</td>
<td>273</td>
<td>3,081</td>
</tr>
<tr>
<td>4. Diet Drugs</td>
<td>Product Liability</td>
<td>Third</td>
<td>3,658</td>
<td>105</td>
<td>3,763</td>
</tr>
<tr>
<td>5. Baycol</td>
<td>Product Liability</td>
<td>Eighth</td>
<td>4,519</td>
<td>1,576</td>
<td>6,095</td>
</tr>
<tr>
<td>6. Phenylpropa- nolamine (PPA)</td>
<td>Product Liability</td>
<td>Ninth</td>
<td>1,237</td>
<td>20</td>
<td>1,257</td>
</tr>
<tr>
<td>7. Silicone Gel Breast Implants</td>
<td>Product Liability</td>
<td>Eleventh</td>
<td>26,465</td>
<td>961</td>
<td>27,426</td>
</tr>
</tbody>
</table>

Cumulative Total for 7 litigations


When evaluated as individual pieces of litigation, seven litigations, then litigation with over 1,000 claims makes up only fifteen percent of all current mass tort multidistrict litigation.

484. Yet, the Panel also transferred the following mass torts of 100 or more total cases for multidistrict treatment. \textit{See} chart in Appendix A.

When evaluated as individual pieces of litigation, seventeen litigations, then litigation with over 100 claims makes up only thirty-six percent of all current mass
litigation includes less than 100 claims.\textsuperscript{485} 

\begin{figure}[h]
\begin{center}
\begin{tikzpicture}
\draw (0,0) circle (2cm);
\filldraw[gray!20] (90:2cm) arc (90:270:2cm) -- cycle;
\filldraw[gray!40] (210:2cm) arc (210:330:2cm) -- cycle;
\filldraw[gray!60] (330:2cm) arc (330:90:2cm) -- cycle;
\node at (0,0) {Less than 100 Claims: 49%};
\node at (0:2cm) {Over 1,000 Claims: 15%};
\node at (90:2cm) {Over 100 Claims: 36%};
\end{tikzpicture}
\end{center}
\caption{Mass Tort Multidistrict Litigation Pending as of September 30, 2003, or Closed Since October 1, 2002}
\end{figure}

In this Article's definition of mass torts, which declines to place an arbitrary limit on the threshold number of claims needed to qualify and focuses instead on the operational issue of whether a particular group of claims needs special judicial management,\textsuperscript{486} the types and number of claimants within "mass torts" subject to multidistrict litigation vary dramatically.\textsuperscript{487} Consequently, it makes sense to provide a flexible solution that judges with the most mass tort experience—the Panel and the transferee judges—can implement and adapt as needed.\textsuperscript{488}

\textbf{B. Conferring Judicial Authority to Authorize Post-Consolidation, Pre-Certification Settlements}

By overemphasizing efficiency and expediency in resolving mass torts, Congress and the lower courts impaired the balance between tort multidistrict litigation.

485. The Panel transferred mass torts of less than 100 total cases for multidistrict treatment. \textit{See} chart in Appendix B.

When evaluated as individual pieces of litigation, twenty-three litigations, then litigation with less than 100 claims makes up forty-nine percent of all mass tort multidistrict litigation.

486. \textit{Manual for Complex Litigation} (Fourth), \textit{supra} note 36, § 22.1, at 343. The Panel selected these claims for special judicial management. Consequently, these claims meet the operational definition of requiring special treatment.

487. \textit{See} Resnik, \textit{supra} note 12, at 861 ("All of us who think about class actions or other forms of aggregation must confront that aggregates range in size, in kinds and values of claims, in dimensions of legal and factual complexity not easily mapped in the current iterations; and moreover the variations are always and unendingly changing.").

488. \textit{See generally} Davis, \textit{supra} note 32, at 161 ("[T]he context of the particular type of mass tort litigation involved must be given central focus to determine whether the class action can be usefully employed—useful to effectuate the goals of both the judicial system and the organic tort laws which that system exists to enforce.").
the dual goals of efficiency and fairness. Because the system has survived the mass tort phenomenon for decades now, confronting mass torts no longer dictates that the system focus solely on the goal of efficiency at the expense of fairness. This impulse toward expediency has caused access to justice to vary among different aggregative techniques. Collective settlements that do not qualify as class actions or result in bankruptcy often lack both the security inherent in the adversarial process and the judicial oversight intrinsic in class actions and bankruptcy. Thus, to preserve a uniform balance between the tort system’s goals of efficiency and fairness, the process of adjudicating mass torts should require judicial approval of all post-aggregation settlements.

To best ensure judicial regulation and approval of post-aggregation settlements, Congress should amend subsection (a) of title 28, section 1407 to permit the Panel to require transferee courts to approve settlements that occur after aggregation by the Panel as the Panel sees fit. As revised, title 28, section 1407(a) should read as follows:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that the transfers for such proceedings will be for the convenience of the parties and witness and will promote the just, efficient, and fair conduct of such actions. To make this determination, the panel shall consider such factors as whether the transfer would reduce costs, duplicative litigation, inconsistent adjudications, and burdens on the judiciary. The panel also shall consider the number of parties, the geographic dispersion of the cases, and the stages of litigation.

To further promote justice and fairness after transfer by the panel, the panel may on its own motion or a motion from any party, require parties to receive approval from the

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489. See generally id. at 159; Resnik, supra note 98 (characterizing managerial judging as a quest for efficiency that dates as far back as the 1900s); Trangsrud, supra note 113, at 831–33 (“Mass tort cases thus confront courts with a procedural conundrum: how to preserve fairness while promoting efficiency.”).

490. See Resnik, supra note 12, at 858.

491. Congress need not include the language in subsection (a) if it determines that a new section is more appropriate. Congress presumably has power under the Commerce Clause to legislate mass torts. See George T. Conway III, Note, The Consolidation of Multistate Litigation in State Courts, 96 Yale L.J. 1099, 1116 (1987); Epstein, supra note 466, at 43; Schwarzer et al., supra note 36, at 1540.
transferee court before collectively settling cases pending before the transferee court. Should the panel enter such a motion, the transferee court may approve the settlement only after a hearing and on finding that the settlement is fair, reasonable, and adequate.

Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

The requirements for ordering transfer should mirror those proposed by the ALI project to ensure that the transfer does not unduly prejudice one or more of the parties. To order transfer and consolidation the panel must find that the order would promote just, efficient, and fair conduct based on factors of whether it would reduce costs, duplicative litigation, inconsistent adjudications, and burdens on the judiciary. The panel should also consider the number of parties, the geographic dispersion of the cases, and the stages of litigation. These specific findings should ensure that defendants do not face undue pressure to settle early in the litigation when they might prefer to go to trial. Of course, the Panel may find particular factors irrelevant in certain cases and can always weigh some considerations more heavily than others so long as the result advances the just, efficient, and fair conduct of the litigation.

Amending section 1407(a) would help prevent collusion in mass tort settlements occurring outside the class action and bankruptcy context by endowing the transferee court with the authority to approve settlements. Rule 23 and the Manual for Complex Litigation (Fourth) encourage active judicial management in class actions, however, this active management should extend to

492. The Panel may determine the number of settlements that qualifies for a collective settlement, or may authorize the transferee court to make this determination once it determines the total number of cases.
493. See 28 U.S.C. § 1407(a) (2000). The underlined text denotes proposed additions to the current version of 28 U.S.C. § 1407. If Congress were to pass the "Lexcon fix," then this final paragraph should reflect the decision to allow the transferee court to retain jurisdiction for trial purposes. See supra Part IV.A.
494. See American Law Institute, supra note 62, at 36–38.
495. See id.
496. Although the proposal specifically contemplates mass tort settlements, there is no reason that the Panel could not authorize the transferee court to approve settlements in other types of multidistrict litigation should it find that the authorization would further the dual purposes of fairness and efficiency.
497. Fed. R. Civ. P. 23(c) advisory committee’s note; Manual for Complex Litigation (Fourth), supra note 36, § 22.91, at 446.
settlements in the non-class aggregated context as well. Judicial supervision helps protect absent or disinterested litigants (due perhaps to being only in the early stages of a latent illness), as well as defendants faced with bandwagon claims containing little scientific evidence of causation.

Because plaintiff and defense attorneys may enter the courthouse with aligned interests and file joint motions for approval of the proposed settlement, the judge may receive little crucial information through the adversarial process. In mass tort cases requiring scientific evidence of causation, or where an expert might impart information withheld by the attorneys, the transferee court should consider appointing an expert to aid it in determining whether the settlement is fair, reasonable, and adequate. The court may also use its inherent judicial authority to appoint a technical advisor to assist in understanding complex technical information. Judges employed experts to aid them in both the breast implant litigation

498. Federal Rule of Evidence 706 permits the court to appoint its own expert witnesses. Fed. R. Evid. 706; see generally Erichson, supra note 356, at 1986–95. The court may also appoint a guardian ad litem. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 827, 854, 119 S. Ct. 2295, 2305, 2318–19 (1999) (permitting the district court to appoint a law professor as a guardian ad litem and citing the guardian’s report on a factual matter); Miller v. Mackey Int’l, Inc., 70 F.R.D. 533, 535–36 (S.D. Fla. 1976) (using the court’s authority under Rule 23(d)(5) to appoint a guardian ad litem to represent the interests of the class in responding to the plaintiffs’ attorneys’ requests for fees). The court may also appoint a special master to assist it. See, e.g., Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 257–58 (E.D. Pa. 1994) (noting that the parties “filed a joint motion for appointment of a special master to assist the Court during the discovery process, and to review sensitive and confidential information relevant to these proceedings”), vacated on other grounds, 83 F.3d 610 (3d Cir. 1996), aff’d sub nom Amchem Prods., Inc. v. Windsor, 521 U.S. 391, 117 S. Ct. 2231 (1997); see generally Thomas E. Willging et. al., Special Masters’ Incidence and Activity: Report to the Judicial Conference’s Advisory Committee on Civil Rules and Its Subcommittee on Special Masters (2000).

499. See Reilly v. United States, 863 F.2d 149, 158 (1st Cir. 1988); see also In re Peterson, 253 U.S. 300, 312, 40 S. Ct. 543, 547 (1920) (“Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.”); see generally Joe S. Cecil & Thomas E. Willging, Accepting Daubert’s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995 (1994); Erichson, supra note 356, at 1986.

and the asbestos litigation. Additionally, the court may require counsel to provide further information needed to thoroughly assess the proposed settlement such as the likelihood of success at trial, likelihood of class certification, defendant's financial resources, value of the claims, attorneys' fees, litigation costs, and the status of any parallel or overlapping actions. By allocating authority to the transferee court to approve settlements, the court retains the necessary flexibility to approach variable types of mass torts. It ensures that judges with the most experience in handling both complex cases in general and that set of aggregated cases in particular can tailor settlement approval to the circumstances of the litigation. Congress may more willingly consider a simple proposal that enhances fairness for all parties than it would of sweeping reforms.

In the meantime, however, all federal courts faced with mass tort claims that include class certification allegations should liberally construe Rule 23 and use their authority to oversee the conduct of collective settlements. Rule 23(e)(1)(A) states that "[t]he court must approve any settlement . . . of the claims, issues, or defenses of a certified class." Although the 2003 revisions speak directly only to certified settlements, the rule does not eliminate the court's ability to require approval of non-certified settlements that contain

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504. Fed. R. Civ. P. 23; see generally Williams, supra note 383, at 325 ("[I]t is my suggestion that, for a small, but inevitable number of cases involving hundreds or thousands of persons injured in similar ways by a single nationally marketed product, or in some types of mass catastrophe, the class action device holds the most promise as an effective tool to accommodate competing interests.").

allegations of class status. The 2003 advisory committee’s note observed that the change from “a class action” to “a certified class” resolved ambiguous language that some courts “read to require court approval of settlements with putative class representatives that resolved only individual claims.”\(^5\) The note continues, “[t]he new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.”\(^6\) Although the court’s duty to inquire into the terms of the settlement extends only to certified classes, the language indicates that courts may still approve aggregated settlements with class action allegations. A liberal reading of Rule 23(e) best serves the purposes of Rule 23, “to assure the fair conduct of [class] actions,”\(^7\) and aligns Rule 23 with the purposes of the Federal Rules of Civil Procedure, to “secure the just, speedy, and inexpensive determination of every action,”\(^8\) and the goals of the tort system. As previously mentioned, the tort system aims to compensate injured persons and deter future wrongdoing.\(^9\) Conservatively reading Rule 23(e) to permit judges to ensure fairness only in certified class settlements subjects a greater number of settlements to the possibility of collusion.\(^10\) It may also encourage defendants (at least those defendants who do not need a global settlement) to quickly settle claims with minimal funds before the putative class falls under the judge’s watchful eye. Consequently, to prevent collusion and bolster fairness in settlements, judges should scrutinize all collective settlements with class allegations under Rule 23(e).

Requiring judicial supervision of aggregated or pre-certified class settlements may result in making private settlements public. Critics might argue that this could have a chilling effect on settlements by bringing marginal claimants out of the woodwork to file suit for a slice of the settlement. This is unlikely for three reasons. First, most mass tort plaintiff’s attorneys engage in extensive advertising for clients as soon as they find even a marginally viable claim. Second, making settlements public may allow defendants to resolve more claims at once. Third, defendants face strong incentives to settle aggregated claims and those economic incentives likely outweigh any countervailing reservations about public records. Making settlements more accessible to the public adds the additional benefit of public accessibility, which may further prevent settlement collusion.

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507. Id. (emphasis added).
508. Id. (describing the purposes behind the 1966 amendments).
510. See Dobbs, supra note 132, at 13.
511. See generally Resnik, supra note 12, at 860 (“[J]udges should scrutinize all proposed settlements of aggregates, be they in classes long, recently, or concurrently certified, or in consolidated or MDL proceedings.”).
C. Applying Characteristics of Legitimate Class Action Settlements to Aggregated Settlements

Besides a greater potential for collusion outside the class action, the main difference between class action settlements and settlement after aggregation is that a class action may bind all claimants—current and future. Otherwise, aggregated settlements primarily resemble a class action settlement. Consequently, many characteristics of a legitimate class action settlement easily translate into characteristics of a legitimate post-aggregation settlement.

Class action settlements, particularly global settlements that bind future claimants, cause particular concern because of both their binding nature and the potential for conflicts of interest between class counsel and class members. Plaintiffs typically have one chance to “opt-out” of the class in which case they would have to pursue the claim on their own. The logistics of the class action make this unlikely. At their core, class actions serve three vital purposes: (1) preserving judicial resources and increasing judicial economy; (2) protecting the rights of potential claimants who would not pursue individual claims due to expense, reticence, or ignorance; and (3) guarding against the possibility of inconsistent results. Similarly, mass tort class actions and aggregated mass torts provide an opportunity for people with small claims to assert their rights, allow claimants to pool their resources to conduct scientific research for evidence of causation, and supply the means to face corporate defendants on even ground. By opting-out of the class or the

512. See Erichson, supra note 6, at 529.
513. Numerous courts have found conflicts of interest between class counsel and class members. See Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781, 785 (7th Cir. 2004); Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 279–83 (7th Cir. 2002); In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 801–05 (3d Cir. 1995); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991); Coffee, supra note 88, at 385–93. Consequently, judges have a duty to carefully scrutinize the terms of a proposed settlement to ensure that class counsel behave as “honest fiduciaries for the class as a whole.” Mirfasihi, 356 F.3d at 785; see also Uhl v. Thoroughbred Tech. & Telecomm., Inc., 309 F.3d 978, 985 (7th Cir. 2002); Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002); In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 23 (2d Cir. 1987).
aggregated settlement, the plaintiff loses much of the protection afforded by group status and must choose between the certainty of receiving some sort of compensation through settlement and the uncertainties of litigation.

Like class certification, aggregation of mass torts results in settlement and may serve as a precursor to class status. Although post-aggregation settlements do not officially bind non-parties in the way that class certification does, the settlement may set a standard bar to which the court may defer in determining future compensation. As in class actions, highly specialized plaintiff and defense firms handle the majority of similar types of mass tort litigation, which supplies one of the precursors for collusion. Centralization of similar claims creates at least a class action environment in which core groups of attorneys manage litigation on behalf of hundreds of clients. In multidistrict litigation, the plaintiffs' steering committee generally conducts pretrial litigation and may negotiate settlement terms. Claimants in aggregated actions have similar disincentives and inabilities to monitor their attorneys as they do in class actions. For example, in latent injury mass tort cases, those claimants with only the early symptoms of illness may have less incentive to monitor their attorneys or fight for a larger portion of the settlement. Claimants also experience an attenuated lawyer-client relationship. Due to the similarities between class action settlements and settlements after non-class aggregation, the multidistricting process should also permit judicial approval of settlements. This would ensure that similarly situated individuals receive equal fairness protections regardless of how the courts aggregated the litigation.

518. See supra Part II.B.
519. Erichson, supra note 6, at 541.
520. For example, some asbestos plaintiffs are symptomatic whereas others are exposure-only plaintiffs. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 610, 117 S. Ct. 2231, 2243 (1997).
521. Depending on whether one views the class action as a principal/agent relationship or as an entity, the attorney may have a greater duty to his or her clients in an aggregated non-class action. Though attenuated, in an aggregated action without class status, the attorney retains a semblance of the individual attorney-client relationship. Some academics have argued that an attorney representing a class action may regard it as an entity, much like a corporation or business organization. See, e.g., Coffee, supra note 88, at 379; Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process, 71 N.Y.U. L. Rev. 13, 26–32 (1996) (noting the positive effects of regarding class members as an entity); David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 917–18 (1998) (contending that "the class as entity should prevail over more individually oriented notions of aggregate litigation."). The obvious impact of this distinction is that the attorney can ignore preferences of particular class members as he or she might ignore the leanings of individual shareholders in a corporation. Coffee, supra note 88, at 379.
522. See Coffee, supra note 88, at 372 ("Across all class action contexts, the
Non-class aggregated mass tort settlements should include a fair determination of both liability and damages, a reasonable assurance that claimants entitled to compensation are not excluded through unscrupulous means such as stringent restrictions on who may collect the compensation, a minimum adverse impact on business and economy so long as the goal of deterring future offensive conduct is achieved, and a minimum expenditure of transaction costs by way of the parties and the judiciary. In the class action context, judges recognize the variations between claimant groups, particularly in personal injury dispersed mass torts, and can ensure that the settlement adequately meets claimants' evolving needs. Class action jurisprudence has developed a number of fair techniques to address the varying degrees of injury between plaintiffs. Although a post-aggregation settlement cannot bind future claimants in the same way that a class action might, these settlements could prevent present parties without severe injuries from relitigating after ascertaining the extent of their injuries. Consequently, if the court could approve settlements for aggregated personal injury dispersed mass torts, it might endorse a settlement that incorporated a “back-end” opt-out of the settlement, a threshold limit on opt-outs, and/or the use of alternative dispute resolution mechanisms or claims facilities to administer and process claims that meet agreed upon definitions and criteria. In aggregated settlements, the client retains the right to decide whether to accept or reject the settlement offer, so block settlements should resemble opt-out settlement class actions.

The “back-end” opt out of a settlement would permit claimants in the early stages of latent injuries to request exclusion from the settlement until they could ascertain the full extent of their injuries. This would prevent an “all or nothing” situation in which an offer to settle might force a claimant with initial symptoms or injuries to accept less compensation. If the parties presented the court with scientific information on the cycle of the expected symptoms from the disease or exposure, then the court could determine whether the

same principal/agent problems recur and need to be addressed in a consistent fashion.”); Resnik, supra note 12, at 858.

523. See Schwarzer, supra note 440, at 837.

524. See, e.g., Manual for Complex Litigation (Fourth), supra note 36, § 22.921.

525. See supra Part II.B. (describing preclusion). The concept of res judicata would prevent the same parties from relitigating their claims.


527. See Cooper, supra note 38, at 1991; Erichson, supra note 6, at 570.

528. See Manual for Complex Litigation (Fourth), supra note 36, § 22.922, at 453.

“back-end” opt-out provision supplied an adequate amount of time for a plaintiff to opt-out of an inadequate settlement.

A limit on the number of opt-outs secures protection for the defendants. Defendants may legitimately condition settlement terms on a threshold number of opt-outs, so that if the number or percentage exceeded that limit, the defendant could renegotiate the settlement terms. Often termed a “blow-out” clause, defendants may choose to include this type of protection in settlements with a high number of cases that could lead to individual litigation.

Using alternative dispute resolution mechanisms (ADR), such as arbitration, mediation, or a claims facility bolsters fairness for both the defendant and the plaintiff after plaintiffs establish liability and general causation. When aggregation of immature mass torts forces a premature comprehensive settlement, alternative dispute resolution may incorporate the necessary flexibility to use more comprehensive case-management techniques as the mass tort matures. These processes can individually assess injury and could allocate resources on the basis of the proscribed settlement terms once the plaintiff establishes injury and causation. They also humanize the process of mass torts by permitting claimants to tell their story and know that someone associated with the legal system will hear it.

ADR could include test-case trials to establish a range of values for resolving similar claims. The settlement could create and define the requisite criteria for compensation and could form institutions to administer and monitor claims, as Judge Merhige required in establishing the Dalkon Shield Claimants Trust. Settlement terms

530. See Manual for Complex Litigation (Fourth), supra note 36, § 22.922, at 454.
531. See id.
536. See Manual for Complex Litigation (Fourth), supra note 36, § 22.922, at 454; see supra Part V.B. (describing the Dalkon Shield Claimants Trust); see also
may also include an administrative appeals process, an auditing
mechanism, or both to ensure that plaintiffs and defendants alike
remained satisfied with the system’s outcomes. 537

Critics of ADR’s use to resolve “residual disputes” that remain at
the end of an aggregated settlement wonder whether ADR satisfies
claimants’ expectations for procedural justice. 538 Although ADR
provides, to some extent, individualized assessments of harm, the real
aspect of procedural justice should enter the equation on the front
end, when the court evaluates the fairness of the proposed aggregated
settlement. Attempts at procedural justice as received in the
individual context necessarily fall short in collective representation
precisely because of collective representation. 539 Yet, the benefits
of an aggregated process may outweigh the costs of losing one’s day in
court. Benefits of an aggregated settlement for claimants include not
needing to individually prove concepts such as the failure to warn
and negligence that may disappear in the subjectivity of hearing a
single plaintiff’s story in individual litigation; avoiding redundant
litigation costs; 540 permitting objective proof that applies to claimants
in the aggregate; and equalizing bargaining power. 541

In all types of mass tort settlements, the judge should determine
whether the settlement’s proposed compensation scheme is
reasonable, 542 and whether, in practice, the claims process will provide
fair and equitable compensation. 543 Like the requirement in Rule 23(e),
ideally, parties should disclose side agreements, agreements to settle
“inventories” or catalogues of claims, 544 agreements by plaintiffs’
attorneys not to bring similar future claims against the defendant, 545

Vairo, supra note 375, at 130–32.
537. See Manual for Complex Litigation (Fourth), supra note 36, § 22.922, at
454.
538. See Hensler, supra note 452, at 1622; Priest, supra note 248, at 559–69
(listing the failings of the procedural approach).
539. See generally Erichson, supra note 6, at 540.
540. Rosenberg, supra note 440, at 397.
541. See Erichson, supra note 6, at 542 (“Scale economies result from the
sharing of information and divvying up of work among coordinating lawyers. The
pooling of resources permits greater investment in the litigation. To the extent
lawyers coordinate their negotiation efforts, enhanced bargaining leverage may
result as well.”); Rosenberg, supra note 443, at 237, 256–57.
542. See Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781, 786 (7th Cir. 2004);
In re The Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 324 n.73
(3d Cir. 1998) (citing Schwarzer, supra note 440, at 843–44 ); In re Gen. Motors
Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig. 55 F.3d 768, 806 (3d Cir. 1995);
Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co., 834 F.2d 677, 682 (7th Cir.
1987); In re Traffic Executive Assoc.—E. R.R., 627 F.2d 631, 633 (2d Cir. 1980).
543. See Prudential, 148 F.3d at 324 n.73.
544. See Tidmarsh, supra note 336, at 40–41.
545. An agreement of this type would violate Rule 5.6(b) of the Model Rules of
Professional Conduct. This rule states: “A lawyer shall not participate in offering
and agreements about attorneys' fees. The judge should ensure that similarly injured claimants receive equal treatment; scrutinize settlements with heightened attention to the amount of litigation that preceded them; and determine whether all of the claimants are adequately and properly represented and that the attorneys do not have conflicting obligations in representing various types of claimants with a range of materially different claims. He should also evaluate the reasonableness of attorneys' fees by examining the amount and type of services rendered and the assumed risks; ascertain whether the proposed settlement will significantly impact potential claims of similarly situated individuals with non-aggregated actions pending in state or federal courts; and require an estimate of the amounts individual group members will receive, when they will receive it, and the costs of distributing settlement funds. The judge should establish and uncover the settlement's effects on potential claims of group members for loss or injury arising out of similar circumstances but excluded from the settlement (including the effects of res judicata and collateral estoppel). He should uncover and prohibit the use of strict eligibility criteria for receiving settlement proceeds from a claims or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." Model R. of Prof'L Conduct 5.6(b). A restriction of this sort limits access to competent attorneys and relates less to the merits of the claim than it does to buying off counsel.

546. See Manual for Complex Litigation (Fourth), supra note 36, § 22.923, at 455.


548. Amchem, 521 U.S. at 620, 117 S. Ct. at 2248; Resnik, supra note 12, at 852.


551. See Schwarzter, supra note 440, at 844.

552. Resnik, supra note 12, at 858.

553. See Real, supra note 547, at 448–49; Schwarzter, supra note 440, at 844.
center that prevents valid claimants from collecting settlement funds and prevent collusion between defense and plaintiffs' counsel during the settlement process.

Judges should examine settlements with the heightened scrutiny required by the Supreme Court, in *Amchem Products, Inc. v. Windsor*, for class action settlements. Consequently, judges should not approve settlements that (1) provide illusory benefits, such as coupon settlements; (2) permit defendants to select certain plaintiffs' counsel willing to provide the least benefits, the so-called "reverse auction" technique; or (3) allow counsel to calculate attorney fees on the basis of set aside benefits rather than on amounts actually distributed.

As in class actions, judges should conduct a preliminary hearing to make findings on the fairness, reasonableness, and adequacy of the proposed settlement, and if warranted, a final fairness hearing before making an ultimate determination. Judges may want to require the attorneys to notify their claimants of the fairness hearing in the plain language required by class action notices.

The court should consider several factors in evaluating fairness, including:

(1) the complexity, expense and likely duration of the litigation ... ; (2) the reaction of the class to the settlement ... ; (3) the stage of the proceedings [including the maturity of the mass tort] and the amount of discovery completed ... ; (4) the risks of establishing liability ... ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

554. See Manual for Complex Litigation (Fourth), supra note 36, § 22.924, at 456.
555. Real, supra note 547, at 448–49.
557. If passed, the Class Action Fairness Act of 2004 would specifically limit coupon settlements within class actions, but it does not address coupon settlements in non-class aggregation. See Class Action Fairness Act of 2004, S. 2062, 108th Cong., 2d Sess. (2004); supra Part IV.B.
559. See id.
The fairness hearing should afford litigants the time to present witnesses, experts, and affidavits. The court may benefit from including some trial type procedures such as receiving sworn testimony subject to cross-examination if it is skeptical about the settlement. After determining whether the settlement meets the prerequisites of fairness, reasonableness, and adequacy, the court should issue a written opinion of its findings and legal conclusions. Should the parties disagree with the determination, they could appeal to the circuit court assigned to the district court.

Amending section 1407 to include judicial oversight of all settlements at the Panel’s discretion ensures that concerns about collusion in aggregated settlements receive equal judicial supervision. The amendment restores the balance between efficiency and fairness that the current process lacks. It empowers those with the most knowledge about the litigation, the Panel and the transforee judges, with the authority to protect defendants from unwarranted settlement coercion and claimants from having to choose between inadequate settlements and individual litigation.

VII. CONCLUSION

In many respects, aggregated mass tort settlements epitomize a win-win situation for all of those involved. The court quickly disposes of burdensome, complex litigation with a solution that satisfies the attorneys. Plaintiffs’ attorneys receive a hefty contingency fee from each individual client, but have to negotiate only one settlement. Defendants using the reverse auction technique minimize the value of the settlement and deter future claimants from filing by settling meritorious claims and litigating weak ones to garner favorable press coverage.

Yet, the judicial system’s impulse toward accepting the efficient, quick settlement has caused claimants to receive marginal payments that reflect their attorneys’ future need to negotiate with the same defendants rather than the merit of their claims. It has also caused defendants to declare bankruptcy and to settle even weak, citations omitted)).

563. See id. § 22.924, at 459.
564. See id. § 22.924, at 461.
565. See Weinstein, supra note 40, at 521 ("Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases.").
566. See id. at 522 ("Plaintiffs’ counsel like [bulk settlements] because they generally do not reduce their percentage fee per case so that, because of the large settlement amounts, the lawyer’s hourly fee jumps spectacularly.").
unmeritorious claims that they might prefer to litigate. At their core, settlements substitute adjudication for private agreement.\textsuperscript{567} In individual litigation, settlement occurs only with the client’s consent. In aggregated mass tort litigation, clients with an attenuated attorney-client relationship must choose between settlement and independent expensive litigation, which offers the client little meaningful choice. Given the benefits of collective representation, the lack of choice may be a valid tradeoff so long as the settlement is fair. Yet, only class actions and bankruptcy provide the necessary judicial review to safeguard the fairness, reasonableness, and adequacy of mass tort settlements. This creates a system of second-class justice for defendants and claimants with issues suited for aggregation but not certification.

To provide collectively represented parties with equal protections of fairness in settlements and restore a balance between the goals of efficiency and justice, Congress should amend section 1407 to permit judicial oversight of all aggregated settlements. All federal courts faced with class action allegations should read Rule 23 in light of its purpose to assure fair conduct and in light of the tort system’s goals of compensating injured persons and deterring future wrongdoing. These goals promote a liberal reading of Rule 23 that permits courts to approve collective settlements with class allegations regardless of their certification status. So long as courts continue to use their judicial integrity,\textsuperscript{568} these measures will instill the fairness aspects of the tort system into mass torts and will stabilize and offset the momentum toward efficiency. Encouraging judges to take a more active role in managing mass torts allows those with the most experience in handling complex litigation to ensure that settlements embody the goals of the tort system (to compensate and deter), the goals of aggregation (to promote efficient resolution of claims), \textit{and} the goal of justice (to make fair decisions).

\textsuperscript{567} Cooper, \textit{supra} note 38, at 1980.

\textsuperscript{568} When assigned a complex mass tort, judges should become involved. Judge Jack Weinstein, who presided over the Agent Orange litigation, appropriately recommends, “involvement must include concern over the various communities which may be affected by the court’s decisions.” Weinstein, \textit{supra} note 40, at 540. To do this, the judge need not “put aside all sense of emotion and concern when the facts are disturbing.” \textit{Id.; see also} Davis, \textit{supra} note 32, at 226–27.
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**Cumulative for 23 litigations**

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