Casey at the Bat: Judicial Treatment of Mass Tort Litigation

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Oh, somewhere in this favored land the sun is shining bright;  
The band is playing somewhere, and somewhere hearts are light,  
And somewhere men are laughing, and somewhere children shout;  
But there is no joy in Mudville—mighty Casey has struck out.

Ernest L. Thayer

I. INTRODUCTION

We are in the midst of a litigation crisis. Mass tort claims were first introduced to the legal scene only twenty-five years ago. In this
relatively short period of time, mass tort claims have become the most critical aspect of federal civil litigation.\(^4\) By 1990, they encompassed seventy-five percent of all new federal product liability filings.\(^5\) Recently in some jurisdictions, mass tort claims stemming from exposure to products or toxins “accounted for over twenty-five percent of the entire civil caseload.”\(^6\) In fact, mass tort litigation has evolved into the single largest category of personal injury litigation in the United States today.\(^7\)

The substance of these claims implicates further problems. Litigation is invariably delayed and claims are often left unresolved.\(^8\) Prosecution costs exceed victims’ compensation nearly two-to-one.\(^9\) Lastly, manufacturers are often deterred from creating newer and better products for fear of potential widespread lawsuits.\(^10\) As the lower courts endeavored to manage mass tort litigation, they encountered the problems described above. Clearly, a consistent scheme for adjudication was necessary.

It was only recently that the lower courts had hope for some direction from the Supreme Court on how to handle the mass tort problem.\(^11\) The Supreme Court first addressed the consolidation of mass

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4. It is important to define the two different types of mass tort claims. First, there are “mass accident” claims. See Hensler & Peterson, supra note 3, at 970. In these cases, catastrophic events result in many serious or fatal injuries and are followed by mass litigation. See id. at 1014. Second, there are mass exposure claims in which mass filings arise from product use or exposure to toxic substances. See id. at 1015. This Note will focus on the latter category of claims.

5. See Deborah R. Hensler, Reading the Tort Litigation Tea Leaves: What’s Going on in the Civil Liability System?, 16 JUST. SYS. J. 139, 147 (1993). In 1991, however, the rate of case filings fell to fifty-seven percent of new products liability cases. See id.

6. Coffee, supra note 2, at 1363.

7. See id. at 1363 (citing Steve Baughman, Note, Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out, 70 TEX. L. REV. 211, 211-12 n.4 (1991)); see also 100,000 Asbestos Cases Ordered Consolidated Litigation: A Judge Orders the Class Action Against Manville to Unclog Court Dockets and Speed up Payment to Workers Injured by the Material, L.A. TIMES, July 17, 1990, at 2 (“Asbestos-related cases form the largest number of personal injury lawsuits in the country.”).


9. See Judicial Report, supra note 2, at 2-3; Edell, supra note 8, at 44.

10. See Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277, 305-20 (1985); see also Mullenix, supra note 8 (stating that in mass tort cases “[d]efendants seek salvation in business restructurings, while severely curtailing research and development”).

11. Prior to 1997, the Supreme Court had not reviewed a single lower court decision within the mass tort arena. See Mullenix, supra note 8 (“For more than 25 years, the [C]ourt has sat by as complex new mass torts have invaded the federal courts ... [and] has ... left the lower federal courts to their own ingenious devices.”). When the Third Circuit repudiated the asbestos futures settlement class in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996) [hereinafter
tort claims in *Amchem Products, Inc. v. Windsor.* The *Amchem* case involved a proposed settlement agreement between a consortium of twenty former asbestos companies and "future claimants," comprised of persons who had not yet filed asbestos claims against the consortium. Both parties initiated a class action in district court by filing a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification, all aimed at gaining district court approval of the settlement agreement rather than actually litigating the issues. The district court certified the opt-out class of future claimants. The Third Circuit, however, vacated the district court's decision based on an earlier holding, which stated that a class may be certified for settlement so long as it satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure ("FRCP") as though the claims were going to be litigated. The Third Circuit found that the class of future claimants did not satisfy the requisite elements of FRCP 23(a) or 23(b)(3).

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*Georgine II*, many felt "[t]he time has come for the Supreme Court to speak." Mullinex, *supra* note 8.


13. See id. at 601 (defining individuals with claims expected to be filed in the future as "anticipated future claimants"). The settlement proposed in this disposition followed the settlement of all claims between the defendant consortium and those plaintiffs whose claims had been filed in federal court, termed "inventory" plaintiffs. See id. at 600-01. The claims of the inventory plaintiffs were consolidated and transferred to the Eastern District of Pennsylvania pursuant to a transfer order from the Judicial Panel on Multidistrict Litigation ("JPML"). See id. at 599 (citing *In re Asbestos Prods. Liab. Litig. (No. VI),* 771 F. Supp. 415, 422-24 (J.P.M.L. 1991)). The defendant consortium agreed to pay more than 200 million dollars to the inventory plaintiffs in exchange for "some kind of protection in the future." *Id.* at 601 (quoting *Georgine v. Amchem Prods., Inc.,* 157 F.R.D. 246, 294, 295 (E.D. Pa. 1994)) [hereinafter *Georgine I*].

14. See id. at 601-02.

15. See *Georgine I*, 157 F.R.D. at 315.

16. See *Georgine II*, 83 F.3d at 624-25 (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799-800 (3d Cir. 1995) [hereinafter *GM Trucks*]). In *GM Trucks,* the Third Circuit wrote:

> Although we acknowledge the need for flexible interpretation of Rule 23 to enable it to achieve its broader purposes of vindicating difficult individual claims and conserving judicial resources ... we emphasize that Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests. ... Thus, actions certified as settlement classes must meet the same requirements under Rule 23 as litigation classes.

*In re GM Trucks,* 55 F.3d at 799 (citations omitted).

17. See *Georgine II*, 83 F.3d at 634. The prerequisites to a class action under the Federal Rules of Civil Procedure ("FRCP") 23(a) are:

1. the class is so numerous that joinder of all members is impracticable,
2. there are questions of law or fact common to the class,
3. the claims or defenses of the
For the purposes of settlement in class actions, the Supreme Court adopted the Third Circuit's standard to determine the legitimacy of the class of future claimants and the settlement agreement that bound them.\(^{18}\) Thereafter, the Supreme Court affirmed the Third Circuit's decertification of the class of future claimants.\(^{19}\)

Just two years later, in *Ortiz v. Fibreboard Corp.*,\(^{20}\) the Supreme Court granted certiorari of another mass tort class action claim for settlement purposes, this time under the limited fund theory.\(^{21}\) The plaintiff class for settlement purposes in *Ortiz* awaited a similar fate as the one in *Amchem*. In *Ortiz*, the Court decertified the class of injured plaintiffs for failing to meet the requisite standards under FRCP 23(b)(1)(B).\(^{22}\)

Although the decisions of *Amchem* and *Ortiz* may have indicated the Supreme Court's general disfavor for class aggregation of mass tort claims, both decisions failed to offer the lower courts any true guidance on how to effectively deal with the enormous number of mass tort
claims circulating in the dockets and the problems they were creating.\textsuperscript{23} In the wake of this crisis and the lack of instruction from the Supreme Court on how to manage it, academics, legal practitioners, scholars, and students have written scores of material suggesting ways to resolve mass tort claims and the dilemmas they bring.\textsuperscript{24}

The purpose of this Note is not to advocate any one solution to the mass tort problem. Rather, this Note seeks to organize the available material in a digestible way and to reveal the most functional approach towards resolving the problems created by mass tort litigation. Part II of this Note explains the evolution of mass tort litigation. Specifically, Part II focuses on the social catalysts behind the development of mass tort claims, the procedural responses by the judiciary to these claims, and lastly, the effects the development of mass tort litigation has had on the judicial system as a whole. Part II also provides a history and overview of mass tort litigation to better understand its inconsistency with traditional adjudication.

Part III categorizes the published materials into essentially two sides of a debate regarding the judicial treatment of mass tort litigation. One position is defined as the “accusatory approach.”\textsuperscript{25} This position argues that judicial self-interest, party favoritism, and other improper motives are the impetus behind the problems mass tort litigation creates.

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23. See Elizabeth J. Cabraser, \textit{Class Action Trends and Developments After Amchem and Ortiz}, SE28 A.L.I.-A.B.A. 617, 627 (1999) (observing that the \textit{Amchem} decision can be used to support whatever position—for or against class certification or class action settlement approval—a court seems predisposed to take); Hon. Jack B. Weinstein, \textit{Notes for a Discussion of Mass Tort Cases and Class Actions}, 63 BROOK. L. REV. 581, 585 (1997) (“The full meaning of \textit{Amchem} will need to be spelled out over the years in many complex litigations . . .”). Compare id. (recognizing that the Supreme Court’s \textit{Amchem} decision has, temporarily at least, put a damper on settlement class actions), with Herbert E. Milstein & Gary E. Mason, \textit{Class Actions Still Held in Favor: The Asbestos Class Certification Failed, but that Doesn’t Spell the End for all Mass Tort Claims Under Rule 23}, TEX. L.W., July 21, 1997, at 31, 31 (interpreting the Supreme Court decision in \textit{Amchem} as “a strong endorsement of the use of the class action in situations for which it was and is intended and a clarification of the standards by which class-action settlements are to be judged”).


25. See discussion \textit{infra} Part IIIA.
The second position is defined as the "sympathetic approach,"26 which acknowledges the judiciary's sincere attempt to adjudicate these claims. This camp applauds the judiciary's efforts in dealing with mass tort claims as the best that can be expected under the circumstances.

Having carefully illustrated the current status of mass tort litigation, Part IV explains why the sympathetic stance is the better way to view judicial treatment of mass tort litigation. This Part argues that the sympathetic approach is not only a more accurate picture of the judiciary's reaction to mass tort litigation, but is also a more productive examination.

Part V elaborates on the revelations described in Part IV. Most importantly, it explains how the sympathetic approach forces reformers to confront judicial inadequacy in dealing with this type of litigation and argues that reform must be based on a broad foundation that extends beyond the court system. Lastly, Part VI offers some final thoughts.

II. THE EVOLUTION OF MASS TORT LITIGATION

A. Economics as a Stimulus for Mass Tort Litigation

The phenomenon of mass tort personal injury litigation is a consequence of various social and legal developments of the late 1970s and early 1980s.27 First, the modern economic system encouraged manufacturers to capture large market shares thereby creating the potential for exposing large segments of the population to dangerous products.28 Second, federal regulation of those widely used products was rather deficient. For example, the Federal Food, Drug and Cosmetic Act ("Act") required manufacturers to pull dangerous devices from the market only after the product had caused injury or death.29 It was only through the 1976 amendments to the Act that manufacturers became obligated to review devices placed on the market.30 Even then, review of

26. See discussion infra Part III.B.
27. See Hensler & Peterson, supra note 3, at 1013-14.
28. See id. at 1015.
29. See id. at 1017 & n.290. It is important to note that the insufficiencies referred to only applied to medical devices as opposed to pharmaceuticals and food. See id.; see also Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360 (1994) (according to the historical and statutory notes, device manufacturers were included under this provision by the 1976 amendments). Prior to those amendments, the provision applied only to drug manufacturers. See id.
30. See 21 U.S.C. § 360(i)-(j) (requiring device manufacturers to furnish records and reports concerning those devices placed on the market for human use and providing a scheme for tracking said devices via the 1976 amendments).
devices made available to consumers prior to the 1976 amendments was not mandatory.\textsuperscript{31} Manufacturers further facilitated distribution of potentially dangerous devices by suppressing information related to product dangers or by allowing products to remain on the market until dangers manifested themselves in the individuals who used them.\textsuperscript{32} Targeting large segments of society with products that were poorly regulated made mass injury much more likely and placed consumers in a position of vulnerability to dangerous products.\textsuperscript{33}

\textbf{B. The Role of Social Organizations and Mass Media in Stimulating Mass Tort Litigation}

The advent of mass injury did not in and of itself create mass litigation. In order for mass tort litigation to occur, vast numbers of individuals injured by defective products must actually file claims against the companies responsible for creating and dispensing the dangerous products. Accordingly, plaintiffs must not only be aware of the connection between product use and their injury, but also of their ability to file suit against a manufacturer or industry.

Mass media has been a huge vehicle in stimulating mass tort claiming.\textsuperscript{34} Over the past twenty-five years, mass media has shifted its attention from reporting on accidents such as airplane crashes and fires, to reporting on product-related risks and the multiple injuries they create.\textsuperscript{35} News stories about product and substance related hazards also began to blame businesses and industries and to mention the existence of pending product injury claims against them.\textsuperscript{36} Mass media has therefore

\begin{itemize}
  \item \textsuperscript{31} See id. § 360(j)(1) (describing transitional provisions for devices after the enactment date of this subsection); Hensler & Peterson, supra note 3, at n.290.
  \item \textsuperscript{32} See Hensler & Peterson, supra note 3, at 1017.
  \item \textsuperscript{33} See id. at 1013.
  \item \textsuperscript{34} See Roger C. Cramton, Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 CORNELL L. REV. 811, 817 (1995); see also In re Orthopedic Bone Screw Prods. Liab. Litig., 176 F.R.D. 158, 165 (E.D. Pa. 1997) (observing that individuals began filing claims against the defendant-corporation after a 20/20 television broadcast on pedicle screws used in spinal fusion surgery); RONALD J. BACIGAL, THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY 36 (1990) (arguing that A.H. Robins, manufacturer of the Dalkon Shield intrauterine contraceptive device ("IUD"), initiated a campaign encouraging women to remove the shield based on its negative press); Hensler & Peterson, supra note 3, at 1021 arguing that the early development of the Bendectin litigation followed an article in the National Enquirer and that the Dalkon Shield IUD litigation arose after extensive coverage on 60 Minutes, a television broadcast).
  \item \textsuperscript{35} See Hensler & Peterson, supra note 3, at 1020 (citing ELEANOR SINGER & PHILLIS M. ENDRény, REPORTING ON RISK: HOW THE MASS MEDIA PORTRAY ACCIDENTS, DISEASES, DISASTERS, AND OTHER HAZARDS 47 (1993)).
  \item \textsuperscript{36} See SINGER & ENDRény, supra note 35, at 110, 134.
\end{itemize}
played a key role in informing injured individuals of the possible causal links between their injuries and product use or exposure and the existence and course of litigation.\textsuperscript{37}

Social organizations and networks also generated mass tort personal injury claims.\textsuperscript{38} These groups often provided information to potential plaintiffs on available compensation for product-related injuries and directed claimants to lawyers.\textsuperscript{39} For example, labor unions have been critical in developing mass tort litigation arising from workplace injury.\textsuperscript{40} Unions worked with medical researchers to develop information about the link between asbestos exposure and disease.\textsuperscript{41} Then, as asbestos litigation grew, unions screened members for disease and referred members to plaintiffs' lawyers.\textsuperscript{42} Vietnam veterans' groups also stimulated mass tort claiming by encouraging veterans to participate in Agent Orange litigation.\textsuperscript{43}

C. Judicial Response to Mass Tort Litigation

1. Initial Resistance to Class Consolidation of Mass Tort Claims

As enormous numbers of exposure claims amassed in the lower federal court dockets, class certification of mass tort claims became "unquestionably alluring" as a means of handling a crowded docket.\textsuperscript{44}


\textsuperscript{38} See Hensler & Peterson, supra note 3, at 1023.

\textsuperscript{39} See id. at 1024.

\textsuperscript{40} See id.

\textsuperscript{41} See Irving Selikoff, et al., The Occurrence of Asbestosis Among Insulation Workers in the United States, 132 Annals N.Y. Acad. of Sci. 139 (1965) (observing that Selikoff's studies were supported by the insulation workers' union); Irving Selikoff et al., Asbestos Exposure and Neoplasia, 188 JAMA 21 (1964) (observing the same).

\textsuperscript{42} See Hensler & Peterson, supra note 3, at 1023 (citing Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 37-57 (1986)).

\textsuperscript{43} See id. at 1024. Agent Orange Litigation involved a herbicide containing small amounts of dioxin as a contaminating product which was used as a defoliant by United States armed forces in Vietnam. See id. at 1001-02. The litigation arose when returning Vietnam veterans claimed that, as a result of exposure to dioxin-tainted Agent Orange, they suffered a variety of injuries. See id. For a comprehensive examination of Agent Orange litigation, see Schuck, supra note 42. It is also worthwhile to note that women's groups played a role in litigation concerning the Dalkon Shield IUD, diethylstilbestrol ("DES") (a synthetic estrogen marketed for the treatment of various female related health problems, particularly the prevention of miscarriage), and silicone breast implants, although their effect was somewhat less substantial. See Hensler & Peterson, supra note 3, at 981-82, 1024.

Still, courts were reluctant to consolidate these claims into class actions. The main reason for federal court resistance to class certification of mass tort situations lies in an Advisory Committee Note to the 1966 Amendments to FRCP 23. The Committee Note was written in reference to FRCP 23(b)(3)'s predominance of common questions of law and fact requirement. It clarifies how Congress intended the requirement to be construed and why. It reads in pertinent part:

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

Initially, courts used this Committee Note to define situations where class action aggregation would be inappropriate under FRCP 23(b)(3). Courts denied certification of mass tort classes under FRCP 23(b)(3) if the litigation involved complex issues of causation or damages. They also rejected class action consolidation for mass injury situations under

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45. See, e.g., Coffee, supra note 2, at 1356 ("At the beginning of the decade, the mass tort class action was uniformly rejected by appellate courts."); Pagan, supra note 37, at 814; see also In re Tetracycline Cases, 107 F.R.D. 719, 724 (W.D. Mo. 1985) ("[M]ost courts have exhibited great reluctance to certify a class in actions involving a number of defendants and exposure to the product in question over an extended period of time.").


47. Id.

48. See In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982) ("Relying in part on that note . . . many courts have denied plaintiffs' motions for class certification in mass tort or personal injury actions, especially those alleging negligence by one or more defendants over extended periods.").

49. See id. at 854 (holding that class action aggregation is inappropriate when litigation seeks to resolve issues of causation or damages); In re Tetracycline Cases, 107 F.R.D. at 733 (denying class certification for plaintiffs alleging damage to their teeth when they or their mothers took DES based on "[t]he importance of the 'details' in each individual claim" that DES caused their injury); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 790 (E.D.N.Y. 1980) (recognizing that in the later stages of mass tort litigation, issues of causation and damages may require reconsideration of whether common questions of law and fact predominate and, consequently, whether a class should be decertified); Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 233 (D.S.C. 1979) (finding class action aggregation inefficient when each member in the plaintiff class had to show that her individual vaginal cancer was caused by the company's drug); Payton v. Abbott Labs, 83 F.R.D. 382, 391, 394 (D. Mass. 1979) (finding consolidation of causation and damages of claims stemming from DES exposure would amount to denial of a fair trial, inconsistent with the Seventh Amendment, due to the "confusion and uncertainty" that would result from the inherent complexity of these issues (quoting Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931))).
this rule when the class members were not identically situated and, therefore, their claims had varying fact patterns whose differences required individual adjudication.50 Courts strictly interpreted FRCP 23(b)(3), finding it an inadequate vehicle to advance class interests in consolidated mass tort personal injury claims.51 Similarly, the Advisory Committee clarified the context in which FRCP 23(b)(1)(B) could apply.52 That Advisory Committee Note states in pertinent part:

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.53

This Committee Note became the basis for maintaining a class action under a "limited fund theory."54 Courts used this language to justify a stringent analysis of a company's insolvency before certifying a class under the limited fund theory.55 Likewise, courts required any party

50. See Sanders v. Tailored Chem. Corp., 570 F. Supp. 1543, 1543 (E.D. Pa. 1983) (barring a class action in a case involving urea formaldehyde insulation based on the highly individualized nature of plaintiffs' claims, specifically regarding the representations made by defendant and relied on by any given plaintiff and the adequacy of installation); Yandle v. PPG Indus., Inc. 65 F.R.D. 566, 570-71 (E.D. Tex. 1974) (denying certification of class of plaintiffs claiming work-related asbestos injuries because the employees were in different positions, worked at the company for differing periods of time, and had differing medical histories); Harrigan v. United States, 63 F.R.D. 402, 406-08 (E.D. Pa. 1974) (holding that common questions between class members cannot exist on the factually intricate issue of whether a Veterans Administration Hospital received informed consent from every member of a class of injured plaintiffs to perform a similar urological surgical procedure).

51. See supra notes 48-50 and accompanying text.


53. Id.

54. See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (using the term "limited fund theory" to describe mandatory class treatment through representative action under FRCP 23(b)(1)(B)); see also supra notes 21-22 and accompanying text (describing limited fund theory).

55. See In re Sch. Asbestos Litig., 789 F.2d 996, 999 (3d Cir. 1986) (approving the district court's refusal to address the defendant's argument that its funds would be exhausted before all claimants were paid because no substantive evidence was presented demonstrating that those assets would be insufficient) (citing In re Asbestos Sch. Litig., 104 F.R.D. 422, 437 (E.D. Pa. 1984); In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982) (reversing the district court's certification of punitive damage class stating that "[t]he district court erred by ordering certification without sufficient evidence of, or even a preliminary fact-finding inquiry concerning, Robins' actual assets, insurance, settlement experience and continuing exposure"); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 789 (E.D.N.Y. 1980)
asserting the limited fund theory for consolidation purposes prove that the detrimental effects of separate punitive damage awards were “clearly inescapable.” This standard usually applied to the detrimental effect individual litigation would have on the plaintiffs’ claims for injury compensation. For example, the theory could apply to a situation where successful individual claims prevented a future claimant from being awarded his due compensation. However, a defendant could also move for consolidation under the limited fund theory arguing that he too would be unable to avoid unreasonable consequences of individual litigation. Still, courts were wary to accept either of these arguments unless the negative consequences alleged were absolutely unavoidable.

In the early days of mass tort litigation, courts proved unwilling to speculate as to the merits of consolidated litigation in this context. Instead, they chose to adhere closely to the Advisory Committee’s guidance and narrowly interpret its intent in order to avoid those problems addressed by the Committee Notes.

2. Trend Reversal—Invocation of the Mass Tort Class Action Suit

While the courts tended to avoid class aggregation of mass tort claims, mass tort claiming continued to grow at an exponential rate. In
the hopes of streamlining the flood of mass tort claims, judges began to reverse their resistance to consolidation of mass tort claims under FRCP 23. In doing so, judges invoked the very provisions of the Federal Rules that had previously been the basis for rejecting class actions in mass tort situations. Judges avoided the adverse precedent by not only reading the provisions of FRCP 23 liberally, but by also emphasizing the uniqueness of mass tort personal injury claims and the

the proverbial iceberg); Hensler & Peterson, supra note 3, at 1004 (predicting that 200,000 asbestos claims would be filed by 1992); Valle Simms Dutcher, Comment, The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases, 10 PAC ENVTL. L. REV. 955, 956 (1993) (predicting 350,000 asbestos claims by 1993); see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 821-24 & n.1 (1999) (noting that there would be no end to the claims defendants would encounter, absent a global settlement that would bind all future claimants); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 589 (1997) (predicting the exponential growth of mass tort class action claims until the year 2015).

63. See Pagan, supra note 37, at 814; Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. ILL. L. REV. 269, 288 (explaining the usefulness of FRCP 23 as a joinder device to avoid duplicative litigation); see also infra nn.67-68 (cataloging cases that justify mass tort claim aggregation under FRCP 23 based on its ability to streamline duplicative litigation).

64. See Amchem, 521 U.S. at 625 (explaining that since the 1970s, district courts were consolidating mass tort cases by certifying them for settlement purposes at an increasing rate); Hensler & Peterson, supra note 3, at 1050 ("in the face of appellate courts' resistance to the use of formal aggregative techniques, courts informally aggregated cases for settlement and trial."); Pagan, supra note 37, at 815 ("[D]istrict courts across the country began to embrace the mass tort class action . . . .").

65. See Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) (affirming the certification of a class action under FRCP 23(b)(3) of a class of plaintiffs suffering personal injuries and property damage resulting from residing near defendant's chemical waste burial site). The court wrote:

In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next . . . .

. . . To this extent, a class action . . . avoid[s] duplication of judicial effort and prevent[s] separate actions from reaching inconsistent results with similar, if not identical, facts. The district court clearly did not abuse its discretion in certifying this action as a Rule 23(b)(3) class action.

Id.; see also Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 475 (5th Cir. 1986) (approving the certification of a class of plaintiffs with asbestos-related claims under FRCP 23(b)(3) and arguing "in light of the magnitude of the problem and the need for innovative approaches, we find no abuse of discretion in this court's decision to try these cases by means of a Rule 23(b)(3) class suit"); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 791 (E.D.N.Y. 1980) ("To achieve those ends [namely, the objectives of FRCP 1 and FRCP 23] the court will certify this to be a class action under F.R.C.P. 23(b).").

66. See, e.g., In re Asbestos Sch. Litig., 104 F.R.D. 422, 428 (E.D. Pa. 1984) (analyzing FRCP 23(a)'s prerequisites under a "permissive" standard and finding that a class of all national, public, and private school districts seeking recovery for costs incurred in undertaking remedial asbestos abatement actions satisfied the prerequisites for class action certification), aff'd in part and rev'd in part sub. nom. In re Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); Real, supra note 3, at 441.
necessity for class action consolidation. While the stimulus behind this judicial change of heart may have been legitimate, aggregating mass tort claims into class actions failed to abate mass tort filing or to alleviate the backlog in the federal court dockets. In fact, the effects of mass tort class action reflect the very fears that were the basis of the courts' initial rejection of the technique.

67. See Jenkins, 782 F.2d at 470 (recognizing that the "[c]ourts, including those in our own circuit, have been ill-equipped to handle this 'avalanche of litigation' . . . recognize[] the dilemma confronting our trial courts, and express[] concern about the mounting backlog of cases and inevitable, lengthy trial delays") (citations omitted); Hardy v. Johns-Manville Sales Corp., 631 F.2d 334, 348-52 (5th Cir. 1982) (reiterating acceptance of the district court's innovation in trying mass tort class action); Migues v. Fibreboard Corp., 652 F.2d 1182, 1189 (5th Cir. 1981) (calling "for new approaches to the national tragedy of asbestos-related disease"); In re Asbestos Sch. Litig., 104 F.R.D. at 433, 435 (discussing the certification of the plaintiff class under FRCP 23(b)(3) and (b)(1)(B) respectively).

68. See Hensler & Peterson, supra note 3, at 1050 (explaining that courts began to consolidate mass tort claims into class actions when faced with their own inadequacy in dealing with these claims individually); see also Weinstein & Hershenov, supra note 63, at 289 ("Faced with innovative district court solutions to seemingly intractable problems, the appellate courts have begun to be more sympathetic to class actions in mass tort cases.").

69. See Judicial Report, supra note 2, at 2-3; Coffee, supra note 2, at 1385; see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 821-24 & n.1 (1999) (noting that the defendant would never see an end to claims against him absent a global settlement that bound all future litigants); In re Sch. Asbestos Litig., 789 F.2d at 1000 ("To date, more than 30,000 personal injury claims have been filed against asbestos manufacturers and producers. An estimated 180,000 additional claims of this type will be on court dockets by the year 2010."); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 652 (E.D. Tex. 1990) (noting that it would take six and a half years to litigate present claims and that 5000 untouched cases would still be pending at the present rate of filing), aff'd in part and vacated in part, 151 F.3d 297, 311 (5th Cir. 1998) (rejecting parts of a trial plan implemented by the trial court); Weinstein & Hershenov, supra note 63, at 275 (recognizing critics who argue that expansive procedural devices have "resulted in a civil justice system that is sinking under the weight of mass toxic tort and other product liability cases").

70. See supra note 61 (citing the goals of the amendments to FRCP 23); see also McNeil & Fancsali, supra note 44, at 492-97 (detailing how class certification in mass tort cases may not achieve efficiency as originally promised); Weinstein & Hershenov, supra note 63, at 275 ("Prominent members of the bench, bar, legal academy, and business community . . . have charged that increased access to the courts and pro-plaintiff tort doctrines have failed to solve the problems they were designed to address . . . ."). At this point, it is important to acknowledge that the effects of mass tort litigation are extremely technical and truly beyond the scope of this Note. This section of the Note merely attempts to elucidate the current context of mass tort litigation by briefly explaining its effects on the judicial system.
D. Effects of Class Action Consolidation of Mass Tort Claims

1. Costs of Litigation

Expenses generated by mass tort class action litigation are astronomical. Costs of litigation are astronomical. Plaintiffs’ expenditures on attorneys’ fees and other transactional costs generally exceed their damage or settlement awards. Insurance is rendered prohibitively expensive or unavailable, thereby raising the price of consumer goods. Moreover, the forced bankruptcy of many defendant-companies acts as a glaring signal of the high cost of mass tort litigation. With costs this high, it is hard to imagine the benefit an injured plaintiff would reap in consenting to representative adjudication.

2. Due Process Violations and Conflicts of Interest

Mass tort class actions also raise serious due process questions as to whether an individual’s interests are being adequately represented as...
part of a large class of claimants. Inevitable conflicts of interest exist between an attorney who represents a large class of clients and the individual clients who make up that class. This is especially the case when an attorney is engaged in settlement negotiations and is tempted to settle at terms unfavorable to class members in order to cut his own costs.

Attorney specialization is another characteristic of mass tort litigation that generates unethical conflicts of interest between an attorney and his class of clients. The explosion of mass tort claiming brought with it the creation of "boutique firms." These firms solicit only those who have been severely injured and settle their individual claims with a defendant-company for high damages. The other option for an injured claimant is to rely on a wholesale firm that will not refuse a claimant based on his minimal injury, but will not invest much time in individual case preparation. Both options demonstrate that some attorneys who specialize in mass tort litigation do so without the interests of their individual clients foremost in their minds.

76. See Roth, supra note 24, at 596-97 (arguing that adequate representation is the cornerstone in maintaining an individual’s due process rights in class actions); see also Edell, supra note 8, at 43 (“Individual parties have little control over how the litigation is conducted. This fact alone has prompted tremendous debate...of the very question of whether aggregation of claims is fair or efficient.”); Genine C. Swanzey, Using Class Actions to Litigate Mass Torts: Is There Justice for the Individual?, 11 GEO. J. LEGAL ETHICS 421, 422 (1998) (calling class actions “an alien force in the tort system” and therefore the antithesis of our individual justice tradition) (quoting David Rosenberg, Class Actions for Mass Torts: Doing Justice by Individual Means, 62 IND. L.J. 561, 562 (1987)).

77. These inevitable conflicts of interest arise when lawyers have to take action on behalf of their individual clients as a group. See Swanzey, supra note 76, at 427.

78. Litigating a class action suit is an extremely time consuming endeavor that attorneys have recently begun to finance themselves. See id. Attorneys therefore are more likely to make and accept settlement proposals out of their own self-interest. See id. (citing Arthur Bryant, Class Actions for Settlement Only: An Invitation to Collusion, LEGAL TIMES, June 17, 1996, at 19; Cramton, supra note 34, at 826. A similar problem exists with “buyouts” of plaintiffs’ attorneys by defendants during settlement negotiations. See Edell, supra note 8, at 56. In a “buyout,” a defendant will offer the plaintiffs’ attorney a lucrative settlement offer conditional on the attorney’s promise not to pursue any more cases against the settling defendant and/or to turn over certain documents. See id.

79. See infra notes 80-83 and accompanying text.

80. See Coffee, supra note 2, at 1365.

81. See id. at 1364-65 (citing Hensler & Peterson, supra note 3, at 1042-43). For an example of a firm solicitation, see the following newspaper advertisement: They Dedicated Their Best Years to Building New York City...Decades Later Many Would Get Sick from the Asbestos, NEWSDAY, Dec. 21, 1999, at C12.

82. See Coffee, supra note 2, at 1365.

83. See id.; see also Edell, supra note 8, at 55 (suggesting that an attorney may settle a claim quickly to offset his own costs regardless of what his client desires); Weinstein, supra note 24, at 490 (stating that the author’s impression of lawyers working for groups of plaintiffs in mass tort
Conflicts of interest between present and future claimants are also common in mass tort cases where injuries strike victims at different times and to different degrees. Class action resolution necessarily leads to conflicts of interest between present class members interested in receiving immediate damages and future claimants whose compensation interests will be prejudiced by a defendant’s depleted fund. In fact, the Supreme Court has used this very conflict of interest as a basis for denying certification of a class of plaintiffs under FRCP 23(b)(1)(B) and 23(b)(3). Although courts may be attracted to certifying classes in mass tort cases, the inevitable conflicts of interest render such certification inequitable.

claims was that they “were focused on getting cash for the individual client, obtaining a large fee, and closing the file as quickly and with as little effort as possible”); Roth, supra note 24, at 609 (discussing the “less heroic” advocacy of lawyers representing clients in mass tort class actions and noting that they have been “accused . . . of colluding with defendants and accepting massive payoffs in return for selling their clients’ rights to the lowest bidder”) (citing Susan P. Konick, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1055 & n.58 (1995)).

84. See Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices 16-19 (1995); Swanzey, supra note 76, at 424; Roth, supra note 24, at 597 (stating that “[i]n the majority of these cases, the courts have discovered . . . [t]he most significant conflicts have been among the presently injured class members and the exposure-only plaintiffs”). Future claimants are those individuals who are not yet aware that they have been harmed by products connected to the defendant. See Swanzey, supra note 76, at 424 (basing one’s ignorance of his injury on the natural latency periods of injuries) (citing Marianne Lavelle, Court Rejects Settlement Class Actions: Asbestos Ruling Could Unravel other Agreements, NAT’L L.J., July 7, 1997, at B1 (quoting Professor John B. Coffee as an expert witness for plaintiffs opposing asbestos settlement)); see also supra note 13 and accompanying text (defining “future claimants”).

85. See Swanzey, supra note 76, at 424; see also Roth, supra note 24, at 597 (implying that the conflicts of interests among the presently injured class members and “future claimants” may be the downfall of aggregating mass tort claims into class action suits).

86. In Ortiz v. Fibreboard Corporation, 527 U.S. 815 (1999), the Court held that when a class is certified under FRCP 23(b)(1)(B), any absent class member would affirmatively have his compensation rights prejudiced if he was bound by a global settlement or jury verdict. See id. at 819. The Court thereafter reversed certification of a class of plaintiffs with claims against a manufacturer of products containing asbestos because the global settlement attempted to bind future claimants absent adequate protection of their interests. See id. at 864-85; see also supra notes 20-22 and accompanying text (explaining the details of the Ortiz decision).

87. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626-28 (1997) (denying class certification because the terms of a settlement did not equally address the interests of those plaintiffs presently injured by asbestos and those plaintiffs only exposed to asbestos); see also supra notes 12-17 and accompanying text (explaining the details of the Amchem decision).

88. See Hensler & Peterson, supra note 3, at 1047; McNeil & Fancsali, supra note 44, at 487.

89. See supra notes 76-87 and accompanying text.
3. Deterrence of Industrial Innovation

Another effect of mass tort litigation is its tendency to deter innovation in the industrial world. The cost and publicity of mass tort litigation has forced companies to remove needed products from the market and has frustrated industry's ability and desire to initiate product development for fear of litigation. In our legal system, which is based on both controlling and improving society, these effects call into question the usefulness of mass tort class actions.

This brief tour through the background of mass tort litigation reveals the current quandary in which the judicial system finds itself. Courts must either adjudicate mass tort claims individually and manage the problems that system produces, or aggregate mass tort claims and

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91. See Weinstein & Hershenov, supra note 65, at 274, 322-23 (citing Barry Meier, A Product Dead-Ended by Liability Fears, N.Y. Times, May 19, 1990, at 50).

92. See Cramton, supra note 34, at 814-15. Here, the author defines the American tort system as:

[R]equired the same values [as the American common-law system] by requiring proof of fault, causation, and harm before one person's loss is shifted to someone else. The injured plaintiff must establish by a preponderance of the evidence that the defendant's wrongful acts caused the plaintiff's harm. Although tort law serves mixed goals—compensating accident victims, deterring conduct that is wrongful or involves unreasonable risks to the health or safety of others, and punishing wrongdoers—the central notion until quite recently has been one of corrective justice—repairing, to the extent possible with a money award, the harm that one individual's wrongful act has caused another.

Id. (footnotes omitted); see also Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 Vand. L. Rev. 561, 605-06 (1993) (finding "corrective justice...the principal contender" for grounding rights in modern tort law); Weinstein, supra note 24, at 476 (recognizing that while mass tort cases are usually driven by the payment of money damages, they also have the purpose of securing the health and security of individuals and the viability of major economic institutions). But see Coffee, supra note 2, at 1355-56 (arguing that victim compensation is the primary goal in mass tort litigation making deterrence a problematic objective, if not an unrealizable one).

93. See Cramton, supra note 34, at 811, 815 (explaining the difference between individual justice and collective justice through claim aggregation in the court system and arguing that "mass exposure torts" threaten to displace the traditional model of individual justice).

94. In In re School Asbestos Litigation, the court specifically listed the problems individual adjudication of mass tort claims would create. It wrote:

[H]igh costs and inefficiencies in handling these individual claims as well as...uneven, inconsistent, and unjust results [are] often achieved. Perhaps the least flattering statistic is the high cost of processing these claims: "On the average, the total cost to plaintiffs and defendants of litigating a claim was considerably greater than the amount paid in compensation."
confront a second set of difficulties. To date, courts remain split, and a virtual debate has ensued regarding judicial treatment of mass tort litigation. The debate reveals certain insights that are essential to understanding mass tort litigation and determining the most adequate method to manage it.

III. DEFINING THE CONTOURS OF THE DEBATE

The tension in the judicial system created by the influx of mass tort class actions has generated voluminous writings regarding the inefficiency of the system. Inefficiency results primarily from relitigation of the same basic issues in case after case. Since a different jury is empaneled in each action, it must hear the same evidence that was presented in previous trials. A clearer example of reinventing the wheel thousands of times is hard to imagine.

Apparent inconsistency of jury verdicts has often been a reflection of the ability of the system to sort out individual differences and tailor redress to precise circumstances. In the asbestos litigation field, however, the variation in jury awards has led to complaints that injustice rather than careful apportionment has resulted. In re Sch. Asbestos Litig., 789 F.2d 996, 1001 (3d Cir. 1986) (quoting Asbestos in the Court, RAND CORP. REP. 1 (1985)); see also Bone, supra note 92, at 568 (explaining that individual litigants in mass tort cases do not have access to trial opportunities due to litigation and delay costs that are so high that it is not possible to guarantee each plaintiff with a meritorious case an individual trial early enough to assure a positive net recovery or an amount of compensation above a minimally acceptable level).

95. See discussion supra Part II.D.

96. Compare Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1230 (9th Cir. 1996) (decertifying a class of plaintiffs alleging injuries based on their use of a drug produced by defendant for failing to meet the requisite standards of FRCP 23), Castano v. Am. Tobacco Co., 84 F.3d 734, 740-41 (5th Cir. 1996) (decertifying a plaintiff class suing tobacco companies for damages due to nicotine addiction for its failure to meet the standards of FRCP 23(b)(3) and due to the district court’s error in applying FRCP 23(b)(3) to the case), In re Am. Med. Sys., 75 F.3d 1069, 1084-85 (6th Cir. 1996) (granting a writ of mandamus and directing a district court in Ohio to vacate certification of a class of plaintiffs who were implanted with a penile prostheses manufactured by defendant), and In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (granting a writ of mandamus directing an Illinois district judge to decertify a plaintiff class of hemophiliacs infected with Human Immunodeficiency Virus (“HIV”), with Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998) (affirming the district court’s certification of a plaintiff class in a products liability class action suit for the purposes of settlement upon finding that the class satisfied FRCP 23), In re Teletronics Pacing Sys., Inc., 172 F.R.D. 271, 287-95 (S.D. Ohio 1997) (recertifying a reconfigured class of plaintiffs with Teletronics pacemaker leads placed in their bodies), and In re Copley Pharm., Inc., 161 F.R.D. 456, 460-63 (D. Wyo. 1995) (denying a motion for reconsideration of class certification after rejecting the arguments raised in In re Rhone-Poulenc Rorer). For a brief synopsis of the decertification and recertification of the plaintiffs’ classes in Teletronics Pacing, see Pagan, supra note 37, at 833; see also Cabraser, supra note 23, at 631-34 (cataloging cases both approving and/or invoking FRCP 23 for settlement purposes after Amchem and denying such certification after Amchem).

97. See discussion infra Part III.
appropriateness of invoking FRCP 23 in the mass tort context. In their discussions, authors assume characteristics about judicial treatment of mass tort class actions without developing their conclusions. This Note confronts the implications commentators have made by defining two approaches taken towards evaluating the judicial role in facilitating or alleviating the problems of mass tort litigation. Examining mass tort class actions in this light allows us to understand what society expects from its judges so that we can realistically assess the consequences of tort reform.

98. See McNeil & Fancsali, supra note 44, at 485 (stating that the subject of mass tort class actions "is blessed with considerable work product. Two major law reviews each conducted a recent symposium, and each devoted an entire issue to this area of law"); Pagan, supra note 37, at 803 ("This Comment will not seek to add to the voluminous writings on the fundamental question of whether courts should certify mass tort class actions."). Compare Baughman, supra note 7, at 241 (proposing that class actions offer plaintiffs in mass tort cases a procedure by which they can secure relief relatively quickly so long as members' rights to opt-out of the class are limited in accord with due process requirements), Richard L. Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 CORNELL L. REV. 858, 859 (1995) (advocating the use of scheduled benefits through settlements governed by FRCP 23 in mass tort litigation), Recent Case, In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995), 109 HARV. L. REV. 870, 874 (1996) (arguing that the class action device aims to solve the procedural problems of mass torts), Hon. Spencer Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 325 (1983) (suggesting that "the class action device holds the most promise as an effective tool to accommodate competing interests"), Heather M. Johnson, Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions, 64 FORDHAM L. REV. 2329, 2333 (1996) (stating that the class action device has a number of advantages in resolving mass product liability litigation), and Roth, supra note 24, at 582 (arguing that mandatory settlement only class actions can fulfill FRCP 23's requirements "and represent a step toward a cure for the mass tort litigation crisis"), with Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the Alli Proposal, 10 J.L. & COM. 1, 61 (1990) (concluding that mass centralization and consolidation are not desirable), James A. Henderson, Jr., Comment: Settlement Class Actions and the Limits of Adjudication, 80 CORNELL L. REV. 1014, 1014 (1995) (concluding that settlement class actions in the mass tort context are inherently unlawful and exceed the legitimate limits of adjudication), McNeil & Fancsali, supra note 44, at 486 (proposing that courts can handle mass torts using conventional procedures and methods), and Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 88 (arguing that the legal system "should resist the judicial impulse to shorten dockets by using mass trials").

99. See, e.g., Craymton, supra note 34, at 826 n.56 ("The limited review of class action settlements many trial court judges provide suggests that they view settlements primarily in terms of the convenience to the judiciary in getting rid of cases rather than in terms of the interests of those for whom the judicial process is being invoked ...."); Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 CORNELL L. REV. 941, 972 n.140 (1995). There has been some literature on the changing role of judges; however, these articles do not expressly contemplate the mass tort situation. See generally Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982) (discussing the changing role of judges in public interest and products liability litigation).

100. See infra Parts III-A-B.

101. See Hensler & Peterson, supra note 3, at 965.
A. The Accusatory Approach

In their proposals on how class actions fit into mass tort litigation, commentators have blamed judicial action for the current inequity that occurs when mass tort claims are processed in the aggregate. The most popular accusation is that the mass tort crisis was initiated by judicial self-interest. One take on this proposition is that judges reversed their initial skepticism of FRCP 23’s appropriateness in the mass tort context based solely on their “obsession” to cut back on their dockets. These critics believe that judges “had it right the first time” and are now exploiting FRCP 23 only to clear large numbers of duplicative mass tort claims from the federal dockets in one fell swoop. Consequently, they argue that judges have encouraged dubious settlements under FRCP 23 and brought about the problems that characterize mass tort class actions themselves.

102. See, e.g., Coffee, supra note 2, at 1463 (arguing that “judicial self-interest must be placed at center stage” in discussing tort reform due to mass tort litigation).

103. See Schuck, supra note 99, at 942 (acknowledging that other tort scholars “argue that the legal actors in the mass tort drama . . . [including] overwhelmed, desperately improvising judges—have subordinated important public goals and the needs of individual claimants to their own interests”).

104. Id. at 972 n.140 (“Some commentators suggest that the judicial commitment to settlement class actions and other controversial changes in the mass tort system reflects their obsession with reducing their burgeoning caseloads rather than more disinterested motives.”); see also John C. Coffee, Jr., The Corruption of the Class Action: The New Technology of Collusion, 80 CORNELL L. REV. 851, 857 (1995) (“[T]he most distinctive fact about mass tort class actions . . . is . . . the palpable self-interest of distinct judges seeking to avoid a flood of individual actions.”).

105. McNeil & Fancsali, supra note 44, at 503-07 (arguing that traditional approaches and procedures are able to manage a flooded docket effectively so that there is no need to reject the Advisory Committee notes); see supra note 47 and accompanying text (quoting the relevant Advisory Committee Note).

106. See Coffee, supra note 2, at 1350, 1358 & n.23 (implying that protection of the federal docket was the impetus behind reversing judicial aversion to using FRCP 23 in the mass tort context); Coffee, supra note 104, at 851-52, 854 (stating that courts embraced the class action for settlement purposes only to reduce the impact mass tort personal injury litigation would have on their dockets).

107. To clarify, using class actions for settlement purposes requires satisfaction of essentially two conditions. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609, 621 (1997) (affirming the Third Circuit’s application of FRCP 23 to a plaintiff class for settlement purposes and requiring the settlement itself be addressed as a factor in that calculation). First, the class of plaintiffs must satisfy the requirements of FRCP 23(a) as if the issues were going to be litigated. See id. at 609, 622. Second, the court must find that the settlement is fair according to one of the subsections of FRCP 23(b). See id. at 622.

108. See Coffee, supra note 2, at 1462-63 (stating that courts accept far more suspiciously collusive class action settlements in mass tort personal injury litigation than traditional personal injury claims). Dubious settlements may be those that are effectively extorted by defendants. See Coffee, supra note 104, at 853-54. Plaintiffs may also extort dubious settlements. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (defining this situation as a “blackmail
Another aspect of judicial self-interest discussed in legal literature is that judges invoked FRCP 23 as a quick fix to the illusory problem of docket inundation. By using class actions and class action settlements in mass tort cases, judges are essentially taking the easy way out. Proponents of the accusatory approach argue that this is tantamount to an evasion of judicial duties, which cannot be justified by the crisis it ultimately created.

settlement”) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). Even judges may extort dubious settlements. See Coffee, supra note 2, at 1391 (describing Judge Weiner's tactics during the asbestos litigation consolidated in his district in 1991 as an exploitation of ill and dying plaintiffs in order to pressure them into agreeing to a global settlement that would bind all present and future claims); Crampton, supra note 34, at 812 (noting the "modern phenomenon of 'managerial judges' who ... take a forceful role in pressing settlement") (citing Resnik, supra note 99). These types of settlements may also validate weak or spurious claims. See McNeil & Fanesali, supra note 44, at 490-92. They may prejudice the claims of other potential class members. See discussion supra Part II.D.2. Finally, these settlements may implicate other elements of collusion. See generally Coffee, supra note 2, at 1378-84.

109. See John Bell, Asbestos Companies Try to Eliminate Their Liability, TRIAL, May 1999, at 10 (calling the contention that asbestos litigation has caused gridlock in federal courtrooms "a false claim"); Coffee, supra note 2, at 1358 n.23 (questioning whether courts are in fact being overwhelmed by mass tort claims); McNeil & Fanesali, supra note 44, at 503 (implying that the mass tort crisis is a perception).

110. See Crampton, supra note 34, at 818-19 (implying that courts and judges accept collective justice, including the class action device, in the mass tort context because it is the easiest way to temper costs, time delays, and space on the federal docket); Hensler & Peterson, supra note 3, at 1050-53 (detailing the problems inherent in utilizing global settlements in mass tort litigation and stating that, despite these issues, most proposals for change are aimed at increasing judicial ability to achieve global resolutions to mass tort litigation); Swanzey, supra note 76, at 421-32, 434 (arguing that the lack of a more efficient mechanism does not justify the use of FRCP 23 in mass tort litigation at the expense of individual justice). For an explanation of how class actions are used for settlement purposes, see supra note 107.

111. See Coffee, supra note 2, at 1422 (implying that the reason a combined system of class action and arbitration is needed is because courts would refuse to litigate mass tort claims in the "ordinary" manner); McNeil & Fanesali, supra note 44, at 503-07 (claiming that judges aggravated a litigation crisis by avoiding such traditional approaches to mass tort litigation as strict analysis of procedural rules and the simple trying of one case after another); John A. Siliciano, Mass Torts and the Rhetoric of Crisis, 80 CORNELL L. REV. 990, 1010-12 & n.80 (1995) (arguing that "[c]ourts should have kept a tight rein on such exotica" as cancer phobia claims in asbesotis litigation and should do so in the future for other mass tort litigation with "a more hard-hearted and rigorous up-front scrutiny" in order to avoid "the next asbestos"); Roth, supra note 24, at 614-17 (advocating the restriction of judicial discretion in reviewing class actions for settlement purposes based on the court's tendency to abandon its responsibilities in overseeing and engaging in settlement negotiations and its tendency to ignore collusive situations during class action settlement negotiations); see also Coffee, supra note 2, at 1384 (doubting that courts will be willing to monitor settlements and class actions to avoid potential conflicts assuming they were able); McNeil & Fanesali, supra note 44, at 510-12, 517-18 (applauding strict scrutiny of settlement agreements by the Third Circuit and Texas Supreme Court and finding that court refusal to engage in this practice is a regrettable interpretation of judicial authority).
Another assertion made by legal commentators is that judges exploit FRCP 23 to allow themselves to proactively resolve public policy issues. Unfortunately, traditional common law prohibits judges from "'legislat[ing] from the bench,'" meaning that courts are forbidden from solving complex social problems under the guise of litigation. Mass tort litigation, however, does not fall strictly within the definition of traditional law. Rather, it is an amalgamation of "public law litigation" and traditional tort law. Therefore, having judges decide policy issues in the context of mass tort litigation may not automatically indicate that a judge has gone beyond his authority.

112. See Coffee, supra note 2, at 1389-91. The dialogue between District Court Judge Charles R. Weiner of the Eastern District of Pennsylvania and Judge Robert Parker, Chair of the Judicial Conference's subcommittee with responsibility for asbestos litigation, proved that asbestos litigation had become a public policy issue and that the judiciary was determined to play a proactive role in it. See id. Judge Weiner was overseeing all the pending personal injury asbestos cases in the federal system under a transfer order by the JPML made July 29, 1991. See id.

113. Weinstein, supra note 24, at 541. An example of judicial legislation is its attempt to create an insurance system through class action settlements. See Coffee, supra note 2, at 1422.

114. See Henderson, supra note 98, at 1016.

115. See Baughman, supra note 7, at 215 (implying that mass tort cases have different due process concerns than traditional tort claims); David Hricik, The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law, 17 REV. Litig. 419, 419 (1998) (noting "the unique circumstances that accompany mass tort litigation").

116. Public law litigation is an exception to the general rule and permits judges to solve social problems from the bench. See Henderson, supra note 98, at 1016-17. In this type of litigation, public officials, such as judges, are permitted to act in the public's interest. See id. at 1017 (citing generally, Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976)).

117. See id. at 1017 (recognizing that "public law litigation" may be analogous to private tort actions); Kenneth R. Feinberg, Lawyering in Mass Torts, 97 COLUM. L. REV. 2177, 2177 (1997) (discussing Judge Weinstein's judicial philosophy for mass tort litigation); Weinstein, supra note 24, at 472-76 (arguing that mass tort cases are "akin" to public law litigation). But see Coffee, supra note 2, at 1384 (finding public law analogies to mass tort litigation "a mist of rhetoric").

118. See Cabraser, supra note 23, at 660. The author writes: Ortiz and Amchem, as settlements, failed to achieve perfection from a due process standpoint. Accordingly, after years of appellate wrangling, they were ultimately rejected. Congress is called upon to save the situation. Yet all of the most sincere and intensive efforts by attorneys general, the plaintiffs' bar, the public health community, children's advocates, and politicians themselves failed to produce a Congressional resolution to tobacco claims. It has been left to the courts to serve as the forum for the attorneys' generals' settlements, and for the smokers' claims that continue to go to trial, to verdict, and on appeal. That is, after all, as it should be. Id.; see also Marcus, supra note 98, at 872-95 (recognizing that using FRCP 23 to adjudicate and/or settle mass tort litigation leads to substantive tort law changes that may accomplish judicial legislation and discussing how to surmount the obstacles to this judicial action); Weinstein, supra note 24, at 491, 539-42, 559 (advocating that a judge has a social obligation to the community which means, in the mass tort context, that he or she must use "social realities beyond the courthouse door") in order to maintain public faith in the legal institution); Williams, supra note 98, at 325 (defending his decision to certify a nationwide punitive damages class action in Dalkon
A third allegation made regarding the judicial role in the mass tort problem is that judges are actively siding with one of the parties to the litigation. Many argue that judges base their certification decisions on a pro-industry bias. They claim that courts have decertified mass tort class actions for settlement purposes to maintain corporate solvency and/or to protect defendant-corporations from liability. Others observe a more pro-plaintiff stance in the courts. They argue that court favoritism of injured plaintiffs is not only at odds with judicial obligations to remain neutral, but may also have the effect of sacrificing issues of actual liability.

Senior District Court Judge Jack B. Weinstein, who has overseen mass tort cases involving Agent Shield IUD litigation. But see Henderson, supra note 98, at 1020 (concluding that public law adjudication does not justify settlement class actions in the mass tort litigation).

See, e.g., Weinstein, supra note 24, at 542 (arguing that a judge can, and should "become 'partial' in favor of the communities' best interests").

See Pagan, supra note 37, at 833 (indicating a potential trend reversal in decertifying class action suits based on economic biases of the court); E. Michael Bradley & Michael W. O'Donnell, Two Circuits Reject Mass Tort Classes: Opinions by the 5th and 7th Circuits and Proposals to Revise Rule 23 May Signal an Industry-Protective Stance by the Courts, NAT'L L.J., July 29, 1996, at B7 (finding opinions by the Fifth and Seventh Circuits, coupled with proposals to revise FRCP 23, indicative of an industry-protective stance by the courts); see also In re Telecommunications Pacing Sys., Inc., 172 F.R.D. 271, 275-76 (S.D. Ohio 1997) (attacking the economic preferences of the courts in deciding Castano and In re Rhone-Poulenc Rorer).

See Coffee, supra note 2, at 1396 (suggesting that the class action route allows a solvent corporation “to escape much of its tort liability without risking the loss of corporate control that is often incident to a bankruptcy reorganization”); see also id. at 1403-04, 1461 (describing how class action settlements under FRCP 23(b)(1)(B) could effectively place a corporation’s shareholders ahead of its tort creditors); Cranson, supra note 34, at 818 (stating that “[s]ome courts assume that maintaining the solvency of corporate actors is a desirable objective wholly apart from its effect on future claimants”); Edell, supra note 8, at 53-54 (implying that an unequal benefit is conferred on corporate defendants who have the ability to avail themselves of the protections of bankruptcy in mass tort class action settlements).

See United States Dep’t of Justice, Tort Policy Working Group, An Update on the Liability Crisis 54 (1987) (recognizing the opinion of some members of the bench, bar, legal community, and legislature that a pro-plaintiff bias has distorted the tort system); Coffee, supra note 2, at 1356 (noting that courts are preoccupied with victim compensation rather than corporate deterrence); McNeil & Fancsali, supra note 44, at 489-90 (arguing that certifying class actions for settlement purposes denies defendants the right to unreasonable settlements); Pagan, supra note 37, at 819-20 (discussing the pressure on defendants to agree to settlements in the class action context); Weinstein & Hershenov, supra note 63, at 322-23 (noting federal and state legislative backlash to pro-plaintiff substantive tort laws that have developed over the past two decades).

See Resnik, supra note 99, at 374-77; Weinstein, supra note 24, at 539-42 (describing the traditional conduct of judges in the adversarial system) (citing Martin Marcus, Above the Fray or into the Breach: The Judge’s Role in New York’s Adversarial System of Criminal Justice, 57 BROOK. L. REV. 1193, 1193 (1992)).

See In re Am. Med. Sys., Inc., 75 F.3d 1069, 1084-85 (6th Cir. 1996) (decertifying the plaintiff class on the grounds that the district court resolved issues relevant to certain plaintiffs on behalf of the entire class).
Orange, asbestos, and diethylstilbestrol ("DES"), has himself acknowledged the potential for a pro-plaintiff stance within the courts.

Members of the legal community who take the accusatory position defined above find judicial invocation of FRCP 23 in mass tort cases is a function of judicial self-interest and bias. They argue that this activity does not symbolize an attempt to relieve the mass tort crisis but rather, has been a contributing factor. Accordingly, they argue that judicial discretion in using FRCP 23 to govern mass tort litigation should be restricted or denied.

B. The Sympathetic Approach

At the other end of the spectrum, there are jurists and members of the legal community who believe that judges resorted to mass processing of cases through class action suits as a pure reaction to the mass tort onslaught. The influx of mass tort cases essentially constituted a legal emergency. To begin with, the courts were faced with a unique legal phenomenon that was resistant to our traditional system. When state
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and federal legislatures ignored the apparent paradox, courts were left to their own devices. Together, these factors forced judges to depart from the traditional models of causation and liability in order to adjudicate the claims that continued to saturate their courtrooms. Given these exceptional conditions, observers applauded judicial innovation of FRCP 23 as the most practical response available under the constraints of traditional tort law.

Others argue that mass tort litigation and the judiciary’s reaction to it are indicative of our legal system’s adaptability. They find that mass in Judge Weinstein’s assumption of Agent Orange litigation from Judge Pratt in 1983; Weinstein & Hershenov, supra note 63, at 273 (describing how mass production and worldwide distribution of new chemicals and drugs resulted in harms and latent illnesses that rendered traditional bipolar adjudication of tort claims inadequate); see also discussion supra Part II (detailing the evolution of mass tort litigation).

132. See Schuck, supra note 99, at 974 (describing the limitations of common law tools when applied to mass tort issues); Weinstein & Hershenov, supra note 63, at 303 (finding traditional tort law ill-suited to mass torts).

133. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 599 (1997) (recognizing that federal courts were forced to manage mass tort litigation with their limited procedural tools due to legislative inaction); Schuck, supra note 99, at 972 (suggesting that legislators may have left mass tort lawmaking to the courts because “they believe that . . . the courts can do it better”).

134. See In re “Agent Orange” Prod. Liab. Litig., 506 F. Supp. 76, 782-85 (E.D.N.Y. 1980); Pagan, supra note 37, at 814 (citing In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig., 526 F. Supp. 887, 920-21 (N.D. Cal. 1981)); Schuck, supra note 99, at 948; see also Marcus, supra note 98, at 866, 870 (arguing that substantive issues forced courts to use FRCP 23 to adjudicate mass tort cases); Weinstein & Hershenov, supra note 63, at 270-74, 287-89 (explaining why district courts were forced to move beyond the advisory committee notes and certify classes in mass torts).

135. See Bone, supra note 92, at 569 (suggesting that Judge Parker was correct in finding “that sampling is the best way to handle this difficult situation within the constrained set of options available to district courts”). Sampling is a statistical method used to adjudicate a large population of similarly situated cases. See id. at 563. The court aggregates all the cases and selects a random sample, adjudicating each sample case and statistically combining the sample outcomes to yield results for all cases in the larger population. See id. Judge Robert Parker applied this technique in his dealings with asbestos litigation. See Cimino v. Raymark Indus., Inc. 751 F. Supp. 649 (E.D. Tex. 1990), aff’d in part and vacated in part, 151 F.3d 297 (5th Cir. 1998); see also Marcus, supra note 98, at 862 (calling Judge Williams’ effort to use FRCP 23 in the absence of Congressional intervention during his management of Dalkon Shield litigation “prophetic”; Schuck, supra note 99, at 949-51, 962 (recognizing the relentless efforts of judges to manage risk and compensation in a maturing mass tort system and implying that global settlements represent the most coherent system for managing mass tort litigation). For a definition of a “maturing” mass tort system, see Francis E. Mc Govern, Resolving Mature Mass Tort Litigation, 69 B.U. L. REV. 659 (1989); Schwarzer, supra note 130, at 839 (finding “the pressures generated by mass tort litigation are driving the justice system toward . . . aggregation procedures and, apart from bankruptcy, Rule 23 offers the most readily available tool”).

torts evolved as a wholly distinct field of law that warranted original application of traditional procedural tools, including FRCP 23. Therefore, creative interpretation of FRCP 23 in mass tort litigation is more of a justified, if not expected, turn of events.

Those who take the sympathetic approach towards the judicial role in managing mass tort litigation believe the efforts made by the judiciary are legitimate. Their proposals therefore involve codification of those very methods the judiciary has been experimenting with up until now. They argue that rejection of these innovations would be detrimental to the function of the justice system.

Disposition, 69 CAL. L. REV. 770 (1981); Schwarzer, supra note 130, at 841-42 (finding that in mass tort litigation, the class action creature is “a commendable example of the law’s adaptability to meet the needs of the time in the best tradition of the Anglo-American common law”); Weinstein, supra note 24, at 481 (implying the adaptability of common law by finding that the notion that class actions are not appropriate for mass torts is “outdated”); Weinstein & Hershenov, supra note 63, at 272-75 (mapping the evolution of the judicial use of equity in mass tort litigation based on the development of the equity judge in common law).

137. See Bone, supra note 92, at 612-14 (suggesting that mass torts allow for large-scale case aggregation not usually permitted by our legal tradition because of its unique foundation); Judith Resnik, Aggregation, Settlement, and Dismay, 80 CORNELL L. REV. 918, 924-31 (1995) (arguing that the rapidly changing world of litigation renders future tort class actions and global settlements “unsurprising evolution[s]” that should not be forbidden due to the initial perceptions of FRCP 23 drafters).

138. See Resnick, supra note 137, at 926 (arguing that federal judges have played a key role in class action mass torts “not only in the last ten years but for the last half century” and that their reliance on FRCP 23 is not extraordinary); Weinstein & Hershenov, supra note 63, at 276 (justifying equity in mass tort cases based on the historical default to equity when common law doctrines prove to be too strict and fail to provide adequate remedy) (citing H. HANBURY & R. MAUDSLEY, MODERN EQUITY 4 (10th ed. 1976)); see also Resnik, supra note 99, at 390-95 (describing hypothetical managerial tasks a judge may expect to perform in products liability cases). The author bases her information on issues arising in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (reversing the trial court’s rejection of personal jurisdiction in a products liability suit) and Parsons v. General Motors Corp., 85 F.R.D. 724 (N.D. Ga. 1980) (finding automobile crash test and design information discoverable because it was not privileged or confidential research).

139. See Hensler & Peterson, supra note 3, at 1031, 1061 (recognizing the legitimate effort the legal system has expended in trying to resolve mass tort personal injury litigation); Schuck, supra note 99, at 958 (affirming the point that judicial innovations “constitute a firm, self-conscious judicial commitment to the project of systematizing and refining mass tort litigation into a distinctive genre with its own rules and practices”).

140. See Bone, supra note 92, at 567-69, 598 & n.104 (justifying the use of sampling in mass tort litigation); Schwarzer, supra note 130, at 842-45 (proposing an amendment of FRCP 23(e) to provide guidelines for courts to follow in approving class action settlements); Weinstein, supra note 24, at 482-85 (suggesting that judges should reform traditional rules of ethics in order to establish functional legal standards applicable to mass torts).

141. For example, refusing to permit certification of classes for settlement purposes would effectively overturn a significant portion of federal litigation. See Cabraser, supra note 23, at 629. A 1996 study of the federal courts reported that thirty-nine percent of all class actions had been certified for settlement purposes only. See Thomas E. Willging, et al., An Empirical Analysis of
IV. SIDING WITH THE SYMPATHETIC APPROACH

Having fully described the debate surrounding the judiciary's part in the mass tort problem, this Note argues that the sympathetic approach is the proper framework to utilize when examining potential solutions. This approach not only paints a more accurate picture of how class actions became established in mass tort law, but is also a more useful means of determining the most practical reform.

The substantive reasons judges give for applying FRCP 23 to mass tort cases demonstrates the courts' sincerity in their use of this technique and resists any argument regarding their self-interest. In making their certification decisions, judges did not willfully ignore the restrictive intention of FRCP 23. Rather, they accepted the Advisory Committees' warning and merely proceeded to justify their use of FRCP 23, notwithstanding its existence. These decisions reflect traditional judicial goals of fairness and equity. They promote effective resolution

Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74 (1996). Denying the use of FRCP 23 in mass tort litigation also tends to set back the progress of reform. See Florida Judge Delays Tobacco Suit to Allow Plaintiffs to Appeal, WALL ST. J., Sept. 13, 1999, at B2; see also Pagan, supra note 37, at 823; Williams, supra note 98, at 332.

142. See infra notes 144-54 and accompanying text.

143. See infra notes 155-60 and accompanying text.

144. See, e.g., Castano v. Am. Tobacco Co., 160 F.R.D. 544, 555 (E.D. La. 1995) (striving to avoid duplicative litigation and to conserve the resources of courts and parties); Dante v. Daw Coming Corp., 143 F.R.D. 136, 137-38 (S.D. Ohio 1992) (indicating that a class action is superior to duplicative litigation); In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 720-23 (E.D.N.Y. 1983) (describing the desirability of class certification in mass tort litigation). However, as District Court Judge Brimmer correctly notes, "efficiency is not ... the only reason to certify a class." In re Copley Pharm., Inc., 158 F.R.D. 485, 492 (D. Wyo. 1994) (certifying a class in order to protect the smaller claims of litigants and to protect the efficiency of consolidation by the Multidistrict Litigation ("MDL") Panel). See also In re "Bendectin" Preds. Liab. Litig., 102 F.R.D. 239, 240 (S.D. Ohio 1984) (contemplating the availability of judges for other litigation in certifying a class); In re Agent Orange, 100 F.R.D. at 720-21 (certifying a class in order to ensure that the financial burden will fall on the party who should bear it and to encourage settlement of the litigation).


146. See Castano, 160 F.R.D. at 553-60; In re Agent Orange, 100 F.R.D. at 721-24.

147. See Castano, 160 F.R.D. at 552 (considering equity and the constitutional right to a jury trial in refusing to certify a class under FRCP 23(b)(2)); see also In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, Civ. A. No. 94-P-11558-S, MDL No. 926, 1994 WL 578353, at *5-6 (N.D. Ala. Sept. 1, 1994) (considering the opinions of members and non-members and evaluating party interests in approving a settlement for class action purposes); In re Bendectin, 102 F.R.D. at 241 (creating subclasses in order to protect the interests of present and future claimants from conflicts of interest); In re Agent Orange, 100 F.R.D. at 722-24, 726-27 (evaluating
to plaintiffs’ claims. Therefore, judicial decisions that certify classes in mass tort cases signify the judiciary’s genuine attempt to reconcile the mass tort crisis with the goals of our traditional legal system.

Admittedly, a court’s justification for its actions may be a function of the result it wishes to achieve rather than a true expression of legal principle. However, inconsistent federal court treatment of motions for class certification in mass tort proves that the judiciary does not have a premeditated agenda. Appellate and district courts have ordered both certification and decertification of classes in mass tort litigation. In the interests of class members in determining class appropriateness under FRCP 23(b)(3) and (b)(1)(B)).

148. See Real, supra note 3, at 439 (arguing that FRCP 1, mandating the just, speedy, and inexpensive determination of every action, is most seriously applied via FRCP 23 in mass tort litigation). Although the case referred to involved a mass accident, as opposed to a mass tort, and was ultimately consolidated under FRCP 42(a) rather than as a class action, Judge Hall’s observations are relevant. In his In re Paris Air Crash opinion, Senior District Court Judge, Pierson M. Hall, wrote:

The most important rule of all is the last sentence of [FRCP] 1, which provides that the Federal Rules of Civil Procedure “shall be construed to secure the just, speedy, and inexpensive determination of every action.” It is this command that gives all the other rules life and meaning and timbre in the realist world of the trial court. It makes the rules useful tools for the trial of actual litigation instead of abstractions to be pontificated over in seminars by learned scholars of the law who have seen little or nothing of real litigation in the trial courts, where approximately 90 per cent of all civil litigation is handled and terminated.

In re Paris Air Crash of March 3, 1974, 69 F.R.D. 310, 318 (C.D. Cal. 1975); see also In re Silicone Gel Breast Implant, 1994 WL 578353, at *6 (considering the ability of litigants to resolve their claims through individual adjudication).

149. See Real, supra note 3, at 441 (“A common thread in all of these [mass tort] cases was the court’s effort to obviate the problem of inconsistent results due to multiple jurisdictions, the threat of multiple punitive damage awards for a single tortious act, and the inability of recovery for persons with smaller claims.”); Schwarzer, supra note 130, at 841 (finding that creative use of FRCP 23 is accomplished with good intentions to help courts cope with burgeoning dockets, to provide claimants with compensation, to allow defendants to manage their staggering liabilities, and to encourage settlement).

150. In 1870, Oliver Wendell Holmes, Jr. wrote, in the first words of his first major essay: “It is the merit of the common law that it decides the case first and determines the principle afterwards.” Felix Frankfurter, The Early Writings of O. W. Holmes, Jr., 44 HARV. L. REV. 717, 725 (1931) (quoting from Codes, and the Arrangement of the Law, 5 AM. L. REV. 1 (1870)).

151. See Cabraser, supra note 23, at 627 (noting that the Supreme Court’s Amchem decision, and has been, invoked to support class certification and to deny class certification in the lower courts).

fact, single opinions often contain procedural outcomes that conflict with each other. If courts were advancing their own self-interest through application of FRCP 23 in mass tort cases, surely a more uniform pattern of class aggregation would exist.

This argument can also extend to the allegations of judicial party favoritism. Certification decisions in mass tort cases have benefited both sides of the litigation. It is therefore impossible to claim that the system as a whole is one-sided.

Another reason to frame the mass tort problem under the sympathetic approach is that this interpretation is a more productive way to view this type of litigation. The accusatory approach’s most fundamental inadequacy is its focus on causation; who, or what, is to blame for the problems mass tort class actions create? Patrons of the


154. See In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, Civ. A. No. 94-P-11558-S, MDL No. 926, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994) ("Verdicts in the cases thus far tried have been mixed, some favorable to the defendants and some favorable to the plaintiffs.").

155. See Cabraser, supra note 23, at 623 (finding that the settlement procedures utilized in Amchem and Ortiz were met with more assiduous dissection and more single-minded condemnation by the uninvolved than any other class action); Hensler & Peterson, supra note 3, at 962 & n.8 (noting the large disagreement surrounding the causes of mass tort litigation). Composing a dialogue between two advocates of the accusatory stance best explains this problem. At one point, a commentator alleged that the Supreme Court was untenable in its “irresolution” and “steadfast inattention” to mass tort class action issues and demanded that the Court should review Amchem Products, Inc. v. Windsor. Mullenix, supra note 8; see also Cabraser, supra note 23, at 669 (recognizing that some commentators believe the Supreme Court has retreated from the notion of a judge’s quintessential power to dispense with equity in a difficult situation). After the Court reviewed Amchem, their decision was admonished for “blurring its Rule 23(113) typicality inquiry.
Accusatory approach categorically define courts as the source of the mass tort problem. Yet, they propose that these apparently unworthy bodies continue to oversee mass tort litigation, justifying the inconsistency by placing prudential limits on judicial power.

Conversely, the sympathetic approach understands the court’s struggle with mass tort litigation. It therefore permits admission of judicial defeat and contemplation of more substantial reform beyond vaguely modified judicial procedures. While this Note does not argue for the absolute elimination of class action aggregation in mass torts or removal of these cases from the legal system, the sympathetic approach allows us to move away from it for a long enough period of time to permit assessment of quasi and non-judicial procedures. These procedures may better answer the needs of mass tort litigation and its participants.

V. APPLYING THE SYMPATHETIC FRAMEWORK TO MASS TORT LITIGATION

Dissecting the field of mass tort litigation reveals the nonsuccess of judicial attempts to resolve mass tort cases. Individual adjudication of mass tort personal injury claims threatens delay of plaintiffs’ recovery and inundation of the federal docket. Class maintenance, on the other hand, into its Rule 23(b)(3) predominance analysis.” Roth, supra note 24, at 593 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609-10 (1997)). This author argued that the Supreme Court’s holding was erroneous and that a group as large and as factually diverse as the class at issue could fulfill the Rule 23 prerequisites. See id. Answering these accusations clearly does very little to solve the question of how to manage mass tort litigation.

156. See discussion supra Part III.A.

157. See, e.g., Coffee, supra note 2, at 1345-48, 1463 (arguing that mass tort class actions may be maintained if their use is limited, while also asserting judicial self-interest the central issue of mass tort litigation); Roth, supra note 24, at 607-17.

158. See discussion supra Part III.B.

159. See Hensler & Peterson, supra note 3, at 1031 (stating “[i]f courts have failed to deliver on the promise of justice in mass personal injury litigation, it is not for want of trying”). The authors continue to explain why aggregation of mass tort personal injury litigation is so problematic. See id.

160. See generally Edell, supra note 8, at 39, 45-53 (discussing the advantages and disadvantages of using alternative dispute resolution (“ADR”) and MDL transfer in mass tort cases); Christine Lepera & Jeannie Costello, New Areas in ADR, 605 P.L.I.-LIT 593 (1999) (discussing the increased use of ADR in areas of law with growing claims, high transaction costs, and questionable future outcomes).

161. See Cramton, supra note 34, at 835 (characterizing the current state of mass tort class action settlements as chaotic and lawless); Hensler & Peterson, supra note 3, at 962-63 (“[A]lmost all of those involved [in mass tort litigation] would agree that the civil justice system has not performed well in response to the challenge of mass torts.”); Roth, supra note 24, at 580-81 (finding the corrective justice model used for resolving tort claims ineffective in mass tort litigation).

162. See, e.g., supra note 62 and accompanying text.
hand, implicates conflicts of interest, due process concerns, high transaction costs, and other constitutional issues.\textsuperscript{163}

We cannot ignore the obvious significance of this predicament. Mass tort litigation has outgrown traditional adjudication.\textsuperscript{164} Using class actions in mass tort cases does not remedy this reality. In fact, it does little more than stretch FRCP 23 itself beyond the bounds of traditional due process.\textsuperscript{165} The 1966 amendments to FRCP 23 did not intend to embrace mass tort claims.\textsuperscript{165} Nor does the potentially creative design of FRCP 23(b)(3)\textsuperscript{167} justify class actions in these situations.\textsuperscript{165} Under these...
standards, any attempt to adjudicate mass tort claims is fraught with such unacceptable violations of our perceptions of justice that quasi- or non-judicial reform is demanded.\textsuperscript{169}

The need for external treatment of mass tort litigation is evidenced by the courts’ self-execution of quasi-judicial procedures activated only by mass tort litigation.\textsuperscript{170} During settlement negotiations, judges have depended on external steering committees and appointed special guardians and chairmen to monitor pre-trial activity and settlement bargaining.\textsuperscript{171} They have created and supervised trusts to pay off individual claims against a defendant-corporation.\textsuperscript{172} In mass tort cases, courts have relied heavily on experimentation with consolidation under FRCP 42\textsuperscript{173} and special masters under FRCP 53.\textsuperscript{174}

The demand for external treatment of mass tort litigation is further evidenced by repeated proposals for non-judicial intervention, including heightened manufacturer regulations and victim compensation

\textsuperscript{168} See Kaplan, supra note 166, at 395 (rejecting the notion that FRCP 23(b)(3) “simply picks up any old spurious action and runs with it”). The author argues that in applying FRCP 23(b)(3) to “pioneer cases,” the courts had, up to that point, understood the limits of the criteria and have not, as Justice Black feared, given district judges power without bounds. See id. at 395-96 (citations omitted).

\textsuperscript{169} See Coffee, supra note 2, at 1422 (assuming that idealism and pragmatism must be balanced in the mass tort context, the author argues that judicial competence in handling these claims is severely limited).

\textsuperscript{170} See Mullenix, supra note 8 (writing that federal courts have used “their own ingenious devices” to adjudicate mass torts); see also Pagan, supra note 37, at 814; Weinstein & Hershenov, supra note 63, at 270-74.


\textsuperscript{172} See In re Johns-Manville Corp., 36 B.R. 727, 741 (Bankr. S.D.N.Y. 1984) (allowing for bankruptcy reorganization of a corporation even though its Chapter 11 petition was based on tort liability); see also Edell, supra note 8, at 53-54 (discussing the role of bankruptcy in mass tort litigation); Manville Trust Paid More Than 25,000 Claims for $108 Million in 1998, 14 No. 3 MEALEY’S LITIG. REP.: ASBESTOS 19 (1999) (discussing the creation of the Johns-Manville Corp. Trust that was created to pay asbestos claims against the corporation).

\textsuperscript{173} See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 599 (1997) (discussing how eight federal judges urged the JPML to consolidate all asbestos complaints then pending in the federal courts to one district).

\textsuperscript{174} See Feinberg, supra note 117, at 2177 (citing the author’s own role as special master in several mass tort cases); Roth, supra note 24, at 607-11 (implying that special masters under FRCP 53 should be utilized in all mass tort claims).
schemes, recommendations for Federal Rules reform, and requests to Congress for assistance in managing mass torts.

Given the diversity of groups implicated by mass tort litigation, the answer to the problem clearly lies within society as a whole. The question belongs to the public and should be answered by interested parties beyond the judiciary, its support staff, and a handful of academics. We need to listen to what everyone is saying and see how every actor is responding, not just the judiciary.

Thus far, we know that requiring the legislative and judicial branches to share power is not fatal to our system. Nor is the creation of a legislative-judicial partnership entirely unforeseeable. In order to protect the interests of those involved with mass torts, adjudication must...

175. See Weinstein & Hershenov, supra note 63, at 270.
176. See Pagan, supra note 37, at 810 (noting that the Advisory Committee is considering changes to FRCP 23 that would make the rule more accommodating to mass torts); Proposed Amendment to Fed. R. Civ. P. 23(b), 117 S. Ct. 352 (1996) (request for comment on possible revisions to FRCP 23(b)); Proposed Rules: Amendments to Federal Rules, 167 F.R.D. 523 (1996) (discussing Reports of the Advisory Committee, open letters, and other instruments on the proposed changes to FRCP 23).
177. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 & n.1 (1999); Amdhem, 521 U.S. at 598 (citing Judicial Report, supra note 2, at 27-35); Cabraser, supra note 23, at 660.
178. Mass tort litigation has caught the attention of judges, litigants, lawyers groups, attorney generals, the public health community, politicians, and children's advocacy groups. See Cabraser, supra note 23, at 660; see also In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, Civ. A. No. 94-P-11558-S, MDL No. 926, 1994 WL 5783553, at *1 (N.D. Ala. Sept. 1, 1994) (hearing opinions of those with no legal standing to sue on the fairness of the proposed settlement); Weinstein, supra note 24, at 559 (explaining that social realities present in mass tort litigation require a judge's "gaze ... [to] lift from the well of the courtroom and the pages of the lawyer's brief").
179. See Resnik, supra note 99, at 444.
180. See id. (advocating a more broad-based investigation of what judges should do and what rules should govern their behavior as their role conforms with contemporary demands). Resnik concludes that "[t]he problems raised by managerial judging, problems that implicate the rights of all citizens, are simply too important to be left to the discretion of judges alone." Id. at 444-45.
182. See Marcus, supra note 98, at 870 (describing prioritization of claimants by category and scheduling of benefits); Judith Resnik, From "Cases" to "Litigation," 54 LAW & CONTEMP. PROBS. 5, 63 (1991). Resnik described the creation of mini-agencies called "claim facilities" to administer compensation to victims. These facilities would be empowered by courts ordering implementation of compensation schemes. See id.
not be frozen in the past. To do so would render efficient decision-making an unworthy aim.  

VI. CONCLUSION

The mass tort litigation crisis has, without a doubt, thrown the federal courts a curveball. The district courts are up to bat and the count is full. With the due process rights of huge numbers of litigants in the balance, what should the judiciary do? At a time like this, it makes sense for us to focus on the fact that the judiciary is still at the plate and has not struck out yet. Of course it should look to its own team members for advice as to what to do next. However, with so much at stake the judiciary should also turn to its manager and ask, "what now?" It should question its fans, well versed in its statistical blunders and successes, on what has worked best in the past. It should listen to its opponents who clarify its shortcomings. And certainly, it should not overlook the advice of its owners, whose future well-being is implicated by any present move.

At the end of the game, we should not look down on the judiciary for refusing to make such an important decision on its own. We should hoist it up on our shoulders for its teamwork and modesty. We should wave a pennant for its recognition of its own limitations and for having the foresight to question whether or not it should step up to the bat.

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185. The United States Constitution provides for Congress to play a role in structuring the nation's judicial business. See U.S. CONST. art. I, § 8, cl. 9; id. art. III, § 1.
186. The author is referring to members of the bench, bar, and community who sympathize with a beleaguered court system. See discussion supra Part III.B.
187. The author is referring to those members of the legal and social community who blame the court system for its current problems. See discussion supra Part III.A.