

Introduction

John B. Oakley*

The Papers that follow are based on the panelists' presentations to the Section on Civil Procedure at the Annual Meeting of the Association of American Law Schools in January 1997. The formal title of the program is a mouthful. It strives to be inclusive enough to embrace the principal concerns of each of the panelists and to connect them to the common problem of the tension between utility and rights with the concept of procedural justice.

A further working subtitle might be "A Tale of Two Rules." Rule 1 of the Federal Rules of Civil Procedure optimistically calls for civil litigation to be conducted so as to promote the "just, speedy, and inexpensive determination of every action."¹ But this "feel good" mantra conceals the tension between competing conceptions of procedural justice.² On the one hand we want our courts to get things right and to render judgments that are fair in the sense that the parties get what they deserve according to their relative rights and obligations under the law as correctly applied to facts that have been accurately determined. On the other hand we do not want to invest our entire gross national product in the operation of our court systems and we want our courts to use such resources as we do devote to them in an efficient manner that makes courts reasonably accessible to all disputants who seek their day in court. This requires some compromise of the goal of perfect justice in the individual case in order to make some approximation of justice available at reasonable cost and without unreasonable delay to the aggregate of litigants.

* Professor of Law, University of California, Davis. B.A., 1969, University of California, Berkeley; J.D., 1972, Yale University. Chair (1996-97), Section on Civil Procedure, Association of American Law Schools.

¹ FED. R. CIV. P. 1.

² See John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 89 MONT. L. REV. 435, 440-43 (1994).

All of us who are not litigants benefit indirectly from this willingness to speed things up and move cases along even at some risk of error in the outcomes of individual cases. The existence of a functional court system that is open to all and relatively predictable in its ability to deliver at least rough justice promotes the sort of voluntary respect for legal rights upon which civilized life vitally depends. No society can conduct all of its business in its courts. But the general ambition to have a functional court system does not resolve the issue of just where and how to draw the line between perfectionist concern for fair treatment of individual litigants and aggregate efficiency — either in the operation of the court system as a whole or in the fair distribution of limited resources when there are multiple parties claiming against a defendant who may be on the verge of insolvency.

So enter the second of our two rules. Not Rule 1 but Rule 23,³ for it is in the domain of the class action, particularly class actions dealing with mass torts, that Rule 1's unresolved tension between individual rights and social efficiency is currently receiving a great deal of close attention. The Standing Committee on Rules of Practice and Procedure of the U.S. Judicial Conference has recently circulated for public comment a set of amendments to Rule 23 proposed by its Advisory Committee on Civil Rules.⁴

These amendments would introduce purportedly modest changes into the availability and conduct of class litigation as it was fundamentally restructured by the 1966 amendment of Rule 23.⁵ Of particular note are two new criteria for determining whether to certify a class action under Rule 23(b)(3), criteria which reference pragmatic evaluation of alternative non-class remedies⁶ and the practical value to individual class members of

³ See FED. R. CIV. P. 23 (setting forth criteria and requirements for class actions).

⁴ See *Proposed Rules: Amendments to Federal Rules*, Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23. Class Actions, 167 F.R.D. 523, 559-60 (1996) (proposing amendments to FED. R. CIV. P. 23) [hereinafter *Proposed Rule 23*]. See generally Henry U. Reske, *Making Class Distinctions: Critics Say Class Action Proposals Encourage Collusion as Well as Settlements*, A.B.A. J., Jan. 1997, at 22.

⁵ Current Rule 23 underwent technical amendments in 1987 but has not been subject to any substantive changes since 1966.

⁶ See *Proposed Rule 23*, *supra* note 4, 167 F.R.D. at 559 (proposing Rule 23(b)(3)(A) and listing practical ability of individual class members to pursue claims without class certification as factor in decision to certify class).

such class remedies as they might actually receive.⁷ In addition, the proposal authorizes a new category of class action, the Rule 23(b)(4) settlement class action.⁸ In the meantime, as these amendments have been percolating through the process, the Supreme Court has granted certiorari to resolve a split between the Third⁹ and the Fifth Circuits¹⁰ as to the propriety under present Rule 23 of certifying a class of potential or actual asbestosis claimants for settlement purposes only.¹¹

A distinguished, experienced, and engaging set of panelists debate these developments in class litigation and the larger issues they reveal about the conflict between individualized and aggregative conceptions of procedural justice. Eric Green¹² teaches Evidence, Alternative Dispute Resolution, and Issues in Mass Torts at Boston University School of Law. He has co-authored leading texts and articles in these fields. In addition, Professor Green is the founder of and the chief mediator at JAMS/Endispute, one of the leading providers of dispute resolution and settlement services in the country. Combining his academic and practical careers, Professor Green has served as special master in several major asbestos personal injury litigations, focusing on settlement. Most recently Professor Green was the Guardian Ad Litem for the class in the *Ahearn v. Fibreboard* litigation,¹³ whose certification as a settlement class has been affirmed by the Fifth Circuit,¹⁴ creating the circuit split that the

⁷ See *id.*, (proposing Rule 23(b)(3)(F) and listing probable relief to individual class members as factor in decision to certify class).

⁸ See *id.*, (proposing Rule 23(b)(4)).

⁹ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir. 1996) (disapproving asbestos settlement class), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2281 (1997).

¹⁰ See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (approving asbestos settlement class), *vacated by* *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997).

¹¹ See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996) (granting certiorari to resolve conflict between Third Circuit's *Georgine* decision and Fifth Circuit's *Asbestos Litigation* decision); see also *Reske*, *supra* note 4, at 22.

¹² See Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791 (1997).

¹³ *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), *aff'd sub nom. In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996).

¹⁴ *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) *aff'g* *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995).

Supreme Court will address by its review of the conflicting decision of the Third Circuit in the *Georgine/Amchem* litigation.¹⁵

Sam Issacharoff¹⁶ is the Charles Tilford McCormick Professor of Law at the University of Texas School of Law. He graduated in 1983 from the Yale Law School and clerked for Judge Arlen Adams of the Third Circuit before working as a federal litigator specializing in civil rights and complex-litigation cases. He has been a member of the Texas faculty since 1989, teaching and publishing in the fields of civil procedure, legal process, employment law, and electoral law.

Judith Resnik¹⁷ is the Orrin B. Evans Professor of Law at the University of Southern California. She is spending the current academic year at New York University, where she is a visiting professor of law. As of July 1, 1997, she is joining the faculty of the Yale Law School, where she will be the Arthur Liman Professor of Law. She teaches and writes in the fields of civil procedure, federal courts, feminist theory, and large-scale litigation. She also participates in large-scale litigation, having served as counsel for named plaintiffs in prisoner class actions, as a court-appointed special master in an ERISA class-action settlement, and as appellate counsel to individual attorneys contesting costs paid by their clients in a mass-accident, multi-party, multi-district case that has repeatedly been before the First Circuit.¹⁸

¹⁵ *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir.), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

¹⁶ See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997).

¹⁷ See Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835 (1997).

¹⁸ See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220 (1st Cir. 1997); *In re Thirteen Appeals Arising Out of the San Juan Dupont Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995); *In re Nineteen Appeals Arising Out of the San Juan Dupont Hotel Fire Litig.*, 982 F.2d 603 (1st Cir. 1992).

Advancing Individual Rights Through Group Justice

Eric D. Green*

Major changes are occurring in the legal system as it struggles to adapt to even larger changes in the economic, political, and social structure of the country. Old models of adjudication are being challenged by the new alternative dispute resolution model; individual justice is being challenged by aggregate justice.¹

The issues presented by the *Ahearn/Fibreboard* settlement² and the *Georgine* settlement³ are of interest to all lawyers struggling with the question of individual rights and aggregate justice. The fundamental question is whether the traditional models of adjudication and due process, designed to protect the individual rights of litigants, can be expanded to meet the needs posed by mass product liability litigation involving hundreds or thousands of cases.

The basic problem is that adjudication and due process do not appear to be unlimited resources; supplying a full amount to one case may inevitably deprive others of their share. In this situation, either adjudication and due process are goods that have to be rationed, or a new conceptualization of them is required — one that shifts the due process paradigm and redefines "adjudication" to include more public-law or legislative values. In many ways, the current debate over the appropriateness of global class action settlements and amendments to Rule 23 are the forerunners of such a possible change in the role of courts.

* Professor of Law, Boston University.

¹ See Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMPORARY PROBS. 5 (1991).

² See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *aff'g* *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), *vacated by* *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997).

³ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 979 (1996), *aff'd* 117 S. Ct. 2231, (1997).

Both *Georgine* and *Ahearn* press the outer edges of the envelope in terms of aggregate approaches to mass torts, albeit in very different ways. The approach of the trial courts in these cases to the problems of thousands of asbestos claims are creative, controversial, and contrary to the customary, case-at-a-time approach to tort litigation under the Federal Rules of Civil Procedure.⁴ They reflect the natural progression of a relatively new phenomenon — the mass tort lawsuit — from a collection of individual cases to a consolidated or class-wide case subsuming thousands of parties. These new creatures — in *Ahearn*, the mandatory, non-opt out class action settlement; in *Georgine*, the global futures class settlement — appear at best alien and at worst monstrous to the appellate judges called upon to review them, from a vantage point at least one step removed from the day-to-day tussle of the trial courts. Strict application of Rule 23 within the context of a traditional trial model does not easily accommodate the trial courts' approaches in *Ahearn* and *Georgine*.⁵ The Third Circuit's negative reaction to *Georgine* reflects not only a narrow reading of class action rules, but a judicially conservative attitude towards class resolutions⁶ which, as the decisions of the circuits in the HIV blood class action,⁷ pe-

⁴ See Proposed Amendments to Rules of Civil Procedure for the United States District Courts, FED. R. CIV. P. 23 Advisory Committee's Note 39 F.R.D. 69, 103 (1966) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.")

⁵ See *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 518-23 (E.D. Tex. 1995) (certifying that global mandatory (non-opt out) class may be used to obtain complete settlement), *aff'd sub nom. In re Asbestos Litig.*, 90 F.3d 963 (5th cir. 1996), *vacated by Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 257-58 (E.D. Pa. 1994) (certifying nationwide opt out settlement class of future claimants and approving proposed settlement), *vacated*, 83 F.3d 610 (3d Cir.), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996), *aff'd* 117 S. Ct. 2231, (1997).

⁶ See *Georgine*, 83 F.3d at 624-26 (holding that settlement classes must meet same class certification requirements of numerosity, typicality, commonality, and adequacy of representation as litigation classes).

⁷ See *In re Rhone-Poulenc Rotor Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (stating that if class certification were allowed to stand, defendants would face greater numbers of plaintiffs than without class certification), *cert. denied*, 116 S. Ct. 184 (1995).

nile implant cases,⁸ and tobacco class actions⁹ indicate, may also reflect conservative political and economic philosophies.

In this context, I believe that the proposed amendments adding Rule 23(b)(4) are both necessary and desirable improvements to the Rule: to clarify uncertainty about the legitimacy of classes that may not be suitable for trial but that ought to be certified for settlement. In doing so, the proposed amendments expand the tools that embattled trial courts have to handle the challenges of modern mass injuries, and enhance individual due process by expanding aggregate remedies.¹⁰

Proposed Rule 23(b)(4) would explicitly authorize certification of class actions for settlement purposes only.¹¹ Contrary to some critical comments, the proposed amendment would not create a new form of class action not currently authorized in the Rules.¹² Rather, as the Advisory Committee note states, proposed Rule 23(b)(4) is added simply to make it clear that certification can be made for settlement purposes, even if the case is not triable as a class action, but only if the case meets the other existing requirements of Rule 23(b)(3).¹³ Practically, this means a (b)(3) class that is certified, generally speaking, at the same time that a settlement is presented to the court; the certification conditional on the settlement later being approved at a fairness hearing. But otherwise, all of the other requirements of a (b)(3) class action have to be met.

⁸ See *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) (granting mandamus to reverse nationwide class certification in penile prosthesis products liability case).

⁹ See *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (reversing and ordering decertification of nationwide class of nicotine dependent persons).

¹⁰ See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) (stating that class certification of mass tort litigation is unquestionably alluring: it purports to provide simple and efficient means of handling crowded dockets).

¹¹ See Committee Note, *Proposed Rules: Amendments to Federal Rules*, Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23. Class Actions, 167 F.R.D. 523, 563 (1996) [hereinafter *Proposed Rule 23*]. At its May 1-2, 1997 meeting the Civil Rights Advisory Committee decided to defer until its October 1997 meeting further discussion on proposed changes to Rule 23 (b)(4) dealing with settlement classes in order to have the benefit of the Supreme Court's decisions in *Georgine*. See *Postscript Amchem Products, Inc. v. Windsor*, 30 U.C. DAVIS L. REV. 873 (1997), for a discussion of the Supreme Court's decision.

¹² See Committee Note, *Proposed Rule 23*, *supra* note 11, at 563 (stating that subdivision (b)(4) permits certification of a class under subdivision (b)(3) for settlement purposes, even though same class might not be certified for trial).

¹³ See *id.*

Now, why do we need (b)(4)? We need (b)(4) because the Third Circuit has introduced uncertainty about the appropriateness of certification of class action settlements where none previously existed, and now the problem needs to be addressed by rule change.¹⁴ In a rather radical departure from practice, the Third Circuit first introduced this uncertainty in *GM Truck*,¹⁵ and then underscored it in *Georgine*.¹⁶ Prior to that time, courts saw nothing in the Rule that precludes settlement classes. Even though, in the *Georgine* opinion, the Court of Appeals acknowledged that it might be better practice and better policy to allow certification of settlement classes, that court found that Rule 23 did not permit such an exception.¹⁷ Proposed Rule 23(b)(4) would explicitly permit settlement classes in appropriate cases. It is important to note that in those appropriate cases, all of the other protections of Rule 23 would still apply.¹⁸

The proposed amendment set off a firestorm of opposition by the academic community — over 120 law teachers, led by my colleague Susan Koniak (who organized the opposition as well as the leading challenge to *Georgine*), composed a strongly worded opposition statement to the Rules Committee. The academic community's inassive negative stance on the proposed amendment is an interesting phenomenon in itself, which I discuss later, but at this point I would like to point out several errors in the position set out in the opposition statement. For example, the statement implies that there would not be notice and opt out opportunities anymore.¹⁹ It implies that the other

¹⁴ See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir.) (holding that settlement classes must meet same class certification requirements of numerosity, typicality, commonality, and adequacy of representation as litigation classes), *cert. denied*, 116 S. Ct. 88 (1995). The Third Circuit stated: "In sum, 'a class is a class,' and a settlement class, if it is to qualify under Rule 23, must meet all of its requirements." See *id.* at 799.

¹⁵ See *id.* at 795-96 (holding that fairness findings for settlement cannot serve as surrogate for certification findings because settlement approval inquiry is far different from certification inquiry).

¹⁶ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624-26 (3d Cir. 1996) (rejecting argument that proposed settlement is appropriate factor to consider in determining whether to certify class), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

¹⁷ See *id.* at 618 ("While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.").

¹⁸ See *Proposed Rule 23*, *supra* note 11, at 563.

¹⁹ See Letter from Steering Committee to Oppose Proposed Rule 23, p.3 (June 1, 1996)

protections of the Rule requiring numerosity, commonality, typicality, and adequacy of representation would not have to be satisfied. It overlooks that there would be fairness hearings on any settlement under Rule 23(b)(3).²⁰ It even overlooks that the same proposed amendments add interlocutory appeals.²¹ All of these protections would be applied to settlement classes, as would the final protection of a fairness determination by the court.

Why this massive opposition from the academic community? At one level, the opposition reflects a serious distrust of trial courts and the ability of judges to detect an unfair settlement and refuse certification. In this respect, the opposition seems somewhat paternalistic and elitist, as if they were saying, "We in the academy know better and the trial judges can't be trusted not to be lazy, concerned only with their docket numbers, or co-opted by self-dealing, greedy trial lawyers." Thus, rather than recognize the value of class settlements in some mass tort cases as the best solution, the opponents would have courts close their eyes to the reality that a class is presented for certification and the case is going to be settled at the same time. This approach would require trial courts to review the appropriateness of class certification as if the case is going to be tried, even though it is not — as if in Alice's Wonderland. Does this make any sense? Everyone knows the case is not going to be tried, but the Third Circuit's approach and the academic opponent's approach would force the court to appraise the case under the Rule 23 criteria as if it were. That seems to me an Orwellian approach to adjudication that I find hard to understand.

Another objection to the proposed amendments, made by law professors in their letter to the Rules Committee, is that there is no case or controversy when a class action settlement is certified.²² This of course is a potentially serious issue in the ab-

(on file with author).

²⁰ See *Proposed Rule 23*, *supra* note 11, at 569 (stating that Rule 23(e) is amended to confirm common practice of holding fairness hearings).

²¹ See *id.* (stating that Rule 23(f) is added to allow permissive appeal from order either granting or denying class certification).

²² See Note, *Back to the Drawing Board: The Settlement Class Action and Limits of Rule 23*, 109 HARV. L. REV. 828, 833 (1996) (stating that, because defendants who participate in settlement class negotiations agree not to contest class certification, judges never receive

tract, and perhaps in reality in a few cases. However, in all the cases in which I have been involved and in the most notorious cases, there is no way that any moderately objective observer could doubt the existence of a concrete dispute with all the requisite adverseness to satisfy the case or controversy requirement. Settlement does not eliminate the existence of a dispute between the parties. All it means is that they apparently worked out a way to resolve it. The argument proves too much. If settlement ended the case or controversy requirement, there could not be consent settlements or consent judgments in many cases.

Part of the opposition of the academics to the proposed amendment may be their distaste for the particular settlement of the future asbestos victims' claims in the *Georgine* litigation.²³ But proposed Rule 23(b)(4) has nothing specifically to do with a futures class. It does not address whether such class actions, comprised of exposure-only claims, should or should not be settled. In fact, justiciability of exposure-only claims is more a question of state law than federal procedure. Whether a future class's claims are ripe and whether there is a cause of action for future claims are substantive state law issues. Is there a cause of action for mere exposure? Is there a cause of action for increased risk? Is there a cause of action for medical monitoring? These are substantive state law questions more than procedural questions relevant to Rule 23. Certification of a settlement class in appropriate cases is, in fact, a very case-specific, case-dependant determination.

The issue I am concerned with here is whether mass tort class settlements will *ever* be permitted, even in appropriate cases. Unless courts can take the fact of settlement into account when deciding whether the class should be certified, few if any such classes will be. The reason is that the trial of such cases as class actions is so unmanageable, as several circuit courts have pointed out, that few requests for class certification can pass the "superiority" requirement of Rule 23 if that decision is based on trial of the action.

benefit of adversarial process that provides information needed to review propriety of class and adequacy of settlement).

²³ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

The real question is: What are the costs and benefits of permitting class actions purely for settlement as opposed to trial purposes? The academic opponents to settlement classes are concerned that a major danger with settlement classes is the possibility of collusion between plaintiffs' lawyers and defendants, in which there is a so-called "race to the bottom" to sell out the claims of absent class members in order to line the pockets of the plaintiffs' attorneys, eager and greedy to be selected as class counsel.²⁴ This is a possibility that always has to be guarded against. The possibility of abuse and the possibility of the plaintiffs' lawyers looking out only for their own interests and producing very little return for the members of the class must be a primary consideration of courts in assessing the fairness and reasonableness of any settlement and in scrutinizing attorneys' fees and costs. Unfortunately, there are cases that can be cited in which the value returned to the members of the class in the settlement is dwarfed by the value awarded the class lawyers in fees. The "coupon" settlement cases are often cited as examples.²⁵

In my experience, however, the particular plaintiffs' attorneys who have been involved in putting the mass tort settlements together are anything but collaborators with the defendants. Indeed, in most mass tort global settlements, the class lawyers are the lawyers who made the litigation in the first place and are the primary reason the defendants are suing for peace. The class lawyers typically have invested much time — some as many as ten or more years — investigating the facts, finding the experts, developing the studies, sitting with the victims, arguing the law, suffering defeats, and refining claims. They are the most knowledgeable and capable lawyers in the country to represent

²⁴ See, e.g., Samuel Issacharoff, *Class Action Conflicts*, 90 U.C. DAVIS L. REV. 805, 813, (1997).

²⁵ See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 818 (3d Cir.) (holding that settlement awarding \$1000 coupons toward the purchase of new GM vehicles was not fair, reasonable, or adequate), *cert. denied*, 116 S. Ct. 88 (1995); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957 (Tex. 1996) (holding that trial court was within its discretion in approving settlement awarding class members \$1000 coupons toward purchase of new GM vehicles); see also *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterwood, J., dissenting from denial of *reh'g en banc*), *cert. denied*, 520 U.S. 117 S. Ct. 1569 (1997).

the members of the class. Their expertise is an extremely valuable and hard-to-duplicate asset for the class members. To take the position that any other plaintiffs' lawyers in the country ought to be negotiating these settlements would place the class members at an extreme informational and strategic disadvantage against the lawyers, experts, and other resources the defendants have at their disposal.

Is there a danger of collusion? Yes. Is it a reason to forbid class settlements? No. Can it be guarded against? Yes. Is it a reason to apply ethical rules governing conflicts of interest that were designed for a very different kind of litigation to disqualify the most competent representatives of class members? No, not unless one wants to hand a huge representational and strategic advantage to the defendants, who hardly need the playing field tilted any further in their direction.

What are the costs of precluding mass tort class settlements? In many of these cases there are urgent, extrinsic factors in favor of settlement. In *Ahearn*, 1.535 billion dollars of insurance assets hung in the balance.²⁶ The class settlement would secure those assets for class members. If no settlement were reached, those assets would have been placed at risk by developments in a separate insurance coverage litigation. Settlement secured those assets, but a quid pro quo for the insurers giving up their rights to try to reverse the insurance coverage decision against them was complete and total global peace, which only a mandatory non-opt out class action could do.

Realistically, there is little doubt that there would be serious problems trying the *Ahearn* case as a class action. The defendants would surely have resisted class certification for trial purposes, and probably would have won that fight on superiority grounds. But as a settlement, the *Ahearn* class action is a far superior procedure to any other way of addressing the litigation.

Professor Issacharoff and others are critical of the *Ahearn* settlement²⁷ because Fibreboard escaped without any of its cor-

²⁶ See *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 516 (E.D. Tex. 1995) (stating that involved insurance corporations offered \$1.535 billion to settle all future claims of plaintiffs), *aff'd sub nom. In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *vacated by Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997).

²⁷ See Samuel Issacharoff, *Administering Damage Awards In Mass Tort-Litigation*, 10 REV. LITIG. 463, 471 (1991) (criticizing court in *In re Fibreboard Corp.* for refusing to confront

porate assets (other than a relatively small amount of proceeds from other insurance) being included in the settlement as part of the quid pro quo for the deal.²⁸ This is an understandable but superficial criticism. Fibreboard's position — not without merit — was that it invested in more than ten years of litigation to secure the 1.535 billion dollars worth of insurance assets for the victims; that it had purchased insurance that would fully cover the claimants because the insurance was applicable and had no aggregate limits; and that the three-way settlement between it, the class, and the insurers should be funded completely by the assets that Fibreboard secured through its enormous time and financial investment.²⁹ The settlement would not have happened had not the insurers received total peace through a mandatory non-opt out settlement in exchange for the insurance completely funding the settlement. Did the class representatives do the right thing — did they get the best deal — by obtaining 1.535 billion dollars on these terms? As the *Guardian Ad Litem* for the class, after detailed investigation and scrutiny, I had no doubts, and neither did Judge Parker.

This brings up the question of the provisions contained in Rule 23 to protect absent class members not personally represented in the case. In my experience, a properly conducted fairness hearing is adequate protection of absent class members' interests, together, in Rule 23(b)(3) cases, with a notice and opportunity to opt out, as opposed to the (b)(1)(B) class of

institutional problems in mass tort litigation).

²⁸ See *In re Asbestos Litig.*, 90 F.3d 963, 969 (5th Cir. 1996) (stating that most assets were not included in settlement), *vacated by* *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997).

²⁹ See *id.* at 988-89 (agreeing with Fibreboard's position that asbestos manufacturer approaching lawyers to negotiate global settlement on behalf of tort claimants against manufacturer and its insurers did not establish that proposed settlement agreement was collusive). By mid-1990, Fibreboard's defense costs and settlement payments had mounted and Fibreboard looked for additional insurance resources. See *id.* at 969. Fibreboard proposed to both of its insurers, Continental and Pacific, that they negotiate a complete settlement of its coverage claims. See *id.*

Ahearn.³⁰ The proposed amendment to Rule 23(b)(4) only applies to (b)(3) classes as currently written, so the notice and opt out protections would also be available.³¹

But what about due process to absent class members? Notice, opt out rights, and a properly conducted fairness hearing supply ample due process. Even in the mandatory non-opt out case (where the situation provided for in (b)(1)(B) exists), due process is satisfied if the Rule is properly applied — due process for the group as well as due process for the individuals in their capacities as individuals within a group. This is the view of due process Judge Jon Newman described several years ago in an important article on class-wide due process.³²

In mass tort class actions, because of the numerosity requirement, one must be concerned simultaneously with the rights of thousands of individuals. Given the nature of our legal system, some of these individuals are going to be at the end of a very long line, figuratively shouting up the line, "turn on the due process," only to hear echoing back, "sorry, you'll have to wait ten years," or worse, "sorry, it's all run out." In many mass torts, nothing is left for those who are near the middle of the line, let alone at the end. And even those at the beginning of the line fall victim to depressingly inconsistent and costly results, even if they get to the finish line and there's something to be gotten.

Under Newman's approach, we must look for class-wide due process and try to do the best we can for as many as we can who make up the aggregate, while preserving basic protection for the individual.³³ I am satisfied that basic protection for each individual under the Rules includes: notice, full disclosure, opportunity to opt out, the fairness hearing, opportunity to appeal,

³⁰ See FED. R. CIV. P. 23(b)(1)-(2); *Ahearn*, 162 F.R.D. at 508 (stating that court certified class under Rule 23(a) and mandatory class treatment is proper under plain language of Rule 23(b)(1)(B)); *Proposed Rule 23*, *supra* note 11, at 536 (stating that proposed amendments would collapse categorical distinctions now observed between subdivision (b)(1), (b)(2), and (b)(3) classes).

³¹ See *Proposed Rule 23*, *supra* note 11, at 563 (stating that subdivision (b)(4) does not speak to question of whether settlement class may be certified under subdivisions (b)(1) or (b)(2)). Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3). See *id.* at 564.

³² See Jon O. Newman, Comment, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985).

³³ See *id.* at 1649-52.

and the requirement that all other provisions of the Rule must be applied in settlement as in trial.

But the issue of the proper rule of aggregature technologies raises not only questions of interpretation of procedural rules or notions of due process. On another level, the debate over class settlements involves political and economic interests. This is revealed by looking at who is lining up for and against the proposed amendment and as advocates or amici in the appellate courts.

The opponents of settlements classes consist of three quite different groups motivated by different interests. First, there are those against any kind of settlement and proud of it. They write articles, "Against Settlement."³⁴ Why are these people against settlement and for the legal equivalent of the Vietnam War? These opponents tend to come from a public litigation perspective, having fought the battles of the 1960s to obtain court ordered school desegregation, prison reform, and welfare reform. In these battles, the courts were there to right wrongs and hand down Justice. Settlements are necessarily less than Justice to these veterans of the great legal wars. In fact, settlement smacks of "compromise," which is next to "collusion," which is evil. This group is made up generally of legal liberals who suspect private action and see in settlements the unseen hand of a private market to the detriment of weaker individuals. They suspect that class action settlements are just a new way of getting around courts and perpetuating injustice.

Second, at the other end of the political spectrum, are those who oppose class settlements for the opposite reasons. They see class actions as giving excessive and dangerous power to class members and their representatives who can wield that power unfairly against corporations by blackmailing them into huge settlements. To this group, class actions are a threat to the economic and political corporate elite. They see class actions as a tool of crusading, power-mad, wealth redistributing trial lawyers. They are fighting to maintain their leverage in the courts by

³⁴ See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984); see also Susan P. Koniak & George M. Cohen, *Under Cloak Of Settlement*, 82 VA. L. REV. 1051 (1996); Susan P. Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

preserving the Maginot Line of case-by-case adjudication, where the individual victim can rarely hope to compete and get through to a successful result. The best examples of jurisprudence unashamedly marshalled in defense of these class and economic elite interests are Judge Smith's opinion in *Castano* and Judge Posner's in the *Rhone-Poulenc* case.³⁵

The third group that seems to tie the first two together in a curious way are the law professors. What binds legal academics to positions taken by the first two groups? Is it the tendency of academics to view every situation in which someone profits from their actions (especially plaintiffs' trial lawyers, who profit hugely, but who probably rarely were the most outstanding students at law schools or candidates for tenured positions on prestigious faculties) as presumptively suspect if not corrupt? These three groups, combining to oppose Rule 23(b)(4), make curious bedfellows.

What are the values furthered by class action settlements? One, access. The primary virtue of the class action rule is that it provides a mechanism for access to thousands of people who might not otherwise be represented or have any realistic chance to get their case heard. Two, economic efficiency, both in resources and time. Three, class-wide due process — consistency. I have seen too many times in which Mrs. Jones's husband died of mesothelioma, but she gets nothing from a jury after she finally gets to court, while Mrs. Smith, whose husband worked right alongside Mr. Jones, gets three million dollars from a jury on essentially the same facts. The injustices are legion. Four, flexibility and economic optimality in shaping the remedy, allowing for the types of remedies that are needed in many of these situations — for example, different types of pay-outs for different types of proof, taking into account the fact that some people have certain kinds of proof and other people do not, perhaps because some are educated and others are not. Five, a major benefit of settlement classes is elimination of risk. What kinds of risk? There are over eighteen defendants now in the asbestos litigation who have gone bankrupt since the litigation started.³⁶ There is the risk of insurance loss, as in *Fibreboard*,

³⁵ See *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

³⁶ See John E. Calfee, *Efficiency Beguils Fairness: The Supreme Court Takes On "Class Action*

where all that money was hanging by a thread.³⁷ And then, of course, there is the risk of outright loss of the case for any reason, which would produce the plaintiff a zero.

There are always abuses present with any form of adjudication or settlement. Susan Koniak has written about atrocious abuse of class actions in some of her articles.³⁸ There is, however, no empirical evidence of which I am aware, showing any widespread abuse or collusion. The recently published Federal Judicial Center study by Tom Willgang and others, although they did not have an opportunity to study the more recent wave of mass torts that we are discussing, discovered no evidence of abuse in class action settlements.³⁹ Further, one must keep in mind the possible abuses in individual case-by-case litigation including scorched earth, "damn the torpedo" strategies by the defendants and incompetent or corrupt counsel handling individual cases. When assessing settlement classes, the "compared to what" question must not be forgotten.

In my view, there are some things that can be done to safeguard against the abuses even more and make the use of settlement classes an even better tool. They include, among other things, certain specific procedures and prophylactic measures that can be applied in settlement classes which, because they are not going to be litigated, lose some of the public visibility that they otherwise would obtain. An example is the appointment of a guardian ad litem by the court to represent class members separate from the class's lawyers, who may have economic conflicts. This guardian represents the interests of the individual plaintiffs. This is a role I served in *Ahearn*, and this is a role I took seriously.

Of course, there are dangers with the appointments of guardians or special masters. Such judicial adjuncts could be appointed based on patronage by the court rather than any special skill

Settlements", *LEGAL TIMES*, Feb. 10, 1997, at 78 (discussing increasing numbers of asbestos-related claims being filed post-bankruptcy).

³⁷ See *Federal Appeals Court Approves Fibreboard's Asbestos Global and Insurance Settlement Agreements*, *BUSINESS WIRE*, July 29, 1996, available in Westlaw, BWIREPLUS database (describing Fifth Circuit's approval of settlement agreements).

³⁸ See Koniak & Cohen, *supra* note 34; Koniak, *supra* note 34.

³⁹ See THOMAS E. WILLGANG, *FEDERAL JUDICIAL CENTER, TRENDS IN ASBESTOS LITIGATION 209-10* (1987), available in 1987 WL 123664.

to scrutinize the settlement. This is always a potential problem with judicial adjuncts. Or, it could be that the timing of the appointment of a guardian, in most of these cases, is necessarily going to be after the settlement has been reached and after it has been presented to the court. That may make it more difficult for the guardian to closely scrutinize or suggest changes in the settlement. Suggesting changes at that time could improve the settlement, but could also upset a carefully constructed apple cart. A prudent guardian would proceed with caution. In addition to those factors, amendments such as limiting attorneys' fees to the amount of money actually returned to the class rather than theoretically obtained, such as in the 1995 Private Securities Act Amendments,⁴⁰ may be beneficial.

Let me leave you with this last thought. The deep issue is that there are two basic visions of the system — and its ultimate goals and objectives and purposes — in contention. Dyed-in-the-wool traditionalist case-by-case adjudicators who know no other model believe that individual case adjudication is the only model. In contrast, people who accept the settlement/ADR system — which is much less confined to a single model of what courts do — and who have positive experience with flexible, wide-ranging settlements, see many benefits with settlement in general and class settlements in particular. There are basic ideological differences between these groups' views of what courts are all about and what they should try to do to address these problems. These ideological differences transcend the federal rules of civil procedure, but the rules are an important forum for the debate between the contending views.

⁴⁰ See Private Securities Litigation Reform Act of 1995 § 101, Pub. L. No. 104-67, 109 Stat. 737 (amending 15 U.S.C. §§ 77z-1, 78u-4) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

Class Action Conflicts

*Samuel Issacharoff**

Class actions occupy an uncertain position in Anglo-American law. Nowhere else do we find such a clear departure from the premise that no one should be bound to a judgment in personam absent the personal security offered by notice and a full opportunity to participate in the underlying litigation.¹ Nowhere else do we find so clear a departure from the premise that the attorney-client relationship is achieved through contractual voluntarism, with the terms of the engagement constrained only by the rules of professional conduct. Nowhere else do we find courts so routinely determining that there is sufficient or adequate representation to provide good enough protection to litigants far removed from the courtroom, yet bound to its outcomes. Nowhere else do we have courts make that determination based on representations of counsel who have little if any connection to the parties to be bound, except through the decrees of the overseeing court.

Yet, despite these manifest departures from an idealized view of individual justice, class actions do exist. Indeed, they must exist. The barriers to collective action — the transaction costs of organizing the dispersed parties affected by all manner of decisions in mass society — require that an organizing solution be found, and that such a solution have the force of law. Similarly, the law must have a mechanism for ensuring closure and repose for institutional actors challenged over conduct affecting masses of people in fundamentally similar manners. Finally, a court

* Charles Tilford McCormick Professor of Law, The University of Texas School of Law. My thanks to the many colleagues with whom I have discussed these issues in recent years, including Fred Baron, John Coffee, Cynthia Estlund, Susan Koniak, Douglas Laycock, Geoffrey Miller, Fred Misko, Jack Radiff, Patrick Woolley, and especially Charles Silver. David Horan and Bret Tate provided research assistance.

¹ See *Martin v. Wilks*, 490 U.S. 755, 761-62 (1992) (stating general rule that judgment or decree among parties to lawsuit resolves issues among them, but does not conclude rights of strangers to those proceedings).

system built around a hallowed image of individual litigants having their turn at the docket cannot accommodate the press of modern litigation. In short, mass society must have available to it systems of aggregate dispute resolution.

The current lines of divide on class actions turn on competing assessments of the complex capacity for manipulation and strategic misuse of class actions. These are competing assessments of a procedural device that necessarily operates at a significant remove from an idealized, if unrealizable, vision of informed individual clients responsibly represented by lawyers of their choosing. And this issue raises the greatest problems in the context of settlement for reasons that are not hard to fathom.

Settled cases fall in the grey area between voluntary action and decisions that are the product of legal coercion. Thus, we can speak of bargaining in the shadow of the law² to convey the idea of private disputants acting in anticipation of potential judgments should settlement fail. To date, the most controversial treatment of such settlements has been when they are reduced to the form of consent decrees and are used to attempt to bind unrepresented third parties.³ But the cutting edge of the disputes has now turned to a different kind of not-directly-represented party: the absent class member who is to be bound by the terms of a class action settlement.⁴

² See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing formal legal system's effect on private dispute resolution in divorce cases).

³ See *Martin*, 490 U.S. at 768 (holding that unrepresented third parties to lawsuit may not be bound by consent decree); *Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (holding that rule binding parties to judgment in earlier case in which they did not participate violates Fourteenth Amendment right to due process). For academic treatment of this issue, see generally Owen Fiss, *The Altars of Individualism*, 78 IOWA L. REV. 965 (1993) (discussing effect of rule barring courts from binding unrepresented third parties to consent decrees on structural injunctions); Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992) (discussing procedural barriers to third party challenges to consent decrees in civil rights cases); Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1993) (criticizing rule that unrepresented third parties may not be bound by consent decrees); Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43 (discussing process for formulating and obtaining approval of consent decrees); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that all members of class in class action suit must be allowed to intervene as full party in proceeding that will extinguish their claims).

⁴ The front line of the dispute is well represented in the Cornell Law Review Sympo-

Let me then begin with an example of the difficulties facing current class action law. Consider the following account of the resolution of a toxic exposure class action, as depicted by a state court of appeals in Texas.⁵ In this case's one day sojourn in the district court, the plaintiffs filed their petition and motion for class certification at 11:29 am. The defendant filed its answer at 11:34 am. At 11:53 am, a scant twenty-four minutes after the case began, the district judge entered an order creating a *mandatory*, non-opt out class action and approving the settlement terms proffered by the parties. The real beauty of the court's order, however, appears in the recitation of the facts of the case: the order states, "... having been duly considered by the Court after presentation of legal citation and oral argument by the parties hereto, and supported adequately, to the extent necessary, by evidence or referenced evidence, including the existence of a proposed class settlement, . . ." and so on.

If our main concern in class actions were simply efficiency, then this is it. Fifteen minutes, top to bottom. This is the issue that the courts are facing right now. While some may indulge the fantasy that this is the product of "frontier justice" in the hands of a Judge Roy Bean, the experience in the courts should dispel this notion. Legal enforceability of prearranged settlements is the critical issue facing the courts today. It is the issue in the *Bank of Boston*⁶ litigation; it is the issue in *Adams v. Richardson*,⁷ it is the issue in *Georgine*,⁸ it is the issue in *Ahearn*.⁹

sium on the litigation in *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir.), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997). See Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995) (discussing tension between efforts to achieve both individual and class justice in class action lawsuits); see also Woolley, *supra* note 3, at 573 (arguing for an even more protective view of individual litigants).

⁵ See *St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc.*, 929 S.W.2d 25 (Tex. Ct. App. 1996).

⁶ See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

⁷ 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam).

⁸ See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

⁹ See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *vacated by* Flanagan v. Ahearn, 117 S. Ct. 2503 (1997).

These are all cases in which settlement turns out to be the problematic vehicle because the effect of court approval of proposed settlements is to terminate otherwise viable legal claims. These are all cases in which, because of the unavoidable remove of class counsel from the multitude of affected class members, the termination of the legal claims of absent class members raises a serious concern about whether these individuals are either expressly or functionally unrepresented. Furthermore, these settlements are being approved by courts who face incentives as complicated as those facing the litigants and the lawyers involved. Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.

I. THE EMERGENCE OF THE SETTLEMENT CLASS

A. *Settlement Under the Rules*

Two events shape the current debates over class actions. First, the Supreme Court's decision in *Georgine* will serve as the first Court review on the merits of mass tort litigation in the guise of a class action. Second, the Rules Advisory Committee has proposed to create a special category of class actions that are to be certified exclusively for settlement purposes. Under Proposed Rule 23(b)(4), a class may be certified if: "[T]he parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for trial."¹⁰

It is of course curious that the proposed rule revision comes at the same time that the issue of settlement classes is finally sufficiently ripe to call for Supreme Court review. The effort to enter the debate by rule-making rather than through the case development of judicial experience is rather at odds with the general efforts to de-emphasize fixed rules of procedure that began with the introduction of the Federal Rules in 1938, and accelerated with the turn to managerial judging that came with the 1983 reforms.¹¹

¹⁰ FED. R. CIV. P. 23(b)(4) (Preliminary Draft of Proposed Amendment 1996), reprinted in 38 F.3d Advance Sheets CCLXXXVI (West, Sept. 16, 1996).

¹¹ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (describing

My concern with these proposed rule revisions, however, is not so much a procedural distaste for rule-making, but the substance of the proposed rule revision. So, my basic argument is that the proposed rule revision is entirely misguided for two distinct reasons.

First, I am not enamored of settlement as such.¹² For me, settlement has neither an independently good nor an independently bad value. Settlement is a fact of life, as reflected in the fact that only a small fraction of the cases filed are pursued to trial — somewhere on the order of five percent or so.¹³ There are good settlements and bad settlements and we have no warrant to alter the rules to get bad settlements for unrepresented parties.¹⁴

Second, I worry much more about the incentives present when a system of procedure is tipped decisively in favor of settlements that will bind non-participating parties. The concern is what kinds of incentives do the courts face at present? Despite extensive criticisms of the basic economic model of litigation,¹⁵ that model still has a great deal of explanatory value in assessing the complicated incentives at work in class action settlements.

The basic economic model analyzes the expected value of a case to each party as a function of each party's assessment of

evolution of federal judges' role from dispassionate pose to more active managerial stance); see generally Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990) (describing impetus toward more flexible managerial standards in federal litigation).

¹² My reasoning on this point is completely independent of the concern raised by Professor Owen Fiss that the emphasis on settlement defeats the role of law as identifying and refining our shared public values. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

¹³ For the most sophisticated assessment of the complex dynamics that explain the selection of cases for trial, see Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); see also Samuel Issacharoff et al., *Bargaining Impediments and Settlement Behavior*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 51 (David A. Anderson ed., 1996).

¹⁴ See Jules L. Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 113-14 (1986).

¹⁵ For my participation in criticizing the simpler renditions of the economics of litigation, see Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1341-42 (1995); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 155-58 (1992) (evaluating psychological factors that undermine central assumptions of traditional model explaining non-settlement of legal disputes).

the likelihood that the plaintiff would prevail, the anticipated size of the judgment should the plaintiff prevail, and the costs of litigation. Thus, the expected value of a case to a plaintiff is the value of the hoped-for judgment discounted by the probability of the plaintiff prevailing, and subtracting the costs anticipated in pursuit of that judgment. The defendant's calculus is the same, save that the expected value is a projected loss to which the costs of defense must be added. When the plaintiff and defendant share common assessments of the probability of the plaintiff prevailing and the size of the anticipated award, the expected values differ only by the costs of litigation being subtracted from the plaintiff's likely award and added to the defendant's likely pay-out.¹⁶

In a world working by design, a well-established regime of positive law would combine with a fact pattern mutually ascertainable through discovery to yield convergent expectations of the likely outcome if a dispute were to be litigated through to trial. At that point, the costs of proceeding further would create a buffer area — termed a settlement zone — in which both parties would be better off by settling rather than continuing further to trial. Despite limitations, this model explains a great deal of settlement behavior.

From the vantage point of plaintiffs, therefore, cases settle when the settlement offer makes the plaintiffs better off than they would be if they were to proceed to trial. What does that mean? It means, if I have a million dollar claim, I face a risk of losing at trial, I face a risk of losing on appeal, I face a risk of losing in the Supreme Court, and I face expenses to be incurred on the way to all those kinds of judgments. And so, if I do a calculation and it turns out that the expected value is \$200,000, and I'm offered \$210,000, I take it. It's a good deal; but it's a good deal because I have discounted due to the difficulty of prosecuting a legal claim through the court system.

¹⁶ This can be expressed simply as follows:

$$EV_1 = P \times A - \text{PLAINTIFF'S COSTS}$$

$$EV_2 = P \times A + \text{DEFENDANT'S COSTS}$$

where EV_1 equals the expected value to the plaintiff; EV_2 equals the expected value to the defendant; P equals the probability of the plaintiff prevailing; and A equals the award should the plaintiff prevail.

The key to this analysis is that it is recursive. It looks to the likely outcome at the final possible legal stage of a litigated dispute and then reasons backward to find the anticipated value when the parties can mutually benefit by not investing in further costs of litigation. This then takes us to the problem of creating a subcategory of cases in which we provide for a settlement procedure untethered to the possibility of actually prosecuting the claim. The problem with these settlement classes is that we have no baseline by which to judge whether or not the plaintiffs are getting a good deal. The normal system of valuation does not arise because these settlement classes, by definition, could never go to trial. Since these cases cannot be tried, the value or "fairness" of a settlement can never be measured against an anticipated endgame of trial and appeals.¹⁷

As a result, the proposed rule revision appears to legitimate a settlement mechanism that departs from the conventional understanding of why cases settle in two significant features. First, since these are class actions, there is of necessity no meaningful capacity of individual plaintiffs to participate in the settlement process.¹⁸ Second, the inability to compare the settlement to a discounted trial outcome robs the settlement of the chief indicator of fairness to the absent class members.

B. *The State Court Twist*

The questionable feature of non-litigable class actions is complicated by the substantive development of the law in a very

¹⁷ At best these cases could be measured against expected returns in well-litigated areas of "mature" claims. This approach still has problems for two reasons. First, in the open-ended future classes, the degree of confidence in the number of claims and the availability of assets to cover such claims is low. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435-36 (2d Cir. 1993); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992). Second, settlement decisions ultimately reflect an assessment of risk and are subject to individual variations in risk-seeking or risk-aversion — decisions which should presumptively be left to the affected individuals. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1264-68 (1995).

¹⁸ This is reflected in the terms of the requirements of Rule 23 certification that common issues predominate over individual issues and that there is no overriding individual interest in prosecuting individual claims. For a dissenting view on this approach, see Woolley, *supra* note 3, at 573 (arguing that rule allowing any class member to intervene in proceeding that will extinguish her claim will significantly improve quality of representation for both present and absent class members).

problematic case, *Matsushita Electrical Industrial Co., Ltd. v. Epstein*,¹⁹ in which the Supreme Court held that state courts have jurisdiction to enter binding consent orders in class actions for claims over which they would have had no jurisdiction were the case to be tried. Therefore, state courts are now empowered to enter binding judgments over claims that were never within that court's subject matter jurisdiction. While the application of *Matsushita* is primarily limited to state courts, it reflects the problem of playing the class action game at a second order level: not only may courts certify settlement classes which could not be maintained for trial purposes, but they may also resolve claims that could never have been litigated in that court at all.

It is now well established under *Philips Petroleum Co. v. Shutts*²⁰ and *Sun Oil Co. v. Wortman*²¹ that the procedural and substantive mechanisms exist for certifying multistate or nationwide class actions in state courts. This allows for the very real possibility of collusive arrangements in which plaintiffs' counsel trades off the rights to claims over which representation could never have been claimed. The upshot is that the settlement of a class action may include claims that not only could never have been tried as an aggregate proceeding, but could never have been brought before the overseeing court in the first place.

Matsushita illustrates the inherent incentives toward collusion perfectly. Consider the plaintiffs' lawyer who files a class action on claims over which a state court properly has jurisdiction and who subsequently is able to negotiate a settlement. Even assuming that the settlement is believed to be a "good one," a powerful temptation toward betrayal nonetheless exists. The lawyer who has entered into negotiations on the basis of a settlement class that could never have been tried is in a weak position to hold out.²² Such a lawyer must be aware that the key to certification of the class lies in the willingness of the defendants to have this lawyer represent the class. Otherwise, there would be

¹⁹ 116 S. Ct. 873, 880-82 (1996).

²⁰ 472 U.S. 797, 808-09 (1985).

²¹ 486 U.S. 717 (1988).

²² Charles Silver and I develop this point at greater length in Brief Amici Curiae of Law Professors in Support of Respondents at 18-22, *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 379 (1996) (No. 96-270), *granting cert. from* *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996).

no possibility of the court granting a contested certification since, by definition, the class could not be certified for litigation purposes. Moreover, should this lawyer attempt to drive a hard bargain, there is always the risk that "friendlier" plaintiffs' counsel might exist elsewhere, offering the defendants a better deal. Therefore, to hold out is to risk losing everything.²³

Assume then that a settlement is achieved under such disadvantageous circumstances. What stops the lawyer from then offering to settle claims which could never have been asserted in this litigation? And at what price? Whatever fee might be available to the attorney for these additional claims is pure windfall; the claims could never have been asserted but for the unique posture of concluding all rights of the class members to proceed further. This is why experienced class action lawyers know that at the final stages of settlement, the key question becomes how broad the release of other claims will be.

What emerges through these cases are the clear incentives toward holding reverse auctions — a full bore race to the bottom. Given these unfortunate incentive structures, effort should be made to increase the protections available to the functionally absent third parties in class action settlements. The trend emerging from *Matsushita* and the proposed rule revisions is unfortunately exactly the contrary. The combined effect is to facilitate rough-cut justice relatively unrestrained by procedural safeguards.²⁴

C. Pernicious Rule Revisions

Advocates of class action settlement reforms malign this decidedly negative assessment of the settlement class dynamic.²⁵ But the settlement proponents fail to take account of just how peculiar an economic entity is the class action lawsuit.²⁶ Consider

²³ Furthermore, plaintiffs' attorneys may face the additional temptation of an "inventory settlement" offered by defendants seeking to foreclose all future claims against them. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373-75 (1995).

²⁴ For a more detailed discussion of the phenomenon of "reverse auctions" coupled with the implications of state court developments in light of *Matsushita*, see *id.* at 1370-72.

²⁵ See Eric D. Green, *Advancing Judicial Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 796-97 (1997).

²⁶ Judith Resnik, for instance, understates the significance of the deleterious effects of

the vantage point of the class action lawyer. There is no other economic activity in the United States that I know of in which we routinely ask people to invest millions of dollars with no security interest whatsoever. At any moment, the entire investment can be undercut and made worthless. When this results from losing the case, no one should be heard to complain; some cases win and others lose. Plaintiffs' lawyers are as familiar as anyone with the risks and rewards of entrepreneurial endeavors.

But settlement classes pose a risk of a different order. Since the active agent in consenting to the creation of the class is the defendant, there is a significant risk that a defendant will seek to undercut legitimate class actions through collusive behavior with alternative plaintiffs' counsel.²⁷ In *Georgine*, for example, the megaclass of all present and future victims of asbestos-related disease was directly the product of negotiations initiated through the Center for Claims Resolution, a consortium of asbestos manufacturers, with selected plaintiffs' lawyers.²⁸ The particular effect in *Georgine* was to foreclose future litigants from recourse through the tort system.²⁹

The attorneys in *Georgine*, therefore, used the diminished claims of unrepresented and unknowing future claimants to subsidize the current settlement.³⁰ These unrepresented individ-

the pursuit of settlement in mass tort class actions by arguing that the push for settlement can be observed contemporaneously in other fields of law as well. She attributes judicial interest in settlement to not only "fear of overload" but also to "disillusionment with trial and adversarialism as well as by increased valuation of consent as a predicate to resolution." Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 939 (1995).

²⁷ See Coffey, *supra* note 23, at 1378-82, 1453-57 (outlining problems of collusion when defendant is permitted to negotiate settlement terms with plaintiffs' attorneys prior to certification of class action).

²⁸ See *id.* at 1394 (detailing negotiations between Center for Claims Resolution and plaintiffs' counsel); Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995) (asserting that settlement model used in *Georgine* litigation was fundamentally flawed); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 866-69 (1995) (detailing "pre-packaged" nature of settlement agreement in *Georgine*).

²⁹ This sort of "lawyer-shopping" by the *Georgine* defendants may explain "the indifference displayed in that settlement to the distinctions among members of the class." Marcus, *supra* note 28, at 898.

³⁰ On a similar score, some commentators argue that mass tort class actions, in particular, raise concerns with regard to questions of adequate notice to absent class members and especially future claimants. See *id.* at 889 ("Whether or not class members

uals, most probably with no knowledge whatsoever that their rights were being foreclosed, were being denied an opportunity to prosecute actions for serious personal injury when such injuries became apparent.³¹ The threat posed by the settlement class is not, however, limited to future claimants. The same mechanism of friendly settlements can be utilized to scuttle a legitimate class action in one forum by the rapid certification and settlement of a class action in a different forum.

The proposed rule revision thus serves to put unsecured investments in legitimate class actions at significant risk. By giving a privileged position to prepackaged settlements, and allowing such settlements to be exempted from the normal requirements for certification, the proposed rule facilitates the collusive termination of otherwise viable prosecutions. The investment in legitimate class actions is put at risk in favor of a class action that may be certified with functionally no notice,³² before a judge who has every reason to sign off on it,³³ and with the authority of a court that can have no idea whatsoever what the case is worth — the case, in fact, has no discernible value. It never could have been tried.

In addition, I think that there is an absolutely pernicious side to the proposed rule revisions. In the asbestos cases, the effect of settlement classes is to terminate what would otherwise be viable individual tort actions. On the other hand, the proposed rule revisions hold out very different treatment for small claim class actions. Under proposed rule 23(b)(3)(F), courts are given very different instructions with regard to low-value consumer

can make an accurate assessment of the coupons offered in settlement of price-fixing claims against airlines is less important than whether people who may be relinquishing the right to go to court to recover damages for life-threatening personal injuries understand what they are doing.”).

³¹ There is a genuine issue whether the “adjudication” of such future claims is permissible under the substantive tort law governing such claims, and consequently whether such future claims represent a cognizable case or controversy for Article III purposes. See Petitioner’s Brief, *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996) (No. 96-270), granting cert. from *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), vacated, 83 F.3d 610 (3d Cir. 1996).

³² This occurs in one of two ways: either by coupling the release to be given with a broad resolution of all “future claims,” as in *Georgine*, or through the creation of a mandatory class action, as in *In re Fibreboard Corp.*, 893 F.2d 706, 708 (5th Cir. 1990).

³³ For a thorough discussion of judicial incentives for settlement of “small claimant” class actions, see Coffee, *supra* note 23, at 1369-70.

harms. Here the proposed rule would direct courts to consider as an element of class certification, "[w]hether the probable relief to individual class members justifies the costs and burdens of class litigation."⁵⁴ While this proposed rule admits of a fair amount of ambiguity, it seems clearly aimed at class actions in which large numbers of class members are allegedly wronged, but only in limited amounts.⁵⁵

If one combines these two proposed rule revisions, the pernicious effect becomes apparent. For those claims that have individual viability, the rules offer a streamlined form of foreclosing individual prosecution by facilitating aggregate settlement. On the other hand, for those claims that can only exist as part of an aggregate prosecution, the proposed rules would direct the attention of courts away from the aggregate in favor of the individual stake.

I do not want to romanticize the litigation process, but the fact remains that an individual with mesothelioma has a live individual claim. This type of claim would now be at risk in the form of easier settlement classes. But an entirely different legal regime would operate for those class actions where the individual plaintiff never has a chance of bringing an individual claim because the underlying injury is a low-value, mass repetitive harm. Here, all of a sudden, each claimant has to justify the value of individual prosecution in order to be offered aggregate litigation. While class actions for low individual value claims give rise to charges of lawyer-led litigation, the proper inquiry should be one of what alternatives are available. Absent the availability of a procedural mechanism to make such claims viable as aggregate litigation, the simple facts of life dictate that consumer fraud and other such low-value mass harms will be unremediable through the litigation process. More critical than the limited compensatory relief now offered in these low-value class actions is the prospect that the law would be unable to deter future misconduct absent an effective policing mechanism.

⁵⁴ FED. R. CIV. P. 23(b)(3)(F) (Preliminary Draft of Proposed Amendment 1996), reprinted in 38 F.3d Advance Sheets CCLXXVI (West, Sept. 16, 1996).

⁵⁵ A classic example would be consumer overcharge cases in which no individual class member's stake would ever justify individual prosecution of a lawsuit.

As the Seventh Circuit recently noted in a case involving potential individual recoveries of as little as twenty-eight cents,

[W]e believe that a de minimis recovery (in monetary terms) should not automatically bar a class action. The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.³⁶

The upshot is that the proposed rule revisions would direct that claims of real value be allowed to settle cheaply, while facilitating the dismissal of claims that have value only in the aggregate. This is a terrible, terrible development in class action law as far as I am concerned.

D. The Difficulty of Legitimate Settlements

Despite my concerns about the incentives toward collusive settlements in the class action context, there is nonetheless a troubling complication in holding settlement classes to the same standard as all other classes for purposes of certification — as required by cases such as *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*.³⁷

Take the case that may be thought of as "legitimately litigated" — the indicia of which are carefully considered in Professor John Coffee's insightful work on *Class Wars*. Basically, this is a category of cases that were filed adversarially and in which there is evidence of an investment by plaintiffs' counsel in trying to secure a return for their plaintiff class. Typically, in such cases there would be a record of plaintiff's counsel having undertaken discovery in order to establish some factual basis for trying to determine what the case is worth.

Now assume that the parties are able to reach an arm's length settlement. What, then, must they do to get this

³⁶ *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997), quoted with approval in *Anchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997).

³⁷ 55 F.3d 768 (3rd Cir.), cert. denied, 116 S. Ct. 88 (1995). In *GM Trucks*, the court held that an action in which classes are certified as settlement classes must meet the same requirements for certification under Federal Rules of Civil Procedure as litigation classes. See *id.* at 799.

approved by the court? Well, if they try to go in under the Third Circuit standard, that is under the standard from *GM Trucks* and *Georgine*, they basically have to go in with the defendant stipulating that this class could have been tried as a litigation class. The problem is that this stipulation may carry estoppel effects elsewhere. For example, the class may be limited to consumers of a product in one state. The defendant may rightfully fear that conceding the certifiability of a litigation class in one state may preclude a defense to class certification in another state. As a result, this rule puts a tremendous weight upon the litigation system.

The rule that emerges from the Third Circuit, that there can be no consideration whatsoever of the fact of settlement, poses real difficulties. Therefore, the issue in legitimately litigated class action settlements is to develop a halfway point that allows assurances of fairness while at the same time not burdening the settlement process so completely that it breaks down of its own weight.

My view is that this is a matter for development through the caselaw, which is still in a nascent stage. The impulse toward rulemaking is entirely misguided. The caselaw from *GM Trucks* to *Georgine* to the Texas case I used as an opening illustration³⁸ shows a healthy degree of judicial skepticism toward some of the more egregious uses of conspiratorial settlement classes. To the extent that some accommodation should be made for legitimate settlements, there is no reason to believe that rulemaking, as opposed to further caselaw development, is the proper mechanism for regulating class action settlements. I will return at the conclusion of this Paper to some of the indicia of illegitimate settlements that emerge from the caselaw.

Looking to the actual caselaw developments is all the more important in light of the Supreme Court's clumsy handling of the legal issues presented in *Amchem Products, Inc. v. Windsor*,³⁹ a decision that was issued as this Paper was about to go to press. Writing for six members of the Court, Justice Ginsburg eased away from the strict Third Circuit requirement that there be an

³⁸ See *St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc.*, 929 S.W.2d 25 (Tex. Ct. App. 1996).

³⁹ 117 S. Ct. 2231 (1997).

absolutely identical standard for the certification of litigation and settlement classes.⁴⁰ Yet the Court instructed that there must be "heightened attention" to the Rule 23 factors in the settlement context, "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."⁴¹ As a result, and despite appearing to reject the Third Circuit's legal test for settlement classes, the Court concluded that the "Third Circuit's appraisal is essentially correct"⁴² — and proceeded to affirm rather than remand in light of the new legal standard.

The apparent relaxation of standards for settlement classes is further undercut by the Court's treatment of the risks associated with settlement-only classes. In particular, the Court endorsed the argument that settlement-only classes have neither real settlement leverage nor any independent indicia of fairness. Thus, the Court warns that "permitting class designation despite the impossibility of litigation" results in a situation in which "both class counsel and court would be disarmed."⁴³ The reasoning could hardly be clearer in summarizing the dangers of settlement-only classes: "Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer and the could would face a bargain proffered for its approval without benefit of adversarial investigation."⁴⁴ The best that can

⁴⁰ "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." *Amchem*, 117 S. Ct. at 2248 (citation omitted).

⁴¹ *Id.*

⁴² *Id.* at 2249.

⁴³ *Id.* at 2248.

⁴⁴ *Id.* at 2248-49 (citations omitted). This then leads to the most peculiar part of the opinion. As authority for the proposition that courts have no benchmark by which to examine the propriety of a proffered settlement, the Court cites Judge Easterbrook's dissent from the *Bank of Boston* litigation, *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from the denial of *rehearing en banc*) (parties "may even put one over on the court, in a staged performance"), *cert. denied*, 117 S. Ct. 1569 (1997). What makes this remarkable is that six members of the Court are endorsing the view that more vigilance is required in a case in which the Court had only recently denied certiorari review.

be said for the Court's handling of *Amchem* is that the factual points of concern were handled well, although the legal standards for mass harm class actions are far from resolved.

II. DEVELOPING PROBLEM AREAS

If we move away from the current proposed rule revisions, there are actually a number of real problems and some real lessons emerging from class action law. Without claiming to be exhaustive, I will identify four primary areas of tension in current class action practice.

A. Mandatory Class Actions

An unmistakable development of recent class action practice has been the emergence of mandatory class actions. Although Federal Rules of Civil Procedure Rule 23(b)(1)(B) allows for the certification of a limited fund class action to avoid adjudications "which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication," this Rule until recently had been rarely invoked.⁴⁵ This Rule is intended as the plaintiffs' interpleader — a mechanism by which to avoid the "run on the bank" risk when outstanding liabilities can be expected to outstrip available assets.

The limited fund class action has emerged from obscurity in the modern class action — most notably in the mass tort setting.⁴⁶ The great advantage of the limited fund class action is that, like interpleader, in order to work it must be dispositive of

⁴⁵ For example, a survey of all reported federal class actions in the five year period between 1986 and 1990 shows only six cases certified for class action treatment under Rule 23(b)(1)(B). Of these, five involve underfunded investment or trust funds; the sixth involves a questionable decision by Judge Jack Weinstein to certify a settlement class of utility rate-payers as a mandatory, non-opt out class. See *Nguyen v. FundAmerica, Inc.*, No. C-90-2090-MHP, 1990 WL 165251 (N.D. Cal. Aug. 16, 1990) (limited investment fund); *Ohman v. Kahn*, No. 87-Civ-7117 (JFK), 1990 WL 97756 (S.D.N.Y. June 27, 1990) (same); *D'Arrigo Bros. Co. of New York v. Freshville Produce Distribs., Inc.*, No. 87-Civ-1091 (PNL), 1990 WL 310632 (S.D.N.Y. Apr. 13, 1990) (commodities investment fund); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (E.D.N.Y. 1989) (ratepayer action), *aff'd in part*, 907 F.2d 1295 (2nd Cir. 1990); *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301 (D. Mass. 1987) (collapse of investment scheme); *In re Johnson*, 80 B.R. 791 (Bankr. E.D. Va. 1987) (same).

⁴⁶ The most notable example is *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), vacated by *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997).

all potential claims. Accordingly, Rule 23(b)(1)(B) does not trigger the individual notice requirement of Rule 23(c)(2) and does not provide individual class members the ability to exempt themselves from collective adjudication. But the premise of the Rule is that a fund of limited and knowable dimensions exists and that the extraordinary process of extinguishing the individual right to opt out is necessitated because no other form of equitable adjudication could be sustained.

What has emerged, however, is that the mandatory quality of the limited fund class action provides tremendous strategic incentives for collusion. In fact, there is no better formula for collusion than a situation in which the rights of non-participants can be extinguished without notice or an opportunity to get out from under a prospective court decree. The pivotal case for confronting this issue is *Ahearn* — a case described in the petition for certiorari as the “first-ever certification of a mandatory, future-claimant, settlement-only class action.”

The most disturbing feature of the *Ahearn* settlement is that Fibreboard, the company that manufactured the asbestos that allegedly injured the plaintiff class, is using the settlement class mechanism to cap its exposure at ten million dollars, even though the record indicates that it had 225 million dollars of equity.⁴⁷ The obvious question is what can justify this significant limitation of liability for the actual tortfeasor in these repetitive harm cases? One possible justification could be that this was a strategic tradeoff: the limitation on Fibreboard's liability was knowingly exchanged for its cooperation in securing 1.53 billion dollars in insurance proceeds to fund the bulk of the class recovery.⁴⁸ It is further possible that the liability cap was the result of Fibreboard's lawyers' singular skill at driving a hard bargain in the final settlement negotiations.⁴⁹

Perhaps this is the best deal that could have been gotten for the plaintiff class. Perhaps — but perhaps not. The nagging question is not so much the merits of the deal but who made the deal? Who decided that the trade-offs were appropriate? The answer is that it was non-appointed, non-contracted-for represen-

⁴⁷ See *id.*, at 972-73.

⁴⁸ See Green, *supra* note 25, at 798.

⁴⁹ See *id.*

tatives of people who had no functional capacity to participate in the case. Why? Because in a mandatory class action there is no capacity to refuse court-appointed representation. Particularly in the context of a mandatory *settlement* class, the individual class member is presented with what purports to be a binding *fait accompli*, with the only recourse a likely futile objection at the fairness hearing required by Rule 23(e).⁵⁰

The mandatory settlement class takes the *Georgine* problem one step further. In *Georgine*, the right to opt out was of questionable value to a class that included potential future claimants with no reason at present to take affirmative steps to preserve their rights. *Ahearn* then takes a similar class but does not even afford the pretense of an individual right to maintain one's claim into the future. The capacity to trade off future claims of unrepresented individuals provides an overwhelming temptation to engage in collusion and should, in my view, defeat any presumption of deference normally accorded settling parties.

Although the issue of preclusion of claims of unrepresented third parties is now arising in the class action context, this is not the first time this question has been presented to courts. The most important case in this area is *Martin v. Wilks*,⁵¹ in which the Supreme Court rejected an attempt to give preclusive effect to a civil rights consent decree between the City of Birmingham, Alabama, and black firefighters against unrepresented incumbent firefighters seeking to protect contractual seniority rights.⁵² *Martin* must be read to reject collateral preclusion of third party claims as a result of bilateral settlements. The reason to reject such collateral preclusion is the overwhelming temptation to use the potential preclusive effect on third parties to subsidize the primary settlement. In blunt terms, when *A* is litigating against

⁵⁰ The absurdity of this "safeguard" was ably parodied by Thomas Geoghegan as follows:

The judge often reviews the settlement for fairness. That lasts about two seconds. You represent the Sandinistas and have settled your case for, oh, half of Florida. The judge, even a Reagan judge, will smile and say: "I want to congratulate you, Counsel, on your professionalism in settling this case."

Thomas Geoghegan, *Warren Court Children: The Angst of an Aging Activist*, NEW REPUBLIC, May 19, 1986, at 17.

⁵¹ 490 U.S. 755 (1992).

⁵² See *id.* at 761-69.

B, it is always easiest to settle when the two of them can make C pay for all or part of the cost of the settlement.

Georgine and *Ahearn* present variants of *Martin v. Wilks* at one level of remove. Whereas *Martin* concerned the rights of third parties who were in no sense parties to the primary litigation, the class action scenario presents third parties who are putatively represented by the litigants in the principal dispute. But this is a distinction that in real life may be of no moment. As soon as the parties in either *Georgine* or *Ahearn* are permitted to bind additional groups of unrepresented third parties, they face the same incentives to collude as existed in *Martin*.⁵³ That the sole safeguard against this type of collusion in *Georgine* was a rather specious right to opt out was bad enough. *Ahearn* does not even offer this.

Therefore, the fact that absent plaintiffs are not C in the classic sense of *Martin* is of little consequence. The problem in these complex cases is that who is A, who is B, and who is C shifts every day. Anybody who participates in these cases knows that the strategic alliances change by the hour. That's just a fact of life in these class actions and the problem that we have in *Georgine*, the problem that seems to cry out in *Ahearn*, the problem that is outrageous in *Adams v. Richardson*, and, as best as I can tell, is shocking in *Bank of Boston*, is that people are trading off rights of third parties who functionally cannot be there or are even precluded from being there. Regardless of the honor and integrity of the participants in these cases, there is no escaping that there are unchecked incentives to subsidize settlements. These incentives run to defendants, to plaintiffs' lawyers, to privileged sectors of the plaintiff class, and — unfortunately — to judges desperate to relieve docket pressures.

The mandatory class is today defended not on the grounds of preserving a truly limited fund, but as a means to avoid bankruptcy proceedings. However, there is no evidence at all that class action federal courts are any better in distributing limited funds on an equitable basis than bankruptcy courts. Bankruptcy has tremendous advantages, beginning with the jurisdiction of the bankruptcy court over every concerned party.⁵⁴ Even more

⁵³ I run through the incentives toward such collusion in *Martin* in Issacharoff, *supra* note 3, at 241-47.

⁵⁴ See 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4106 (2d

significant is that bankruptcy has well-established priorities governing disposition of truly limited funds by which the people who are the owners of the tortfeasor, that is the shareholders, are last in terms of priority.⁵⁵ Moreover, given the incentives toward collusion, there is no guarantee of credible valuation of the tortfeasor enterprise through the class action mechanism. In bankruptcy, by contrast, there are well-established specialized courts that routinely deal with distressed firms. Moreover, the bankruptcy courts have the power to install trustees to oversee the financial records and management of the firm so as to insure an appropriate return to creditors.

But my basic view at this point is that we should get rid of Rule 23(b)(1) altogether. It is emerging as an abomination which does not serve the purposes for which it was intended.

B. Competing State Court Class Actions

A second source of current class action tension stems from the emergence of rival nationwide class actions. While this is not a rules issue, this has emerged as a major problem, particularly in light of the impetus toward state court nationwide classes after *Matsushita*, *Shutts*, and *Sun Oil*. A clear indication came with the certification of rival nationwide class actions in Tennessee and Alabama in the polybutylene pipe litigation.⁵⁶ This is a difficult problem to solve because the procedural posture of the certification decision leaves each state free to issue apparently binding notices to the plaintiff class. Since the pressure in these cases is on the certification decision, and since this occurs well in advance of a judgment on the merits, let alone an appeal to the highest court of a state, there is apparently no recourse under the Full Faith and Credit Clause of the Constitution.⁵⁷

ed. 1988 & Supp. 1996); see also Coffee, *supra* note 23, at 1383 (listing advantage of bankruptcy proceedings as compared to mandatory class actions).

⁵⁵ See Coffee, *supra* note 23, at 1383 (referring to "absolute priority rule" in bankruptcy proceedings).

⁵⁶ See *Spencer v. Shell Oil Co.*, No. 94-074 (Ala. Cir. Ct. 1995); *Cox v. Shell Oil Co.*, No. 18,884, 1995 WL 775863, at *1 (Tenn. Ch. Nov. 17, 1995).

⁵⁷ The Supreme Court granted review on March 24, 1997, to a case that will address the impact of the Full Faith and Credit Clause on one state court's required acquiescence to the procedural rulings of another state court. Heretofore, full faith and credit was implicated only when the highest court of a state had rendered a final and binding judgment.

The involvement of a federal court mitigates this danger because of the greater injunctive powers in defense of federal jurisdiction under the All Writs Act.⁵⁸ Even with the presence of a federal court, however, the problems of rival class actions remain a source of concern.⁵⁹

Consider the predicament of plaintiffs' lawyers in a legitimately litigated class action. Assume that such counsel genuinely represent the interests of the absent class members.⁶⁰ What happens if such counsel are "too diligent," that is too solicitous of the claims of the absent class members? There is always the risk that a sweetheart deal may be crafted in a distant state forum. Under *Shutts*, that deal could be binding on all class members who did not affirmatively opt themselves out of the class. Under *Matsushita*, the state court settlement could include claims over which the court could not exercise subject matter jurisdiction. And under the terms of the sweetheart deal, it will inevitably be the case that the class will receive less, that the second group of plaintiffs' lawyers will be well compensated for undercutting the potential exposure in the legitimate class action, and that the diligent class counsel will find themselves without clients, without a case, and without compensation for their investment of time and costs in prosecuting the action.

C. Merits Inquiries and Class Certification

A third area emerges from the change in the types of cases that presently confront the courts. One of the inherited axioms of class action law from the Supreme Court in *Eisen v. Carlisle & Jacquelyn*⁶¹ is that district courts should not "peek at the merits" in deciding whether or not to certify a class action.⁶² So long

Since there is no final judgment at the certification stage, the constitutional protection had not been triggered. See *Baker v. General Motors Corp.*, 117 S. Ct. 1310 (1997) (No. 96-653) (petition granted Mar. 24, 1997), granting review to 86 F.3d 811 (8th Cir. 1996).

⁵⁸ See 28 U.S.C. § 1651(a) (1994).

⁵⁹ See Geoffrey Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996).

⁶⁰ I should reiterate why the concern must be from the vantage point of absent class members rather than named plaintiffs or defendants. This Article began with the observation that what distinguishes class actions is the readiness with which the rights of non-participating parties are resolved absent their direct involvement.

⁶¹ 417 U.S. 156 (1974).

⁶² See *id.* at 177 ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in

as the cases to be tried as class actions were either Rule 23(b)(2) injunctive cases or simple damages cases, such as securities claims, this rule reflected the role of class actions in providing definitive resolution of common claims. That goal was as readily advanced by settlement as by litigated judgment — regardless of which party prevailed.

The clean separation between the procedural inquiry into certification and the substantive inquiry into the merits is coming undone. The clearest example in the caselaw is Judge Richard Posner's decision in *In re Rhone-Poulenc Rorer, Inc.*⁶³ to deny class certification on the ground that plaintiffs had lost twelve of the thirteen prior underlying cases that had been litigated to judgment.⁶⁴ Since the case involved suit by HIV-positive hemophiliacs against a blood provider, Judge Posner reasoned that the "in terrorem" value of the defendant having to bet the ranch on a potentially huge damages award would coerce a settlement unjustified by the merits.⁶⁵

Clearly, Judge Posner's opinion in *Rhone-Poulenc* directly contravenes *Eisen*. That departure from *Eisen* is increasingly common in light of the types of cases that are coming to the courts as putative class actions. As set forth in Rule 23, the primary filter for class actions was the Rule 23(a) prerequisites for the maintenance of a class action. In the modern class action, however, these are rarely a significant issue. There is almost always numerosity, there are inevitably common questions of law or fact, the typicality of the named plaintiffs is either presumed or not an issue,⁶⁶ and, in light of the tremendous investment required to prosecute a large-scale class action, there is rarely a challenge to the adequacy of representation except in those cases in which rival groups of plaintiffs' lawyers are jockeying for control of the case.

order to determine whether it may be maintained as a class action.").

⁶³ 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

⁶⁴ See *id.* at 1296.

⁶⁵ See *id.* at 1299-300. Ironically, after Judge Posner's denial of class certification, the case did indeed settle as a nationwide settlement class action — with the price appropriately discounted for the fact of plaintiffs not having been successful at the certification stage.

⁶⁶ See Samuel Issacharoff, *Administering Damage Awards in Mass Tort Litigation*, 10 REV. LITIG. 463, 490-93 (1991) (describing limited role of Federal Rules of Civil Procedure Rule 23(a)(3) in modern class action practice).

In the current crop of class actions, the difficult question in deciding whether to certify the class comes under Rule 23(b)(3). This rule directs courts to decide not simply whether there are common questions of law or fact, but whether these common issues predominate. The rule also directs courts to assess the manageability of the case should a class be certified and to determine whether certification would promote the "fair and efficient adjudication of the controversy."⁶⁷ In complex, hybrid cases, this inquiry cannot progress unless the reviewing court has a handle on what are likely to be the significant issues at trial and how the evidence is likely to be presented. Leaving aside the merits determination by Judge Posner in *Rhone-Poulenc*, it is inevitable that courts recognize that the certification of such a complex case requires some inquiry into the underlying substance of the claims presented.

D. Attorneys' Fees

The fourth issue, which may be the most critical of all, is the question of attorneys' fees. Basically, all courts except the Florida Supreme Court⁶⁸ and, to some extent, the Fifth Circuit,⁶⁹ have abandoned the failed lodestar experiment. This is a welcome development for the reasons set forth in the Third

⁶⁷ FED. R. CIV. P. 23(b)(3).

⁶⁸ See *Kuhnlein v. Department of Revenue*, 662 So. 2d 309, 312 (Fla. 1995); *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

⁶⁹ The Fifth Circuit rule is reflected in *Shipes v. Trinity Industries*, 987 F.2d 311, 319 (5th Cir. 1993), and *Longden v. Sunderman*, 979 F.2d 1095 (5th Cir. 1992). There is, however, ample evidence that even the district courts of the Fifth Circuit are rejecting the lodestar approach. See *Orzel v. Gilliam*, Civil Action No. 3:90-CV-0044-G (N.D. Tex. May 16, 1995) (Judge Fish); *In re Prudential-Bache Energy Income Partnerships Sec. Litig.*, No. 888, 1994 WL 202394, at *1 (E.D. La. May 18, 1994) (Judge Livaudais); *Steiner v. Phillips*, Civil Action No. 3:89-1387-X (N.D. Tex. March 14, 1994) (Judge Kendall); *Belman v. Warrington*, Civil Action No. H-91-3767 (S.D. Tex. Nov. 16, 1993); *In re Intellicall Sec. Litig.*, Civil Action No. 3:19-CV-0730-P (N.D. Tex. Sept. 22, 1993) (Judge Salas); *Kleinman v. Harris*, Civil Action No. 3:89-CV-1869-X (N.D. Tex. June 21, 1993); *In re First Republic Bank Sec. Litig.*, Civil Action No. 3:88-CV-0641-H (N.D. Tex. Feb. 28, 1992 and March 8, 1993) (Judge Sanders); *Transamerica Ref. Corp. v. Dravo Corp.*, Civil Action No. H-88-789 (S.D. Tex. Nov. 16, 1992) (Judge Black); *In re Lomas Fin. Corp. Sec. Litig.*, Civil Action No. CA-3-89-1962-G (N.D. Tex. Jan. 28, 1992); *In re Middle S. Util. Sec. Litig.*, 1991 LEXIS 18062 (E.D. La. Dec. 17, 1991); *Rywell v. Healthwest*, Civil Action No. CA-3-89-2394-H (N.D. Tex. Dec. 3, 1991) (Judge Sanders); *Teichler v. DSC Communications Corp.*, Civil Action No. CA-3-85-2005-T (N.D. Tex. Oct. 22, 1990); *Finkel v. Docutel/Olivetti Corp.*, Civil Action No. CA-3-84-0566-T (N.D. Tex. Feb. 23, 1990).

Circuit Task Force Report,⁷⁰ in the academic literature,⁷¹ and in the reviews of court practice.⁷² But I want to suggest that the attorneys' fees are starting to emerge as a central component of due process rights of absent class members.

What protections are currently in place for the rights of the absent class members in class actions? The structure of class actions suggests three possible alternatives.

The first is that absent class members will have their interests protected by the named plaintiffs. Presumably, this is the import of the requirement under Rule 23(a)(3) that the named parties be "typical," and under Rule 23(a)(4) that the "representative parties will fairly and adequately protect the interests of the class."⁷³ A literal reading of these requirements may suggest that the named class representatives will not only serve as the representatives of the class in an evidentiary sense, but as some sort of fiduciaries charged with overseeing the interests of the class as a whole.

Such a reading of the Rule 23(a) requirements would force a confrontation with the numerous cases in which classes have been certified of minors, of institutionalized persons, of mentally incompetent persons or, as in *Evans v. Jeff D.*,⁷⁴ classes of mentally incompetent, institutionalized juveniles. Clearly, the named plaintiffs in such class actions are incapable of exercising any meaningful fiduciary responsibility for the remaining class members. Beyond this, however, the idea of a fiduciary responsibility of the named class plaintiffs for the absent class members reinforces what has to be the most ill-guided, absurd moment in class action practice. There is nothing so embarrassing to all involved as the moment in low-value consumer class actions when a named plaintiff takes the stand and swears that no matter how small her claim, no matter how great the offer of per-

⁷⁰ Third Circuit Task Force, *Covert Awarded Attorney Fees*, 108 F.R.D. 237, 246-49 (1985).

⁷¹ See in particular, John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865 (1992).

⁷² See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 156 (1996).

⁷³ FED. R. CIV. P. 23(a)(4).

⁷⁴ 475 U.S. 717 (1986).

sonal reward, she would never, never abandon the interests of her fellow class members — whom she has of course never met. Not only is this practice a travesty, but if this individual is sincere in thinking that no amount of money justifies abandoning some unknown absent class members, who would want someone this stupid as his or her fiduciary?

The second possibility is the courts. The same problems that confront courts in the settlement context are present throughout class action litigation. No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket.⁷⁵ They cannot reliably police the day-to-day interests of absent class members.

The third possibility, and the only realistic protection for absent class members, is class counsel. Indeed, to the extent that courts are indispensable agents in protecting absent class members, the most effective way to police class action practice is to provide the proper incentives for class counsel to diligently prosecute the class's interests. Although every system of principal-agent relations is fraught with difficulty, the best arrangement is one in which the attorneys function as partners of the class.⁷⁶ The attorneys' recovery should be tied to that of the class; to the extent the attorneys hope to prosper in the representation, that reward should be a direct product of what they return to the class. The optimal mechanism for creating this partnership is to establish a quasi-contractual relationship at the beginning of litigation in which the attorneys are provisionally awarded a percentage of the class's recovery should they prevail. This is

⁷⁵ Professor Coffee, in fact, places his concerns about judicial self-interest in advancing settlements at the center of his analysis of the dilemma in mass tort class actions. See Coffee, *supra* note 23, at 1462-65 (arguing for three policy conclusions on basis of centrality of judicial self-interest: (1) "the least acceptable reform proposals are those that simply increase the discretion of the trial judge"; (2) "reformers are best advised to address their proposals to appellate courts and place little hope in legislative reform"; and (3) "reformers must recognize the necessity of constraining litigant autonomy").

⁷⁶ See Charles Silver, *Law and Economics of Class Actions and Group Lawsuits*, INT'L ENCYCLOPEDIA L. & ECONOMICS (forthcoming 1997).

precisely the mechanism that was proposed by my colleague Charles Silver⁷⁷ and then adopted by the *Manual for Complex Litigation, Third*.⁷⁸

There is no better mechanism that I am aware of for securing class counsel's investment in a case and aligning the interests of class counsel and the plaintiff class than a partnership relationship established at the beginning of the case. This arrangement has two virtues. First, it relieves courts of the almost impossible job of policing substantively defective settlements.⁷⁹ Instead of placing the pressure of fairness on an *ex post* review of the terms of the settlement, attention *ex ante* to the proper incentives for faithful prosecution of the claims of the absent class members allows for fairness in the context of actors with proper incentives furthering their own interests. Second, it impedes sweetheart deals by insuring that attorneys' recoveries are directly tied to the actual return to the class and by providing an incentive for attorneys to maximize the size of the pot from which they will draw their fees. So long as the plaintiffs' attorneys recover only to the extent that the class is benefitted, they can vigorously prosecute the action and invest according to the merits of the case.

Such an approach simply reproduces in the class action context the typical attorney-client relationship that exists in individual representation. I am not troubled by the fact that this may result in plaintiffs' lawyers receiving large fees in successful cases. Providing a return for successfully prosecuting a case is simply a private incentive for *ex post* regulation, a feature of society that is increasingly important as we attempt to move away from more heavy-handed *ex ante* bureaucratic regulation. If the price of private policing of misconduct is a need for plaintiffs' attorneys, and if the further consequence is that the good ones get rich, so be it.

⁷⁷ See Silver, *supra* note 71, at 902 (describing one attorney fee arrangement as percentage of plaintiff's recovery).

⁷⁸ MANUAL FOR COMPLEX LITIGATION § 30.40 (3d ed. 1995).

⁷⁹ See Hazard, *supra* note 17, at 1266-68 (discussing lack of objective fairness criteria in class action settlements).

III. CASELAW LESSONS

In my view, the rush to regulation through rule revision in class actions is unwarranted. Undoubtedly a far broader array of cases is being brought as class actions than was ever anticipated at the origins of the modern class action in 1966.⁸⁰ As the Supreme Court properly noted in *Amchem*, "In the decades since the 1966 revision of Rule 23, class action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy and inexpensive determination' one by one."⁸¹ But that has also yielded a correspondingly broader judicial experience with class actions. There is now significant caselaw showing courts becoming increasingly successful at handling very large and sometimes quite complex cases that basically go after economic harm. The most straightforward of these involve application of federal statutory rights, such as in antitrust or securities cases. But even in multistate litigation, either in federal or state court, there is a strong basis for believing that the court system can dispense adequate justice. So long as there are generalized harms emerging from a single act, as with the breach of a contractual duty, these new class actions are basically being handled with relative ease by the court system. On the other hand, there are areas of law in which the court system has had little success in aggregate litigation. The key example is the mass tort cases.

It is possible to divide the successful and unsuccessful class actions by separating the cases involving economic harms on the one side from personal injuries on the other. Nonetheless, there is something more to be learned from this than simply the distinction between economic harms and personal injuries.

It turns out, perhaps not surprisingly, that courts are at their best in finding and handling facts. The further we stray from that basic role of courts as fact finders, the more problems we have. The reason that the economic harm cases are basically manageable by the courts is that there are only a few critical facts that dominate the whole case. These are what can be

⁸⁰ See Marcus, *supra* note 28, at 872-74 (criticizing expansion of Rule 23 on basis of Erie principles); Resnik, *supra* note 26, at 922-29 (discussing current trend in expanding Rule 23).

⁸¹ *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2281, 2247 (1997).

thought of as the upstream cases; that is, cases where the harm is alleged to be some uniform course of conduct by the defendant, from which everything else follows. Usually the damages can be calculated administratively, with each plaintiff receiving a pro rata share of compensation for some particularized kind of harm should the plaintiffs prevail.

On the other hand, there are the personal injury cases. What distinguishes these is not that they sound in tort, but rather the fact that the upstream inquiry is not dispositive. In cases such as asbestos, for example, even if there is a common upstream inquiry into the fact that asbestos exposure causes asbestosis, there is an immediate need to shift downstream and find fact after fact with regard to each individual plaintiff.⁸² The caselaw history shows that no court has been able to handle that in one proceeding. The caselaw history cautions that the further we stray from that which courts could administer in their fact-finding capacity, the worse off we are. The general line of demarcation seems to be that the upstream liability cases are manageable as class actions; the downstream harm cases are not. Based on this experience, the caselaw also gives some fairly direct signals of impropriety that should jump out in class action practice:

1. There should be a strong presumption against any class seeking to be certified under Rule 23(b)(1) as a mandatory class action.
2. Any prepackaged settlement class should be deemed presumptively suspect, particularly where there is no evidence of discovery-like procedures carried out in anticipation of settlement.
3. There should be a strong presumption against class certification in which plaintiffs' counsel are able to unload an inventory of preexisting cases, especially on terms that differentiate them from other categories of claimants. This is one of the significant problems in *Georgine*, in which the rights of unrepresented future claimants were put at risk in a settlement that was decidedly more favorable to current claimants.
4. Relatedly, there should be a strong presumption against class certification in any type of case in which there are preexisting contractual relationships between plaintiffs'

⁸² This observation may be traced as far back as the Advisory Committee that drafted the revisions to Rule 23 in 1966. See WRIGHT ET AL., *supra* note 54; Issacharoff, *supra* note 66, at 467-68 (examining problem of individual proof in mass tort class actions).

counsel and one segment or section of the proposed class and no preexisting contractual relationship between the plaintiffs' counsel and another section of the class, particularly if the settlement calls for differential treatment of absent class members.

5. Any class seeking to bind future claimants or foreclose future harms should also be suspect — particularly if these future claims do not create an active case or controversy under applicable substantive law.⁸³ This can also be thought of as a presumption against what I would term non-closed class actions⁸⁴ in which the class cannot be presently defined.

CONCLUSION

The tension in class action law is an inescapable outgrowth of the need to accommodate the protection of individual interests within collective litigation. However, the ultimate balance is struck, the experience through *Georgine* and *Ahearn* reinforces the importance of at least preserving the forms of individual participation — most critically, a meaningful right to opt out of class actions. This is not because of a romantic attachment to an idealized vision of each individual having his or her day in court and telling his or her story to a desperately attentive jury of twelve peers. Rather, the right to opt out does two things. First of all, it is a signal to other attorneys that there is a deal in the works and that the deal may be cooked. Second, it preserves judicial integrity by removing the Star Chamber aspects of the worst of class action practice.

⁸³ These concerns track the central arguments put forward by Professor Coffee as his "three fundamental principles on which procedural reforms should be based." See Coffee, *supra* note 23, at 1464. In line with my concern for privileged prepackaged settlement classes, he argues that "[s]ettlement class actions must be monitored by the only participants with the appropriate incentives to monitor: namely, other plaintiffs' attorneys." See *id.* Second, I agree with Coffee that "[f]uture claimants are uniquely exposed in class actions." See *id.* As such, he argues that "open-ended settlements should be preferred, both because the lump sum alternative essentially shifts residual risk from the firm to its tort creditors and because the bankruptcy process performs marginally better when a definitive resolution of the firm's tort liabilities is necessary for its survival." See *id.* at 1465. Finally, Coffee also emphasizes the need to preserve the right to opt out, arguing that "[a] delayed right to opt out, triggered by the discovery of a previously latent mass tort injury or illness, would solve many of the problems of both future claimants and settlement classes." See *id.*

⁸⁴ See Issacharoff, *supra* note 66, at 478.

Litigating and Settling Class Actions: The Prerequisites of Entry and Exit

Judith Resnik*

I. THE IMAGES THAT FRAME THIS CONVERSATION

John Oakley has entitled the panel discussion, and now this symposium, "*Summing Up Procedural Justice: Exploring the Tension Between Collective Processes and Individual Rights in the Context of Settlement and Litigating Classes*." Under this rubric we could be discussing an array of topics, but given that this conversation takes place in the winter of 1997 among a group of proceduralists, our attention has been drawn by proposed revisions to the 1966 class action rule¹ and by pending and vivid case law examples (including *Georgine*,² *Ahearn*,³ and *GM*

* © Copyright 1997 Judith Resnik and the Regents of the University of California. Orrin B. Evans Professor of Law, University of Southern California Law Center. Visiting Professor of Law, New York University School of Law, 1996-97; as of July 1, 1997, Arthur Liman Professor of Law, Yale Law School.

This essay is written at the prompting of John Oakley, who assembled a panel in January of 1997 to discuss class litigation and is informed by the exchanges with co-panelists John Oakley, Eric Green, and Sam Issacharoff. My thanks also to Janet Alexander, Margaret Berger, Richard Bieder, Elizabeth Cabrer, Jack Coffee, Denny Curtis, Owen Fiss, John Frank, Deborah Hensler, and Nancy Morawetz for ongoing conversations about the scope, shape, and utility of large-scale litigation and to Alys Brehio and Jennifer Rakstad for ongoing assistance in understanding the current shape of the doctrine.

¹ See *Proposed Rules: Amendments to the Federal Rules*, Proposed Amendments to Federal Rule of Civil Procedure, Rule 23. Class Actions, 167 F.R.D. 523, 559-66 (1996) [hereinafter *Proposed Rule 23*].

² *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir.), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The case was argued on February 18, 1997 but, as of this writing, had not yet been decided. See Judith Resnik, *Postscript: The Import of Amchem Products, Inc. v. Windsor*, 30 U.C. DAVIS L. REV. 881 (1997).

³ Now known as "*In re Asbestos Litigation*," 90 F.3d 963, *reh'g denied*, 101 F.3d 368 (5th Cir. 1996), *petitions for cert. filed sub nom.* *Flanagan v. Ahearn*, No. 96-1379, 65 LW 3611 (Mar. 11, 1997) (challenging the decision not to disqualify the trial judge who approved the settlement in which he had been involved in the negotiations, as well as contesting the mandatory nature of the class) and *sub nom.* *Ortiz v. Fibreboard Corp.*, No. 96-1394, 65 U.S.L.W. 3631 (Mar. 18, 1997) (challenging the certification that provided for a mandatory, non-opt out class under Fed. R. Civ. P. 23(b)(1)(B)). See 65 LW 3638 (Mar. 18, 1997).

Trucks⁴) of class action practice, doctrine, and aspirations.⁵

The issues come packaged under headings like "futures classes" and "settlement classes" and the controversy has become heated — with accusations of collusion, attorney self-interest, and judicial acquiescence in or support of unfair settlements.⁶ In this heat, issues become conflated that need to be disentangled; examples stemming from cases claimed to be typical may themselves be only a part of a diverse and variable lot.

Neither rulemaking nor commentary on procedure should be driven by that which grabs attention unless we can be confident that the vivid example is paradigmatic of the set. Thus, while I share concerns about the equity and quality of certain class action (and other) settlements and about the processes that generate them, I am also concerned about a reaction to these instances that disables class action litigation rather than attempting to constrain particular distressing manifestations.

II. THE EXPECTED COURSE OF LITIGATION, CIRCA 1990S: SOME DATA

Both the practice of litigation and the Federal Rules of Civil Procedure are shaped today by an understanding that the act of *filing* a lawsuit does not constitute a statement of intention to *try* a lawsuit. Not only do litigants and lawyers begin most lawsuits with little expectation of trial, but judges and rulemakers also encourage them to try hard not to go to trial, and they do so through rules, doctrine, and practices.⁷

⁴ *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

⁵ Here, teachers of civil procedure owe special thanks to Tom Rowe, a member of the Advisory Committee on the Civil Rules. Via a civil procedure and federal courts "listserv," Professor Rowe disseminates information on the activities of the Rules Committee and on pending cases of import. Hence, as of May 5, 1997, we all learned that the Advisory Committee decided to defer consideration of the question of settlement classes until October and to send forward two of the proposed revisions circulated; the Committee proposes changing Rule 23(c)(1) to revise the mandate to certify "as soon as practicable" with a permissive "when" and to add a subsection (f) to provide for discretionary interlocutory appeals of class action certification decisions by district judges. Tom Rowe e-mail of May 5, 1997 (on file with the author).

⁶ See generally the exchanges in Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 *passim* (1995).

⁷ See generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement*,

Revisions to Rule 16 of the Federal Rules, local rules in many districts, and the Civil Justice Reform Act all call for judges to control litigation and, if possible, to help create conditions under which settlement can occur.⁸ Take for example a local rule in the district of Massachusetts, which reads that:

At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances.⁹

Similarly, the Eastern District of New York's local rules oblige judges at the mandatory Rule 16 conference to explore "the feasibility of settlement or invoking alternative dispute resolution procedures, such as the use of settlement judges, early neutral evaluation, and mediation."¹⁰ Thus, over the past few decades, judges have shifted roles, becoming "managerial judges,"¹¹ "settlement judges," and one of many "players" around a bargaining table.¹²

and the Role of Adjudication at the Close of the Twentieth Century, 41 UCLA L. REV. 1471 (1994); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996); Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339 (1994). For a discussion of settlement efforts in federal bankruptcy courts and in state courts, see Anne M. Burr, *Building Reform from the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation*, 12 OHIO J. DISP. RES. 311 (1997), and Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO J. DISP. RES. 253 (1997).

⁸ See the 1983 and 1993 amendments to Rule 16; the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1994); *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996). See generally Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

⁹ U.S. DIST. CT. RULES, D. MASS. Expense and Delay Reduction Rule 4.02 (West's Mass. Rules of Court, Jan. 15, 1997).

¹⁰ N.Y. RULES OF COURT, E.D.N.Y. Rules of the Eastern District of New York, Civil Justice Expense and Delay Reduction Plan II(F)(5)(ix) (West, Dec. 1, 1996).

¹¹ Resnik, *Managerial judges*, supra note 8.

¹² Judith Resnik, *Procedural Innovations, Slashing Over: A Comment on Deborah Henster, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627, 1630 (1995); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995). Some of what that "play" entails (ranging from meetings in courts to joining the judge at his home) can be found in the descriptions of the settlement process in both the majority and dissents in *In re Asbestos Litigation*, 90 F.3d 963, 971, *reh'g denied*, 101 F.3d 368 (5th Cir. 1996), *petitions for cert. filed sub nom. Flanagan v. Ahearn*, No. 96-1379, 65 LW 3611 (Mar. 11, 1997) (challenging the decision not to disqualify the trial judge who approved the settlement in which he had been in-

Rules, statutes, and practice are not the only sources for the proposition that the procedural system is aimed at dispositions without trial. The case law is similarly emphatic on this point. A phrase that has found its way into a few published cases is that "a bad settlement is almost always better than a good trial."¹³ Further, the judicial policy favoring settlements is said to have special force in the class action context.¹⁴ And the 1996 decision by the United States Supreme Court in *Matsushita* provides further illustration of the commitment to the policy of settlement, for the case holds that state courts may have jurisdiction to approve settlements of lawsuits that they lack jurisdiction to try.¹⁵

Given the many variables that affect decisions to go to trial, the contribution made by these rules and policies to the declin-

involved in the negotiations, as well as contesting the mandatory nature of the class) and *sub nom* Ortiz v. Fibreboard Corp. No. 96-1994, 65 U.S.L.W. 3631 (Mar. 18, 1997) (challenging the certification that provided for a mandatory, non-opt out class under FED. R. CIV. P. 23(b)(1)(B)). See 65 LW 3638 (Mar. 18, 1997).

¹³ *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995) (quoting *In re Warner*, noting that courts have "often stated" this view, and approving as fair a "coupon" settlement in which owners of luxury cars received certificates of varying thousand dollar values), *aff'd* 66 F.3d 314 (3rd Cir. 1995) (table).

¹⁴ See, e.g., *Adams v. Robertson*, 676 So. 2d 1265, 1275 (Ala. 1995) (citing federal law for the proposition that the "judicial policy favoring settlement is particularly important in the context of class actions"), *cert. granted*, 117 S. Ct. 37 (1996), *cert. dismissed as improvidently granted*, 117 S. Ct. 1028 (1997); see also *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement").

The congressional attitude toward settlement has recently become more complex. The enactment of the Prison Litigation Reform Act (PLRA) of 1996, Pub. L. No. 104-154, 110 Stat. 1321 (to be codified at various titles), affects consent decrees in prison conditions litigation in a fashion that undermines incentives to enter them. Specifically, Congress has provided that prospective relief in consent decrees involving prison conditions terminate absent findings that the relief was "narrowly drawn, extends no further than necessary to correct the violation of the Federal right and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(b)(2). See also 18 U.S.C. § 3626(e) (providing for automatic stays of consent decrees if motions to invalidate them are filed). Courts have disagreed about the constitutionality of these provisions. See, e.g., *Plyer v. Moore*, 100 F.3d 365 (4th Cir. 1996) (upholding the PLRA's provisions relating to consent decrees); *Gavin v. Ray*, Civ. No. 4-78-CV-70062, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996) (finding PLRA provisions about termination of consent decrees to be unconstitutional); *Hadix v. Johnson*, 933 F. Supp. 1362 (W.D. Mich. 1996) (finding that automatic stay provisions unconstitutionally reopened final judgments); *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996) (provisions terminating consent decrees constitutional).

¹⁵ *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 878 (1996).

ing rate of trials cannot be specified, but the fact of the rarity of trials can. With the help of Stephen Yeazell, we know that trial rates have declined from about twenty percent of the federal civil caseload in 1938 to under five percent in the 1990s.¹⁶ (In 1995, the percentage of civil cases going to trial in the federal courts was just above three percent.¹⁷)

While commentators sometimes equate a low trial rate with a high settlement rate, it is erroneous to deduce a settlement rate of ninety-five percent from the trial rate of under five percent. Within the ninety-five percent of cases not tried, a significant proportion involve some form of adjudication other than trial. Estimates are that in about a third of the pending cases, judges decide contested motions such as motions to dismiss, preliminary injunctions, and summary judgment.¹⁸ Thus, my point is not that the federal courts do not adjudicate but, rather, that trials are a *rare form* of adjudication.¹⁹

Turning again to the specific subset of litigation that is our focus (class actions and other large-scale cases), the fact that a case is processed in the aggregate (by class action, multi-district litigation, or other mechanism) does not appear to vary these propositions. Be it two-party or multi-party litigation, trial remains the odd form of disposition while adjudications other than trial remain frequent. While empiricism on class actions is very limited,²⁰ we have recent and welcome data from Thomas Willging's, Laural Hooper's, and Robert Niemic's study for the Federal Judicial Center (FJC).²¹ They reviewed filings in four

¹⁶ Yeazell, *supra* note 8, at 633.

¹⁷ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 36, tbl.C-4 (Dec. 31, 1995) (reporting that 3.2% of civil cases reached trial).

¹⁸ Yeazell, *supra* note 8, at 636 nn.18-19.

¹⁹ Again, Professor Yeazell has provided an important picture: that in "1938, 63% of the adjudicated terminations of civil cases were trials and directed verdicts. In 1990, trials accounted for only 11% of all adjudications; the remainder were disposed of before trial." *Id.* at 636 (footnotes omitted).

²⁰ Additional information will become available when RAND's ICJ completes an ongoing project on class action practice; data collection is under way on the study of class actions in 1995-96 in both state and federal courts. See Deborah R. Hensler, Jennifer Gross, Erik Moller, & Nicholas Pace, *Preliminary Results of the RAND Study of Class Action Litigation*, Documented Briefing, May, 1997 (on file with the author) [hereinafter *RAND's Class Action Study*].

²¹ Thomas E. Willging, Laural L. Hooper, & Robert J. Niemic, *An Empirical Analysis of*

districts²² and learned that (at least in those districts) settlement rates in class actions were generally comparable to settlement rates in other civil cases.²³ Turning to the question of trial, in three of the four districts studied, the trial rate was similar (ranging from three to six percent) to that of non-class-action litigation.²⁴ And, in terms of non-trial adjudication, in about two-thirds of the class actions certified, judges made substantive rulings on contested motions.²⁵

Lawyers commencing cases and judges presiding over them know these rules, these practices, the case law, and the odds. The shared understanding is that commencing a lawsuit is a plan to litigate or to settle a case but is rarely a plan to try a case. Further, those seeking trial will be met by a rule regime that is suspicious of the activity; both individual and class litigation is handled with a strong presumption against trial.

III. CLASS ACTION STATUS: ALTERING THIS COURSE?

The predicate question for me is whether class actions should be permitted to be commenced with an assumption parallel to that of individual litigation — that trial is unlikely and perhaps implausible. Or, should the price of certification be that in class

Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74, 92 (1996) [hereinafter *FJC Class Action Study*]. The authors remind us to attend to the problems of data collection, both their own and those of other sources. A central caveat is that the FJC study was based on an intensive inquiry into four district courts, but cannot tell us whether those courts are representative of class action litigation as a whole. Further, because of the rapid change in practice in the last few years, data from even the early 1990s may not capture activity in the late 1990s.

²² Specifically, the Eastern District of Pennsylvania, the Southern District of Florida, the Northern District of Illinois and the Northern District of California. *Id.* at 82.

²³ *Id.* at 92, 182 fig.2. The researchers also remind us to take care about the differing modes of collection of data; their information comes from case files while the data about non-class actions comes from the Administrative Office (AO) of the United States Courts, which codes dispositions under categories such as "dismissed: settled," "dismissed: voluntarily," and "judgment on consent," but does not review individual files. *Id.* at 92 n.63. When the researchers looked at such files in four districts, they found rates of class actions different from those reported by the AO. Thus, when comparing AO data on non-class actions with the FJC Class Action Study data on class actions, one is relying on two different data sources and hence, differences in settlement rates, in substantive adjudication, and in trial rates "may simply reflect the differences in data collection methods." *Id.*

²⁴ *Id.* at 92, 151 (excluding prisoner civil cases). In the fourth district, class action trials were 5.5% and non-class action civil trial rates were 3.2%.

²⁵ *Id.* at 109-10.

actions, unlike other civil cases, lawyers have to demonstrate the ability to bring cases to trial?

One response is to argue that the distinctive features of class actions (and specifically their representative structure on behalf of absentees²⁶) mandate different rules; for those who seek authorization from a court to function in a representative capacity, the hurdles should be higher, including a demonstration of the ability to proceed to trial at the time of certification. While this formulation has appeal, I disagree with it for several reasons.

First, I think that such a requirement limits access to courts. I worry that demanding the capacity to try a class could function like the *Eisen*²⁷ requirements to preclude the litigation of meritorious claims.²⁸ Recall in *Eisen* that to fulfill the obligations imposed by the Supreme Court's reading of Rule 23(b)(3), the named plaintiff proposing the class action had to provide individual notice at the time of certification to so large a circle of potential class members that the case (already found likely to succeed on the merits²⁹) could not proceed. Similarly, if class counsel is required to establish as a predicate to certification that the lawsuit could be tried, meritorious lawsuits might fail that test, even though they might — had certification been granted — have proceeded to some form of adjudication or settlement.

Second, I am opposed to imposing this burden on class actions because it will create incentives to litigate cases under other aggregate rubrics that may provide fewer safeguards to absentees than do class actions. Class actions are but one form of grouping claims. Aggregate litigation has increased (on both the civil and criminal sides) over the past decades in frequency and appears under a variety of headings, including but not limited to class actions.

²⁶ See Samuel Issacharoff, *Class Action Conflicts*, 80 U.C. DAVIS L. REV. 805, 805-08 (1997).

²⁷ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974).

²⁸ For commentary exploring the burdens thus imposed, see Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97; Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASHINGTON & LEE L. REV. 21 (1996).

²⁹ See *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565, 567 (S.D.N.Y. 1972) (finding that the plaintiffs were "more than likely" to prevail).

Given the array of interests promoting aggregate litigation, trial judges and inventive lawyers are fully able to form aggregate lawsuits via means other than class actions, such as the multi-district litigation process, consolidation, informal aggregations via uniform pretrial orders, the assignment of special masters, and of course, bankruptcy.³⁰ If federal rulemakers or courts impose a rigid requirement that a class cannot be certified without evidence of the ability to take that configuration to trial, such cases often will neither die nor revert to single-case processing, but will instead be processed in the aggregate, either informally or via some other process.³¹

Further, federal class action law is not the only venue for class action practice; state courts are an important site of class action activity. The language of class action practice now includes terms like "portable" classes and "migration" to capture the point that cases rejected in the federal courts move to the state courts and proceed, in the aggregate, to judgment.³² Absent a United

³⁰ See, e.g., Judith Resnik, *From "Cases" to "Litigation"*, 54 L. & CONTEMP. PROBS. 5, 21-37 (Summer, 1991).

³¹ While the last few years have brought forth appellate concern about these innovations, those restraints have not precluded a robust practice in collective litigation. See, e.g., *In re Rhone-Poulanc Korer, Inc.*, 51 F.3d 1293 (7th Cir.) (mandamus ordering decertification of a class action, involving allegations of tainted blood to hemophiliacs, in part on the grounds that by collectivity, undue pressures to settle flowed), *cert. denied*, 116 S. Ct. 184 (1995). Following that decertification, however, a group of hemophiliac recipients of blood transfusions who argued that the blood exposed them to HIV infections have proceeded to settle (albeit controversially) as a collective. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, MDL-986, N.D. Ill. May 8, 1997 (on file with author). See Darryl Van Duch, *Victims of Hemophilia and Delay: Two Camps Battle for Money and Justice Over Blood Products Containing HIV Virus*, 19 NAT. L.J., Oct. 7, 1996, at A1; *Four Drug Companies Ordered to Pay Hemophiliacs*, N.Y. TIMES, May 8, 1997, at D12 (describing district court approval of a settlement fund of \$670 million, with payments of \$100,000 to six thousand hemophiliacs, and comparing it to a settlement in Japan with payments of \$450,000 per person; noting that about 550 hemophiliacs opted out and could pursue individual litigation).

Sam Issacharoff finds it "ironic" that the case proceeded toward a nationwide settlement (Issacharoff, *Class Action Conflicts*, *supra* note 26, at 826 n.65; I find it instructive.

See also *In re Repetitive Stress Litig.*, 11 F.3d 368, 372-73 (2d Cir. 1993) (reversing, via mandamus, the consolidation of 44 repetitive stress claims and arguing that individual distinctions overwhelmed common issues, but also noting that the appellate court "saw nothing wrong with assigning" this set of cases "to a single district judge who may order that particular proceedings or certain discovery requests" be handled conjunctively).

³² See, e.g., *White v. General Motors Corp.*, No. 42,865 (La. Super. Ct., 18th Dist. Dec. 20, 1996) (approving a settlement on behalf of all persons purchasing certain GM pickup trucks by a certain date) (opinion on file with author); *In re General Motors Pickup Truck Fuel Tank Prods. Liab. Litig.*, MDL No. 961, 1996 U.S. Dist. LEXIS 17510, at *2, *41 (E.D.

States Supreme Court decision requiring that, as a matter of constitutional law, class actions are only permissible if plaintiffs can demonstrate their capacity at the outset to bring the aggregate configuration to trial, a federal rule imposing those limitations will not constrain state courts to whom class action practitioners have turned and will turn. To the extent federal Rule 23 offers salutary protections to absentees,³³ it is unwise to drive aggregate litigation away from its parameters.

Third, I am less convinced than some commentators that individual class members are worse off under some of the litigation and settlement regimes than they would be in a world without settlement classes. The key phrases in this sentence are "some settlements" and "worse off." I am not here making an argument that certain recent settlements are wonderful nor about comparative states of well-being, but rather about comparative states of misery. The single-file case processing system has not served well the range of individuals who have suffered from the ills imposed by asbestos, the Dalkon Shield, and many other products or toxic substances, nor has it responded to many forms of injury that involve individually small-value claims but cumulatively significant acts of wrongdoing. While some individual plaintiffs may have obtained singular victories, a glorious record of the triumph of justice cannot be found across claimants and groups. Susan Koniak, opponent of many class settlements, uses the evocative phrase of a "widow weeping"³⁴ to signify the

Pa. Nov. 25, 1996) (denying an injunction against the *White* litigation in Louisiana despite the allegation that the Louisiana court had been presented with a proposed settlement "little changed from the one previously . . . rejected on appeal by the Third Circuit in *In re General Motors Corp. Pick-Up Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir.), cert. denied, 116 S. Ct. 88 (1995)," and also noting that "11 class action complaints [were] pending in state courts").

³³ As discussed *infra*, the issue of the degree to which Rule 23 so functions depends in part on the role judges take in attempting to learn of and safeguard absentees' interests and to control attorneys. Some commentators believe that Rule 23, as currently administered, has failed to and cannot so function. See Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996) (arguing that "lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds").

³⁴ Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995).

individual injuries that go unredressed. My sense is that we should all be "weeping" as we watch justice processes fail in these categories of claims.

One example comes from the Dalkon Shield litigation: at the time when A.H. Robins entered bankruptcy, between fifteen thousand and thirty thousand tort claims had been filed.³⁵ After the bankruptcy and an effort to notify potential claimants, some three hundred thousand individuals filed claims, of which estimates are that about two hundred thousand represented valid injuries.³⁶ The tort system's singularity may have enabled the individuals who had the wherewithal to file — those first several thousand — but did not well provide for tens of thousands of others. Of course, once the unfilled claims are "invited" in, enormous questions of distributional fairness arise, but closing one's eyes to people waiting in the wings (many of whom may never get to court) is not an appealing alternative.³⁷

In the debate about the desirability and utility of settlements of classes, the assessment of the pros and cons varies depending on what is offered by way of comparison. Is the assumption that, in lieu of class-wide settlement, each member of a tort class action would otherwise be equipped with a lawyer and proceed, individually, to a judgment or settlement of significant sums? Or, is the claim that, were plaintiffs to form that line of claimants, the last in line would find no funds because the defendant(s)' assets would have been depleted? Is the implicit or explicit baseline that, absent a group-wide litigation, individuals will receive no process and no compensation at all?³⁸ What lies in between?

³⁵ See generally Kenneth R. Feinberg, *The Dalkon Shield Claimants' Trust*, 53 L. & CONTEMP. PROBS. 79, 100 (Autumn, 1990) (stating that about 14,000 claims were disposed of or pending); RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALCON SHIELD BANKRUPTCY* 11 (1991).

³⁶ Feinberg, *supra* note 35, at 100, 101 n.55; Herbert M. Kritzer, *Public Notification Campaigns in Mass Litigation: The Dalkon Shield Case*, 13 JUST. SYS. J. 220, 223 (1988).

³⁷ This problem is particularly acute in the large-scale products and toxic cases and less difficult when the number of claimants is limited and the individuals more readily identifiable. See discussion *infra* notes 41-43 and accompanying text.

³⁸ Here the ongoing debate about the HIV-hemophilic litigation is illustrative. When the proposed remedy of \$100,000 per claimant is compared to single verdicts of millions, the settlement looks very limited; when reference is made to those who have litigated and lost, or long suffered but as yet have received no compensation, or to the question of government efforts to seek reimbursement for health care costs from those who do recoup, the settlement looks preferable to waiting for remunerations that may neither come nor, if

When are defendants' *willingness* to pay conflated with defendants' *ability* to pay? And how do answers proffered to this list of questions correspond to the landscape of cases actually filed or processed as a group?

My co-panelists have greater confidence than I that they know the terrain. Professor Issacharoff offers the example of the twenty-four minute class action as if it were prototypical,³⁹ while Professor Green relies on the illustration of one widow receiving three million and another no recovery at all.⁴⁰ In contrast, as I look at these last several years of litigation in the arena of mass torts, I am acutely aware of the dominance of specific cases that comprise our shared referents but also of the existence of dozens of cases unseen, proceeding in state or federal courts — some formally as classes, others under the MDL rubric or in other variations.

Further, I see important features that distinguish the cases, not only as between tort and commercial litigation, between high-stakes individual claims and low-stake claims, or as between personal and property injuries, but also within such categories.⁴¹ For example, in products cases involving substances like asbestos, the large number of claimants (not all identified) and the problems of equity among claimants loom large. In contrast, in certain medical products cases like the Shiley Heart Valve or in certain mass disasters such as fires, a circumscribed number of readily-identifiable injured claimants, many with attorneys already retained, present a different mix of problems.⁴² And

paid, be protected from government collection efforts. See Van Duch, *supra* note 31 (describing the obstacles to plaintiffs' success); Emily Swiatek, *Jury Trial Puts National Class Settlement in Different Light*, IND. LAW., Apr. 2, 1997, at 6 (reporting on a \$2 million verdict for the death of a hemophiliac boy who had contracted AIDS). The district judge's decision approving the settlement relied in part on the number of cases defendants had won, as contrasted with the few plaintiff victories, such as in a case without issues of "product identification" or statute of limitations. See *In re Factor VIII or IX, Concentrate Blood Prods. Litig.*, MDL-986, N.D. Ill. May 8, 1997, at 9 of the slip opinion.

³⁹ Issacharoff, *Class Action Conflicts*, *supra* note 26, at 807.

⁴⁰ Eric D. Green, *Advancing Individual Rights Through Group Justice*, 90 U.C. DAVIS. L. REV. 791, 802-03 (1997).

⁴¹ See RAND's *Class Action Study*, *supra* note 20.

⁴² See, e.g., *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1036 (S.D. Ohio 1996) (discussing the settlement of claims involving a limited number of individuals who had received the Shiley Heart Valve and subsequent remedies of "explantation," payments, and research); *In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603

consumer cases (ranging from contract to tort, some with small-value claims but others involving larger injuries to personal property) offer yet other variations on the theme. Moreover, unmentioned in most of the current discussion of class actions are civil rights lawsuits, a category dominant only three decades ago.⁴³

From the pieces of the landscape visible to me and from those I know I can't see, I am neither prompted to celebrate class actions as a triumph of "group justice" (to borrow Eric Green's phrase⁴⁴) nor to condemn them as inevitable sites of either group or individual injustice. Instead, I proceed with a strong sense of distress at the failures of civil processes in general and with only a bit of optimism about our collective interest — let alone capacity — to respond.

Hence, I offer a first conclusion. Over the past three decades, federal civil litigation has been increasingly organized around efforts to obtain dispositions without trial. The "value" of a case is not only measured by what a trial could produce. To insist that class actions — unlike the rest of civil litigation — may only proceed as if trial were the expected mode of resolution is to unduly burden this form of aggregate litigation. I therefore oppose the blanket prohibition of what are called "settlement class actions" because I believe that prohibition closes too many doors. But the vivid examples that have troubled so many judges, lawyers, and academics serve as more than a caution, requiring reconsideration of the structure of class actions.

The question is how to reformat in an attempt to monitor litigant, attorney, and judicial behaviors. When revising (via case law interpretation or rulemaking), one should endeavor to make class action and other large-scale litigation governed by an amalgam of procedural and ethical constraints and obligations imposed on both judges and lawyers. This effort would thus join much of the past decade's revisions of procedural rules (including not only Rule 11 but also Rule 16 and the Civil Justice Re-

(1st Cir. 1992) (detailing procedures used for some 2,000 plaintiffs and 200 defendants in an MDL proceeding resulting from a fire in Puerto Rico).

⁴³ See Judith Resnik, Dennis E. Curtis, & Deborah Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 350-55 (1996).

⁴⁴ Green, *supra* note 40, at 791.

form Act), in that all represent a melding of rules of ethics and rules of practice in an effort to control not only process but also professional behavior.⁴⁵ While much discussion describes these efforts as "case management," that phrase is something of a misnomer, as so much of the goal is *lawyer* management.⁴⁶ And, in this context as in others involving strategic interaction, each attempt to constrain begets innovative methods to avoid such limits and concerns that the constraints themselves impose costs.⁴⁷

IV. ADDING OPTIONS AND VARYING STANDARDS: LITIGATING CLASSES, SETTLING CLASSES, TRIAL CLASSES, AND INCREASING SCRUTINY OF SETTLEMENTS

To refuse a *per se* prohibition on settlement classes is not to argue that all settlement classes are desirable or even permissible. I think, rather, that rulemaking could reflect some of the variety that comes under the current blanket phrase "settlement classes" and should insist upon a distinction between the propriety of certification of a class and the adequacy of any proposed settlement. To help make distinctions among the kinds of settlement classes, I want to thicken the vocabulary by describing different kinds of class actions — specifically, "certify-to-settle classes," "litigating classes," and "trial classes." These distinctions add to the current differentiations among classes related to the form of remedy sought (such as "injunctive" or "damage" class actions) by referring to the relationship between the *timing* of a request for class certification and the *timing* of a request for approval of a class-wide settlement.

⁴⁵ Resnik, Curtis, & Hensler, *supra* note 43, at 389-91.

⁴⁶ See Judith Resnik, *Constraining Lawyers and Judges: Reflections on the Civil Justice Reform Act, the Civil Jury, Rulemaking, and Congressional Control of the Federal Judiciary* (forthcoming, U. ALABAMA L. REV. Symposium on Civil Justice Reform, 1997; USC Working Paper, 1997, manuscript on file with the author).

⁴⁷ See generally JAMES S. KAKALIK, TERENCE DUNWORTH, LAURA A. HILL, DANIEL McCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE, & MARY E. VAIANA, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT I (RAND, 1997) (reporting research of implementation of the CJRA and concluding that it had "little effect on time to disposition, litigation costs, and attorneys' satisfaction and views of the fairness of case management").

As is detailed below, rules and doctrines should be plain that, at whatever time a settlement is proposed, a series of issues come to the fore; included are the extent of the information provided participants in a settlement about the remedy to be provided, whether claimants within a class are treated equally or distinguished by criteria that are appropriate, the relationship between compensation to claimants and to attorneys, the cost of administering the remedy and how it is financed, the degree to which opting out is either legally or practically feasible, and the timing of the processes of informing the class and permitting opt outs. Below, I offer details on what such a regime might entail, whether developed by means of interpretation of Rule 23 as it is currently formulated or by means of revision of the text and notes to that rule, or by legislation. Appended to this discussion is a rule-based formulation that Professor Jack Coffee and I provided in January of 1997 to the Advisory Committee on Civil Rules.

*A. Additional Options: Settling Classes,
Litigating Classes, Trial Classes*

1. Certify-to-Settle Classes

This kind of class is what is currently termed the "settlement class" because settlement negotiations and a proposed disposition *predate* the certification of a class. The certification is the means by which to implement the settlement, rather than the settlement emerging after a case has been filed and litigated for some time; the existence of a class and of a settlement are linked and interdependent. Because no defendant contests class certification, the plaintiff has a lower burden and the court is provided with no adversarially-based test of the propriety of class litigation.⁴⁸ Such proposals inspire the fear that no one (plaintiffs, defendants, or the court) is questioning the adequacy of

⁴⁸ Even within this category, variations exist. For example, in "prefiling settlement classes," the negotiations for settlement of the class predate the filing of a lawsuit. Another variation is that, while a lawsuit may have been filed before a settlement is proposed, the question of class certification has not been addressed by the court at the time a proposed resolution is reached by plaintiff and defense attorneys. Thus the court is presented simultaneously with requests for two decisions: certification and approval of a settlement. A useful shorthand to stress the simultaneous events may be "filing-certifying-settling classes."

representation or the quality of the outcomes. Instead, what is known is that defendants' and plaintiffs' attorneys are enthusiastic.⁴⁹

How common are these "certify-to-settle" classes? The short answer is that we don't know; in terms of current empirical information, the *FJC Class Action Study* was limited to four federal district courts in a specific time period. We do not know if this set of 152 cases is in any way representative of class litigation as a whole, either then or now. Hence, with caveats galore, I report information that should not be read as descriptive of the universe but only as one glimpse. Class certification was limited (as compared to "unconditional" certifications) to settlement in fifty-nine of the 152 cases.⁵⁰ Further, the dockets indicated that in twenty-eight of those fifty-nine settlement classes, the requests for settlement and for certification were either filed concurrently or the settlement proposal predated the certification request.⁵¹ Of twenty-eight certify-to-settle cases, all settlements were approved; in most of those (twenty-four of those twenty-eight), settlements were approved without changes.⁵²

2. Litigating Classes

I offer this nomenclature to capture a distinct set of cases in which, at the time when a court is considering class certification, questions are raised about the ability of the case to be tried as a class action. Often a defendant, opposing class certification, poses the question under current Rule 23 in terms of challenges that either the prerequisites of 23(a) have not been met or that the proposed class cannot show that it can comply with 23(b)(3) standards on management and superiority. Alternatively, judges may raise the issue of the ability of plaintiffs' counsel to bring the claims to trial as an aggregate. Occasionally, an objector (sometimes competing to represent another class, other times

⁴⁹ See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (detailing some of the concerns about self-interest of lawyers and defendants).

⁵⁰ *FJC Class Action Study*, *supra* note 21, at 112. These 59 cases represent 39% of the group studied.

⁵¹ Thus, these cases were 18% of the universe of 152. *Id.* at 112.

⁵² *Id.* at 112-13 (eighty-six percent of the cases considered).

pressing for single-case processing) may also protest and argue that the proposed class cannot proceed to trial.

I believe that Rule 23 practice should develop to include a self-conscious and limited certification of such "litigating classes." Judges should certify classes for the pretrial process, including discovery and settlement negotiations, and then reconsider the certification if and as the case proceeds. In a sense, such class certifications parallel the formation of an aggregate under the MDL statute,⁵³ which authorizes inter-district transfers of pending cases to enable collective treatment during the pretrial process. While technically under MDL, each case remains officially distinct and can be remanded for its own individual trial. In practice, the cases are more often than not disposed of en masse.⁵⁴ Further, in such MDL cases, trial judges may appoint lawyers to work as a "plaintiff steering committee" (PSC) and vest them with authority to speak on behalf of the individual litigants, even though such litigants also have individually-retained plaintiffs' attorneys (IRPAs) who filed each individual case.⁵⁵

"Litigating class actions" vary the idea of the MDL in two respects — by permitting the case to proceed on behalf of absent members (i.e., unfiled claims) and by creating a rule regime that imposes obligations on judges and lawyers vis-a-vis both the absentees and the individually-identifiable plaintiffs who have filed their own cases. Adding this nomenclature highlights the change in civil process with which I began; litigation, not trial, is the focus of procedure. Labeling a set of class action cases "litigating classes" also echoes a distinction now common among lawyers, in which some are described as "litigators" (by which is meant a lawyer whose practice consists primarily of pretrial motions, discovery, and settlement efforts) and others are described as "trial lawyers" (by which is meant a lawyer who tries cases to judge or jury).

⁵³ 28 U.S.C. § 1407 (1994).

⁵⁴ See Resnik, *From "Cases" to "Litigation"*, *supra* note 30, at 34-35 (from 1968-88, 18% were remanded); see, e.g., *In re Asbestos Prod. Liab. Litig.* (No. VI, MDL 875, 1996 WL 539589 (E.D. Pa. Sept. 16, 1996) (denying a motion to remand 2700 cases to 47 jurisdictions in the MDL asbestos litigation, in part based on the view that "plaintiffs have made great strides toward settlement of their cases").

⁵⁵ See Resnik, Curtis, & Hensler, *supra* note 43, at 309-26 (discussing the different types of lawyers and their roles).

3. Trial Classes

This final set might also be described as "full certifications," in which, at the time of certification, a judge finds that the proposed class has met all the requirements not only to proceed through the pretrial process but also to proceed, if necessary, through trial. Certification is likely contested, as may be a good deal else about the litigation, and the question of settlement is not linked to the certification process. Given that many class actions (particularly in civil rights actions) involve bifurcation of liability and remedy, settlement may even be proposed after a part of the case is tried, raising (as we know from the case law) yet other, complex questions about what was adjudicated, what was agreed to, and the remedial authority of a court.⁵⁶

B. Constraining Settlement Negotiators

With this tripartite topology (certifying-to-settle classes, litigating classes, and trial classes), the basis for my objection to the formulation of the Rule 23(b)(4) under consideration becomes clear. That text adds another option, at the time of certification, by instructing trial courts to consider proposals to certify classes in which:

the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.⁵⁷

This language and particularly the phrase "*the parties to a settlement*" suggest that the existence of a settlement class *depends* upon pre-negotiation of a proposed settlement. It thus encourages pre-filing and/or pre-certification negotiations of settlement and the very behavior that is most problematic: inviting small collectives of plaintiff and defendant lawyers — before a class action has been filed or certified — to negotiate among themselves and to present the court with an agreement that could

⁵⁶ See, e.g., *Martin v. Wilks*, 490 U.S. 755, 769-93 (1989) (Stevens, J., dissenting); see also the Prison Litigation Reform Act, discussed *supra* note 14, appearing to require statements about what would have been adjudicated as a prerequisite to the continuation of consent decrees in certain prison cases.

⁵⁷ *Proposed Rule 23*, *supra* note 1, 167 F.R.D. at 559.

then bind absentees. Such negotiations would proceed without any court determination that the lawyers proposing to act on behalf of a group (and in fact negotiating for a group-wide, if not "global," settlement) are in fact adequate representatives for the class they plan to represent, without notice to anyone beyond a small group that negotiations have commenced and, in many instances, without the development of sufficient information by means of discovery to provide any means of appraising the quality of the proposed resolution.

The invitation to engage in pre-certification negotiations creates incentives for behavior that is the center of criticism of settlement classes: the fear of collusive bargaining in which lawyers profit to the detriment of class members.⁵⁸ Once such "deals" are made, those affected are presented with the choice either of opting out (often impractical) or of accepting the agreement. Reshaping the agreement, if it happens at all, tends to be at the margins.

Instead of encouraging interactions among self-selected attorneys, I think judges should sort out the different kinds of classes and promote those that maximize protection of absentees. The rule and practice should require that proposed settlements of class actions be negotiated in a manner that: (a) makes visible the many different aspects of the alleged injuries suffered by class members; (b) informs class members of the potential for settlement as early as possible; (c) gives class members information about those negotiating on their behalf; (d) puts responsibility on the court for structuring means to enhance fairness during the course of such negotiations; and (e) scrutinizes settlements with special attention to the amount of litigation that preceded them. Higher burdens of proof and persuasion should be imposed on those litigants who seek court approval of "certifying-to-settle classes." When certifying "litigating classes," notice should be provided to class members of the possibility of pretrial disposition and thereby invite in an array of representatives.

⁵⁸ See, e.g., Coffee, *supra* note 49, at 1373-84; commentary provided by John Frank, included in the *Draft Minutes, Civil Rules Advisory Committee* (April 18-19, 1996), reprinted in *Proposed Rules: Amendments to Federal Rules, Amendment to the Federal Rule of Civil Procedure 23*, 931 F. Supp. CLV, CLXXXVIII (1996) (raising concerns about "sell-out settlements"), 167 F.R.D. at 552, 556.

And, depending on the nature and kind of litigation that has occurred prior to the proposed settlement, one can also vary burdens of disclosure and of substantiation of the quality of a proposed settlement, create opt out rights, or devise other means by which to respond to objectors.

Of course, insisting on structure and adding participants to negotiations are not necessarily the means by which to bring conflicts to rapid conclusions. As Professors Sam Issacharoff, Douglas Laycock, and Susan Sturm have discussed (in the context of *Martin v. Wilks*⁵⁹), the exclusion of certain groups from participating in the underlying litigation enabled the parties present to forge bargains unattractive to the nonparticipating disputants.⁶⁰ More recently, descriptions of efforts to settle the tobacco litigation refer to the multitude of views presented by state attorneys general, private lawyers, and industry members; the lack of singular representatives makes agreement more difficult as different visions of proper resolutions are pressed.⁶¹ The structure suggested above will thus slow and make more cumbersome the process of agreement; more litigation than settlement may result. But as Dennis Curtis, Deborah Hensler, and I have argued, it is not the process that produces such complexity but rather the underlying amalgam of interests, parties, and agendas.⁶²

V. SECOND-BEST SOLUTIONS

My concluding comments are about the difficulty of implementing these suggestions. The problem that "settlement classes" raises is an aspect of a larger problem: the quality of settlements in general and the propriety of the shift, over the past decades, toward procedural processes aimed at the production of settlement.

⁵⁹ 490 U.S. 755 (1989).

⁶⁰ Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 241-47 (1992); Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1012-13 (1993); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993); cf. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993).

⁶¹ *Optimism Dims for Agreements Over Tobacco*, N.Y. TIMES, May 12, 1997, at A1.

⁶² Resnik, Curtis, & Hensler, *supra* note 43, at 399-401.

While the fact of settlement is not necessarily proof of a desirable outcome (however measured), courts have relied on the existence of a settlement in individual actions as a proxy for an appropriate outcome. When praising settlement, commentators and judges invoke the fact of *consent*, that disputants have themselves determined to abort the litigation in favor of whatever agreement they have forged. Yet, we cannot rest comfortably with the idea that such agreements are always celebrations of justice. Compromises are borne not only from the current regime that pushes for settlement but also from the many burdens of litigation, including lawyers' fees and lawyers' pressures to settle,⁶³ and from disparities among litigants, some of whom are risk-prone and some risk-averse, some one-shot players and others repeat players.⁶⁴ Settlement in group litigation is all the more problematic. We know that it is lawyers who offer consent on behalf of those they represent. We know that, in many kinds of cases, lawyers are the largest stakeholders — with more riding on costs and fees than any individual plaintiff (even one sustaining massive injuries) will recoup. Further, we know that it is meaningless to speak of the discipline of clients monitoring attorneys when "the clients" number in the thousands.⁶⁵

The current practice is largely to ignore the problem of settlement in individual cases. Absent facially invalid agreements, courts routinely enter proposed consent judgments as presented; they have neither obligation nor permission in individual civil litigation to scrutinize the adequacy of settlements.⁶⁶ In a few specialized civil litigation schemes,⁶⁷ in criminal cases when

⁶³ See, e.g., SANDRA M. GILBERT, *WRONGFUL DEATH: A MEDICAL TRAGEDY* (1995); William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

⁶⁴ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Stephen Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

⁶⁵ See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L. REV. 1 (1993); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1993).

⁶⁶ See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 85-92.

⁶⁷ See, e.g., The Tunney Act, 15 U.S.C. § 16(b)-(h) (1994) (anti-trust litigation); see also FED. R. B.P. 3020 (bankruptcy).

guilty pleas are entered,⁶⁸ and in class actions,⁶⁹ judges are given a different role and charged with some form of oversight. Thus, in class actions, even after courts have certified plaintiff class's lawyers as adequate representatives under Rule 23(a), judges are obliged to oversee that representation at the time of compromise or dismissal. Under Rule 23(e) and its interpretative case law, a class action cannot be settled without notice to the class and a judicial statement of the "fairness," "adequacy," and "reasonableness" of its resolution.⁷⁰

But we also know that the judge — under contemporary practice — is not the disengaged arbiter coming fresh to the question of the quality of the outcome. Rather, the judge is often a participant in framing both the conditions under which negotiations have occurred and sometimes proposing terms for the settlement itself.⁷¹ Cases refer to judges who, when reviewing settlements, "suggest modifications" that become part of a settlement subsequently approved.⁷²

Whether such judicial engagement is beneficial to litigants is the subject of debate; that the Rule 23 framework itself does not always function to provide notice to absentees or much attention to class-wide settlements is yet more disheartening. In the set of class actions the *FJC Class Action Study* considered, notice of proposed settlements was not provided to members in all cases, the notices that were provided often lacked important information and were jargon-filled, few objections were made, and few changes in the settlements occurred.⁷³

⁶⁸ FED. R. CRIM. P. 11(c)(1)(B).

⁶⁹ FED. R. CIV. P. 23(c).

⁷⁰ See generally FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION*, THIRD 236-48 (1995).

⁷¹ Judge Jack Weinstein's role in the resolution of the Agent Orange litigation is often used as illustrative (see PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987)); Judge Robert Merhige took an active part in the Dalkon Shield litigation (see SOBOL, *supra* note 35); and Judge Bob Parker's actions in the asbestos litigation are detailed in *In re Asbestos Litigation* and are the subject of one of the pending petitions for certiorari, cited *supra* note 3.

⁷² See, e.g., *Adams v. Robertson*, 676 So. 2d 1265, 1268 (Ala. 1995) (describing the trial court's approval of a settlement "so long as the parties agreed to certain court-imposed modifications").

⁷³ *FJC Class Action Study*, *supra* note 21, at 146-51.

In short, "judging consent" is a very difficult task.⁷⁴ The purpose of a settlement regime is to avoid conflict among disputants and imposition of rules by courts. Requiring the parties to a settlement to describe the potential dispute that the settlement is designed to resolve often results in formalistic exercises that do not enlist exacting judicial scrutiny of the settlement agreements championed by the participants. And lurking behind such inquiries is the question of "what next?" If a court refuses to enter a settlement, how does it make parties litigate a case they wanted to settle?

What are the possible solutions to this problem? One option is to preclude judicially-based settlement, period. As Judge Jerry Smith has commented, "[t]he Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more."⁷⁵ The view might be that courts should never add their imprimatur to litigants' decisions to terminate lawsuits by means other than adjudication, for courts can make no genuine assessment of the quality of outcomes other than by means of ruling on disputed claims.⁷⁶ One might rewrite the Civil Justice Reform Act, rewrite Rule 16, Rule 68, local rules, and revise the guilty plea practice — all to move settlement activity outside the judicial ambit.⁷⁷

Or, one might retreat more selectively, distinguishing between two-party cases and aggregate cases. While sanctioning two-party settlements⁷⁸ on the grounds that they are founded in partici-

⁷⁴ See Resnik, *Judging Consent*, *supra* note 66. See also Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 BOSTON U. L. REV. 1257 (1995) (discussing the difficulties of evaluating settlements and the indeterminacy of most such inquiries).

⁷⁵ *In re Asbestos Litig.*, 90 F.3d 963, 994 (Smith, J., dissenting) (quoting an earlier Fifth Circuit reversal of what Judge Smith described as "Chief Judge Parker's certification of another class action against Fibreboard").

⁷⁶ The practice of using courts to record settlements stemmed from an era when that was one of the few modes of verifying documents and perhaps has outlived its rationale. See Resnik, *Judging Consent*, *supra* note 66, at 50 (reviewing English practice).

⁷⁷ Paul Carrington has argued that the proposal for rulemaking about settlement classes exceeds the authority of rulemakers under the Rules Enabling Act. Paul Carrington, *The Limits of Rulemaking* (Dec. 18, 1996) (manuscript on file with author).

⁷⁸ Multiple party litigation, even when only involving a few rather than thousands of participants, begins to raise questions of the fairness to all participants. See, e.g., *United States v. Martinez-Molina*, 64 F.3d 719, 734 (1st Cir. 1995); *United States v. Daniels*, 821 F.2d 76 (1st Cir. 1987) (both imposing a special obligation to inquire into voluntariness when pleas are part of a "package" agreement); *United States v. Caro*, 997 F.2d 657 (9th

pation and consent, courts might decline to permit settlements in collective actions⁷⁹ on the grounds that non-participants (absentees) can never be bound without their individual consent. A strict version of this argument is that mechanisms for opting out do not suffice to ensure genuine consent and participation, and that opt in provisions should be required; a more forgiving standard would rely on opt out provisions.⁸⁰ While one might further attempt to impose such constraints in only one form of aggregation — mass torts — one would have to be aware of the “portability” of process, that procedures crafted with one set of problems in mind are often generalized and applied to other kinds of cases.⁸¹ Under such rules, the settlement activity thus dislocated would likely not only be in mass torts, but also in other aggregate cases, such as institutional reform, civil rights, and environmental litigation.⁸²

Once again, the issues are whether and how group litigation should be treated differently than individual actions. I do not want so to burden aggregate litigation as to disable it, and I am not optimistic about disabling some class actions while preserving the practice in other arenas. I am left, under the current regime and lacking empirical information to give me confidence that I know the landscape, to urge less celebration of settlement in general⁸³ and even greater caution in the aggregate litigation

Cir. 1992) (discussing the legality of the practice of “package pleas” in which the government conditions acceptance of one criminal defendant’s guilty plea on the agreement of other co-defendants to plead guilty).

⁷⁹ The Prison Litigation Reform Act provides an example of efforts to limit settlements, albeit for different reasons. See *supra* note 14.

⁸⁰ See Issacharoff, *Class Action Conflicts*, *supra* note 26, at 832 (recommending a “strong presumption against any class seeking to be certified under 23(b)(1) as a mandatory class action”). For suggestions that, in mass torts, administrative regimes (also possibly with opt out provisions) could be more responsive to the problems, see Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 367-68 (1996) (proposing that Congress create a statute that permits agency action and that tort litigation be held “in abeyance pending agency action”).

⁸¹ See Resnik, *Procedural Innovations*, *supra* note 12, (describing how judges developed procedures for large-scale litigation and then applied them to “ordinary” actions).

⁸² Moreover, conceptual appreciation for the role of groups may be shifting from an appreciation of the utility of groups as rights-holders to a more individualistic regime. See, e.g., James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996) (arguing that what he terms “group action” is now devalued).

⁸³ See Resnik, *Whose Judgment?*, *supra* note 7; Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RES. 211 (1995).

context. I am left as well with reliance on a regulatory regime, implemented either by statutes or by trial judges scrutinized by appellate courts. The purposes of such regulation would be to impose a host of burdens on lawyers who propose to represent aggregates or individuals within aggregates and on judges who preside in such cases. And, I am left to criticize both the current and the proposed revision of Rule 23,⁸⁴ as well as the MDL statute and many other forms of aggregation, none of which detail either judicial or lawyer obligations at the time of settlement. I suggest that more be said — again either by means of rulemaking or by doctrine.

Judges should be obliged to structure settlement negotiations (*ex ante*) and to evaluate settlements (*ex post*) in all aggregates, be they called class actions, MDLs, consolidations or whatever. As Denny Curtis, Deborah Hensler, and I have suggested, judges should require the many lawyers within aggregates to participate in negotiation processes to enable the diverse interests within the group to be plain.⁸⁵ And before judges approve agreements, they must be provided with information about their facets. Specifically, the terms of settlements should include estimates of what individual members of the class are likely to receive, when such remedies will be provided, and with what costs for their distribution. If categories of class members are to be treated differently, those disparities should be plain to all presented with a proposed settlement, as should be explanations for the variations suggested. Further, participants should be informed of the fee and cost arrangements not only between defense and plaintiffs, but among plaintiffs' lawyers, including any objectors who enter the fray.⁸⁶

Two issues require amplification. First, hearings on the quality of settlement should not occur without sufficient time for notice to be disseminated,⁸⁷ for discovery (either of the underlying

⁸⁴ Here specifically, the suggestion of altering Rule 23(e) by adding the requirement that the trial court hold a hearing before compromise or dismissal. See *Proposed Rule 23*, *supra* note 1, 167 F.R.D. at 560.

⁸⁵ Resnik, Curtis, & Hensler, *supra* note 43, at 891-96.

⁸⁶ Some of these suggestions parallel those of Judge Schwarzer, who has suggested that Rule 23(e) be amended to require exploration of these issues. See William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995).

⁸⁷ New technologies offer the possibility of notice programs to enable pre-settlement

case or of the decisionmaking that produced the proposed settlement), and for the production of sufficient information for the court and the class members. In some instances, objectors to settlements have not been permitted to depose settlement proponents. Judges should not permit suspension of the discovery system in the federal rules, and purported needs for "fast track" treatment should be carefully scrutinized. Proponents of settlement should be required to present data (obtained by sampling or other techniques) on the kind of injuries suffered by the class and on the distribution of such injuries. Moreover, questions of inter-class equity should not be postponed to some fictive later stage: disclosure of methods of allocation of funds or other remedial forms must be provided prior to the approval of a settlement.⁸⁸

Second, as Dennis Curtis, Deborah Hensler, and I believe,⁸⁹ too little attention has been paid to how attorneys and judges distribute the costs of aggregation — both in terms of lawyers' fees,⁹⁰ the expenses (sometimes denominated "costs") charged directly by lawyers to clients outside the fee,⁹¹ and the adminis-

participation and to make more successful post-settlement distribution of funds. See, e.g., Joseph M. Fisher, *Internet Seen as Means of Providing Legal Notice*, NAT'L L.J., July 11, 1996, at C3.

⁸⁸ One litigation raising such issues is a proposed "mandatory" settlement of a part of the Orthopedic Bone Screw Products Liability Litigation, now pending. See *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014 (E.D. Penn. 1997); Pretrial Order No. 724 (Preliminary Approval Order) (on file with the author) (ordering a fairness hearing on a proposed mandatory class action and of a proposed settlement); the proposal did not include information on the amounts likely to be paid to individuals nor the sums for administrative or attorney fees. The fairness hearing began on April 23 and 24, 1997 and resumed on May 19, 1997.

⁸⁹ Resnik, Curtis, & Hensler, *supra* note 43, at 321-26 (describing the creation of "ad hoc law firms" when judges appoint a group of attorneys to work as members of a PSC).

⁹⁰ For recent decisions addressing these issues, see *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1036, 1045 (S.D. Ohio 1996) (rebuffing a PSC's "crescendo of hyperbole" that its "fee award is so low that it sounds 'a death knell to the expeditious resolution of 'complex litigation'" and awarding \$10.25 million plus expenses as well as the right to apply for future fees); *In re Thirteen Appeals Arising Out of the San Juan Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995) (reversing a district court's decision to award 70% of an attorney fee fund to PSC members and concluding that IRPAs and PSC members should each receive 50% of an attorney fee fund, but that all common benefit work, provided by any lawyer, be paid out of the 50% paid to the PSC).

⁹¹ See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220 (1st Cir. 1997), *pet. for reh'g pending* (affirming in part an award of more than \$10 million in expenses to a PSC but requiring that the PSC remit more than \$1 million in charges for an attorney de-

trative expenses resulting from the fact of aggregation.⁹² In some cases, in which layers of lawyers (individually-retained plaintiffs' attorneys and lead counsel appointed by the court) work, clients may find themselves paying two sets of "costs" as well as paying fees to two sets of lawyers, those personally retained and those designated by the court. The litigants, the judges, and the public must understand more about these costs before courts approve the settlements. In contrast, in some of the current settlements, class members know nothing or little of the terms — of recovery or costs and fees — to which they are asked either to assent or to object.

In short, judges should scrutinize all proposed settlements of aggregates, be they in classes long, recently, or concurrently certified, or in consolidated or MDL proceedings. And, when judges have little information about the underlying injuries or distribution of harm, more information should be demanded as a predicate to approval.

But as I propose thickening information and process, let me sound neither cheerful nor naive. Everyone is an interested actor in this story — litigants, lawyers, guardians ad litem, special masters, court-appointed experts, testifying witnesses, litigant activist groups, objectors, judges. Not only do these participants have specific stakes in particular cases, many are repeat players, whose incentives are framed by events beyond the case at hand. Yet to describe the participants as "interested" is not to condemn them all as either noxiously self-interested or enmeshed in collusion. Rather, I think a good many judges, lawyers, and other participants, in both state and federal courts, are struggling with misery that they see around them and are trying, in a world of second-best responses, to do something useful in the face of huge problems.

Of course, some lawyers are making lots of money; some defendants are seeking to protect themselves from liability and

scribed as an expert and for payment of photocopying at \$.25 per page).

⁹² The case law is sparse; thus far, the district judge presiding has substantial discretion. See, e.g., *In re Three Additional Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 93 F.3d 1 (1st Cir. 1996) (upholding a district court order requiring reimbursement of \$41,500 by each of 13 insurance companies; despite the insurance companies' success on summary judgment, the court concluded that they had benefitted from a case management system including a document depository).

avoid the expenditure of their own assets, and some settlements are unwise and unjust. I am all for watching the money, for figuring out ways to regulate both fees and costs, and for exacting scrutiny of dealmaking. But the dislike of particular egregious high visibility cases should not be the sole engine that drives our processes. The landscape is richer than that, and I know there is more to know about class actions than what newspapers (themselves also with and responding to agendas⁹³) report. Some of the class-wide settlement efforts are borne from deep distress at both the justice and the efficiency of the individuated regime, in which some litigants have lawyers and some do not; some make it to court and others never file; some receive payment and others either lose or settle too quickly.

All of us who think about class actions or other forms of aggregation must confront that aggregates range in size, in kinds and values of claims, in dimensions of legal and factual complexity not easily mapped in the current iterations; and moreover the variations are always and unendingly changing. Whether a critic or celebrant of any particular practice or set of practices, all of us need attend to a phrase found in the Fifth Circuit's opinion in *In re Asbestos*, which describes one set of lawyers as having an "inventory of some 45,000 present claims."⁹⁴ The first, obvious point is one of sheer wonder: What does it mean for a law firm to have 45,000 clients? Surely whatever has been meant by the attorney-client relationship is not captured in that nexus. But before rebellion takes hold, consider also what would happen to those forty-five thousand people were they not collected in some kind of joint framework.

My point is not that *In re Asbestos* is a good or a bad settlement; I don't know. My point is that — however we name it — we must think about the group of individuals that comprise those affected by that settlement — *as a group*. We have to wor-

⁹³ See, e.g., Claudia MacLachlan, *Meritless Class Suits: A New Focus*, NAT'L L.J., Aug. 5, 1996, at A9 (describing the announcement by the Chrysler Corporation of a "clearing-house" to "gather information on meritless [class action] suits and the lawyers who file them").

⁹⁴ *In re Asbestos Litig.*, 90 F.3d 963, 971, *reh'g denied* 101 F.3d 368 (5th Cir. 1996), *petition for cert. filed sub nom. Ortiz v. Fibreboard*, 65 U.S.L.W. 3611, No. 96-1379 (Feb. 27, 1997).

ry about inter-claimant equity, about current and future claimants, and about a system that has yet to provide redress to so many.⁹⁵

One option is to revolt against the developments of the second half of the twentieth century: to reject consent as the preferred mode of resolution, to insist on an adjudicatory regime, to rewrite rules of procedure to revalorize adjudication and trials, to create new court structures and new judges. While such a project has my sympathies, I think it unlikely to happen soon. And, in the interim, within the procedural world currently constructed — with its too few judges, too expensive lawyers, and preferences for settlement — let class actions come within these strictures and let us try to craft protections to mitigate against the miseries.

⁹⁵ At the AALS session in which Professors Issacharoff, Oakley, Green, and I first presented our comments, Professor Robert Bone commented on this aspect of the problem: that the difficulty of assessing settlements stems in part from the need to ascertain what trade-offs among class members are permissible. Association of American Law Schools Section on Civil Procedure, Program of Jan. 6, 1997, transcript at 55 (on file with the *U.C. Davis Law Review*). A predicate question, constantly haunting class settlements in which liability is capped, is the issue of whether scarcity (a "limited fund") in fact exists or whether the cap is provided in exchange for settlement and a more rapid distribution than might otherwise have occurred. *Id.* at 57-59. To the extent such deals are appropriate, the ability to implement them — to distribute funds rapidly — becomes all the more salient.

APPENDIX*

JUDITH RESNIK
Visiting Professor of Law
New York University School of Law

JACK COFFEE
Adolf A. Berle Professor of Law
Columbia Law School

January 2, 1997

The Honorable Paul Niemeyer
United States Court of Appeals for the Fourth Circuit
Room 740
101 West Lombard Street
Baltimore, Md. 21201

re: Additional Comments on
Proposed Changes to Federal
Rule of Civil Procedure 23

Dear Judge Niemeyer:

You had asked us to provide you with joint commentary — outlining our areas of agreement about settlement classes and offering language for proposed changes to Rule 23 that take into account our different concerns. Below, we do both. Please note that we address here only the issue of settlement classes and do not reiterate the concerns we have about the proposed balancing test set forth in 23(b)(3)(f).

* [This letter, sent by Professors Coffee and Resnik to the chair of the Advisory Committee on the Civil Rules, is reprinted with the permission of both authors.]

OUR SHARED ASSUMPTIONS

Although we have somewhat divergent views about settlement class actions, we in common recognize that there is a serious potential for abuse associated with them (particularly in cases involving future claims). At the same time, we do not believe a broad prophylactic rule, prohibiting settlement classes when an action cannot be certified for trial, is necessary. Thus, we offer below a possible compromise that attempts to protect against these abuses without adopting an overbroad prohibition.

At the outset, however, we should also note that we both object strongly to the proposed formulation of 23(b)(4). The text now states:

"the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial."

The rule should not suggest that the possibility of a settlement class *depends* upon the fact of pre-negotiation of a proposed settlement, nor should the rule *encourage* the behavior that is most problematic: inviting small collectives of plaintiff and defendant lawyers — before a class action has been filed or certified — to negotiate among themselves and to present the court with an agreement that could then bind absentees. Such negotiations proceed without any court having determined that the lawyers acting are in fact adequate representatives for the class they plan to represent, without notice to anyone beyond a small group that negotiations have commenced, and in many instances, without the development of sufficient information by means of discovery.

Such an invitation creates incentives for behavior that is the center of criticism of settlement classes: the fear of collusive bargaining in which lawyers profit to the detriment of class members or one set of claimants benefit to the detriment of co-claimants.¹ Once such "deals" are made, those affected are presented with the choice either of opting out, which is often im-

¹ See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

practical in practice, or of accepting the agreement. Reshaping of such settlements, if it happens at all, tends to be at the margins.

Instead of encouraging interactions among self-selected attorneys, the rule should sort out the problems posed when certifications are presented jointly by attorneys for plaintiffs and defendants. The rule should also address the distinct question of cases in which class status may be appropriate for the pretrial, litigation and possibly settlement process, but it is not known, at the time of certification, whether class certification is proper for trial. Finally, the rule should require court scrutiny of all class settlements to try to guard against abuses that have become apparent, particularly in mass torts.

Below we provide proposed language. Our proposal entails what we take to be an intermediate approach; we do not ban settlement classes in all forms but impose standards by which to assess their propriety.

Two other introductory remarks are in order. First, some may object that our rule places more burdens on negotiators of proposed settlements than does the current draft. As was discussed at the hearings, because these proposals emphasize the desirability of a broad array of participants, the development of a comprehensive information base, and more exacting scrutiny of proposed settlements, it may make more difficult the process of achieving settlement in some cases. On the other hand, it will also enable some settlements that might not have occurred and make better (we hope) the quality of the settlements proposed. Second, we have not provided what an ideal, final drafted version would contain. Our draft is meant to convey the concepts and not to represent the final drafting language in which the rule would be expressed. What this draft provides are the principles that are at the core of a revision that we can support.

THE PROPOSED LANGUAGE

Proposed 23(b)(4)

(4) the court finds that provisional certification under subdivision (b)(3) for the purposes of litigation or settlement would constitute a fair and efficient method by which to advance the

resolution of the dispute, and such certification is requested either:

A) by the plaintiffs, who seek certification but are not able to establish that they can meet all the requirements of 23(b)(3). When making such a provisional certification, the court shall:

i. indicate that the proposed certification is conditional and for litigating purposes only ("litigating certification");

ii. make specific findings as to which requirements of subdivision (b)(3) it finds satisfied, unsatisfied, or to which it reserves judgment;

iii. require that members be notified of the limitations placed on the certification. Should defendants or class members object, the court shall provide a hearing, after notice, on the issue of the propriety of certification. After such a hearing, the court may alter the certification and/or appoint additional representatives, a guardian ad litem, or employ other procedures to ensure that all interests within the class are adequately represented during the litigation process.

iv. either upon motion of the parties or sua sponte, revisit the certification and alter it, either by decertifying the class, recertifying it under subdivision (b)(3) or (b)(4)(B), or by creating subclasses for certification as it deems appropriate; or,

B) jointly by one or more of the defendants to the action and by a plaintiffs' steering committee, appointed by the court, even though all of the requirements of subdivision (b)(3) might not be satisfied for the purpose of trial. Before certifying such a provisional class, the court shall:

i. make specific findings as to whether each of the requirements of subdivision (B)(3) are satisfied;

ii. if one or more of the requirements of subdivision (b)(3) are found not to be satisfied, determine whether any discrete subcategory of class members would be likely to obtain a superior result (via settlement, trial or other form of disposition) in another available forum or proceeding (including actions pending or to be commenced in the foreseeable future). In so determining, the court

shall consider whether similarly situated individuals have obtained superior results in the past in other proceedings; whether individual or representative litigation in the future in other proceedings constitutes a viable alternative for most of the class or an identifiable subcategory thereof, whether delay is likely to affect materially the effectiveness or enforceability of any judgment or remedy, and other factors (including the availability of counsel) bearing on the ability of class members to receive just and fair treatment. If the court determines, either before or after certification, that one or more discrete subcategories of class members would likely obtain or has obtained a superior result in another forum or by means of another procedure, the court shall exclude such subcategory from the certified class; and

iii. determine and make specific findings as to whether a need exists for subclasses, special counsel, guardian ad litem, or other additional procedures are needed, because of the potential differential in impact of any proposed settlement upon class members or because of the need for negotiation among subcategories as to the allocation of any proposed settlements.

C) When considering the request to approve a class action settlement, and whether the class is certified pursuant to 23(b)(3) or 23(b)(4), the court has fiduciary obligations to protect the interests of absentees. Prior to approval of any proposed settlement, the court shall require that the parties requesting the settlement provide the court with detailed information about:

i. the means by which the lawyers seeking to represent the plaintiffs came to engage in negotiations with lawyers seeking to represent defendants;

ii. the degree to which the proposed settlement treats all members of the class equally or, if distinctions are made, the bases on which such distinctions are claimed to be proper;

iii. the means by which the remedial provisions shall be accomplished;

iv. why it is in the interest of the members of the proposed class action to accept the proposed settlement in

lieu of either individual litigation or other forms of aggregate litigation, in either state or federal court or in an administrative proceeding;

v. information, if available, about the amount of compensation, including costs and fees, provided to the attorneys representing the class and the relationship between that compensation and that received by class members;

vi. information about payment of fees or costs associated with special counsel, guardians ad litem, court experts, objectors, or others;

vii. information about the methods by which other lawyers, if any represent individual class members, shall be compensated (including fees and costs) and the amounts of such compensation; and

viii. such other information as the court deems necessary and appropriate.²

A PROPOSED ADVISORY COMMITTEE NOTE

Under this subdivision, a court may consider two kinds of certification not provided for in 23(b)(3) — certification of classes in which, at the time of certification, it is not yet known whether the case can proceed through all phases, and particularly through trial as a class action ("litigation classes") and certification of classes jointly requested by lawyers for plaintiffs and defendants (and often, but not exclusively, including proposed settlements as well).

The purpose of litigation classes is to enable an initial exploration, on notice to affected parties, of the possibility of a group-wide disposition, either through the pretrial process or via settlement. Building on the model of the multi-litigation statute, 28 U.S.C. § 1407, a litigation class permits discovery and exploration of settlement on a class wide basis, but only upon notice to affected members and opponents. This rule revision is proposed to complement the spirit of other rules involving parties, specifically Rules 19 and 24, which endeavor to enable participation of

² The provisions we have proposed for 23(b)(4)(C) could alternatively be placed in an expanded 23(e).

litigants with somewhat divergent interests within a single lawsuit. The rule revision is also designed to make the practice in class actions accord with that in other aspects of civil litigation, namely that few cases are in fact disposed of by trial but many proceed through pretrial litigation under the aegis of amended Rule 16. The proposed amendment to Rule 23 places burdens on judges to ensure that those affected by such litigation are adequately represented throughout the pretrial process, and further requires judges to revisit the question of certification when appropriate.

The other kind of certification contemplated by the rule is that requested jointly by plaintiff counsel, seeking to represent a class, and one or more of defendant counsel, joining in that application. A common form of such requests is that of the settlement class, in which a certification of a class is a means to implement a settlement but the findings in 23(b)(4)(B) should be made whenever the court has reason to believe that the requests for class certification and for approval of a settlement are linked. Given contemporary concerns about such cases (see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995)), the rule imposes higher burdens on such joint certification requests, including that courts determine whether subclasses should also be certified to ensure that all of the interests of class members are adequately represented within the litigation structure and that those affected either legally or practically by a judgment are either appropriately represented or beyond the scope of any proposed judgment.

As used in subdivision 23(b)(4)(B), the term "superior result," achieved "via settlement, trial or other form of disposition," requires the court to consider more than a comparison of the likely monetary results of the pending action as compared with likely results in another forum (e.g., an individual action in state or federal court, an administrative remedy, other forms of aggregate litigation, formal or informal, in state or federal court). In class actions involving monetary recoveries, the court should also evaluate how proposed recoveries will be funded (including the adequacy of insurance coverage) and whether relegating class members to individual actions, to multi-district litigation, or to other processes will give such class members viable remedies, if

liability is established, against defendants who are likely to remain solvent in the foreseeable future. When evaluating non-pecuniary aspects of proposed settlements, the court should evaluate carefully the actual utility of those proposals and the means by which they will be provided to class members. If the court finds that identifiable groups of class members have a viable and established remedy by means of processes other than a settling on certification class, the court shall consider the effect of divesting class members of such remedies by approving of the proposed certification. In short, this comparative analysis requires the court not only to consider the class and settlement proposed simultaneously but the other options practically available to class members, the incentives of the litigants and their attorneys to proceed by means of a class as compared to those other ways, and the availability of counsel and of access to such other fora. The question before the court is whether there are better ways to respond to the alleged injuries of the plaintiffs than by means of a settlement class action or whether, under the particular circumstances of a specific case, such a certification is appropriate.

When certified under any provision of 23(b), the provisions of 23(f) that permit discretionary appeals apply. Judges considering certifying litigating classes may take into account the concerns either that class certification inappropriately creates undue pressures to settle or, alternatively, inappropriately undermines the authority of the class representatives.

Classes certified for litigation and those certified at the behest of both plaintiffs and defendants should be accompanied by notice to class members, thereby enabling the development of information relevant to the settlement negotiations and relevant to the propriety of maintaining the class certification.

The proposed revision also provides for the appointment, by the court, of more than one kind of representative or lead counsel and the utilization of an array of lawyers and others to ensure a process of litigation and negotiation that will, in turn, facilitate the district judge's task in considering the adequacy of proposed settlements, if any result, and will assist the judge in the discharge of his/her fiduciary task of monitoring the class representatives. "Judging" consent — evaluating the reasonableness, adequacy, and fairness of an agreement — is a very diffi-

cult task. See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL FORUM 43. The proposed language provides the framework by which judges are to discharge their fiduciary obligations to the absent members of the class. Because this proposal anticipates that more lawyers may participate in the pretrial proceeding and in the negotiations, judges should — in cases involving court-awarded attorneys' fees and costs or when approving settlements that provide for fees and costs — consider awarding or requiring that attorneys' fees be paid to a wider array of lawyers than those designated as attorneys for a class, those on a Plaintiffs' Steering Committee, in other "lead counsel" positions. See Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996). The new language expressly calls for information to be provided to the court about the proposed compensation, including costs and fees, for all lawyers, be they class representatives, individually-retained attorneys, objectors, or others.

While the standards for considering of settlements filed concurrent with requests for certification do not preclude so-called "futures" classes per se, the standards require close scrutiny by the court of the treatment of all segments of a class when settlements are proposed.

The court should ensure an inclusive array of representatives during the course of class action litigation but should also guard against the risk that small segments of class members or their attorneys might attempt to exert control over the shape of a settlement in a fashion that proves detrimental to other, and possibly, most, members of the class. The requirement of disclosure of all fee and cost arrangements, including those among plaintiffs' lawyers as well as between plaintiffs and defendants, is aimed at enabling the court to assess the interests of all participants and the degree to which specially-identified participants (lead counsel, PSC members, special counsel, objecting counsel, defense counsel, etc.) represent the interests of the disputants.

CONCLUSION

We have erred on the side of being comprehensive in terms of our explanation, our draft, and our notes. We would be happy to meet with you to discuss means by which we could shorten these proposals or otherwise redraft them. We remain willing to help the Advisory Committee in any way that is useful to you.

Thank you for consideration of these comments.

Sincerely,

Judith Resnik
Visiting Professor of Law, NYU School of Law
40 Washington Square South
New York, New York 10012
telephone: 212 998-6307
fax:212 995-4763

Jack Coffee
Adolf A. Berle Professor of Law
Columbia Law School
435 W. 116th Street
New York, New York 10027
telephone: 212 854-2833
fax:212 854-7946

cc: Professor Ed Cooper, Reporter to the Advisory Committee

Postscript: *Amchem Products, Inc. v. Windsor*

On June 25, 1997, as these essays were en route to publication, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor*.[†] Given that case's prominence in the discussion of settlements of class actions, the U.C. Davis Law Review has asked each of the authors to provide a few comments. Professor Issacharoff has incorporated his comments into his Article;^{††} while both Professors Green and Resnik wrote short essays, reproduced below.

* * * * *

A Post-Georgine Note

Eric D. Green*

Although the Supreme Court in *Amchem Products, Inc. v. Windsor*¹ upheld the legitimate role of settlement as a factor in class action certification decisions, at the same time it appears to have sounded the death-knell for mass tort class actions (whether settled or litigated) under the current version of Rule 23.

In a six person majority opinion by Justice Ginsburg, the Court held that the "predominance" requirement of Rule 23(b)(3) requires a close look at the legal and factual issues of

[†] 117 S. Ct. 2231 (1997).

^{††} See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997).

* Professor of Law, Boston University.

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

each class member's case preexisting any settlement to determine if the proposed class is "sufficiently cohesive to warrant adjudication by representation."² The majority concluded that the factors relied upon by the District Court in satisfying the predominance requirement — "the class members' shared experience of asbestos exposure and their common interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system," and "the settlement's fairness" — did not satisfy the Rule's requirements. These benefits might be "fit for legislative consideration," the majority stated, but were *not* "pertinent to the predominance inquiry."³ Put another way, the majority concluded that the benefits of the settlement relied upon by the District Court to satisfy the predominance requirement may bear on the Rule 23(e) fairness requirement, but were irrelevant to the separate requirements of Rule 23(b)(3):

But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.⁴

The majority accepted the Third Circuit's view that the Center for Claims Resolution's settlement of "future" asbestos claims could not satisfy the predominance requirement of Rule 23(b)(3) because of the different time, period, and manner in which class members were exposed to asbestos-containing products; differences in their injuries; differences in their likely medical needs and costs; and differences in their cigarette smoking histories. The majority also noted that differences in state laws "compound these disparities."⁵

Moreover, the majority also rejected the district court's approval of the "adequacy of representation" requirement of Rule 23(a)(4) because, in its view, the interests of those class mem-

² *Id.* at 2235.

³ *Id.*

⁴ *Id.* at 2249-50.

⁵ *Id.* at 2250; *see Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996).

bers who were currently injured conflicted with the interests of exposure-only plaintiffs whose injuries might manifest later. Representation of both types of victims among the named plaintiffs was not sufficient to satisfy the Rule, according to the majority, because each named plaintiff "served generally as representative for the whole, not for a separate constituency." The majority cited with approval the Second Circuit's requirement for subclasses in such a situation.⁶

Finally, the majority expressed reservations over the adequacy of notice to persons with "no perceptible asbestos-related disease at the time of the settlement." Although the majority did not have to rule definitively on the notice issue in this case, given its rejection of the class on predominance and adequacy of representation grounds, it is clear that it was troubled by the inherent difficulty in alerting uninjured individuals, including family members with unripe consortium claims, to the terms of the settlement.⁷

In light of these concerns, it is apparent that few, if any mass tort classes (especially those involving exposure-only victims), could meet the majority's interpretation of Rule 23(b)(3)'s predominance test or Rule 23(a)(4)'s adequacy of representation test in either a settlement or trial class action. The majority implied as much when it stated that although the "predominance requirement is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws," "caution" in certifying a class action is called for "when individual stakes are high and disparities among class members great," as in mass torts.⁸

Moreover, as the dissent points out, the requirement of appointment of subclasses during the negotiation phase of mass tort settlements has problems of its own and can create enormous costs, including exhaustion by protracted litigation.⁹ Indeed, in a mature litigation in which the landscape is littered with the bankrupt bodies of many major defendants, the

⁶ *Id.* at 2251; see *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), modified on reh'g sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993).

⁷ See *Amchem*, 117 S. Ct. at 2252.

⁸ See *id.* at 2250.

⁹ *Id.* at 2255-56 (Breyer, J., concurring in part and dissenting in part).

balkanization of a large class of toxic tort victims into several or more subclasses seems a prescription for heightened conflict as opposed to efficient resolution.¹⁰

The majority left the door open a crack for class action treatment of mass disaster cases (such as an explosion or plane crash), perhaps, but appears to have slammed it shut for mass torts involving multiple impacts or exposures. However, the Court was also at pains at virtually every important point in its opinion to distinguish the *Amchem Products* Rule 23(b)(3) class action from the *Ahearn* Rule 23(b)(1)(B) class action,¹¹ which it subsequently remanded to the Fifth Circuit for reconsideration in light of its decision in *Amchem Products*.¹²

The resounding rejection of the class action in *Amchem Products* is ironic because the Court was unanimous in disagreeing with the Third Circuit on the specific question on which certiorari was granted: whether settlement should be taken into account when looking at the requirements of Rule 23(a) and 23(b)(3). The majority stated without quibble that "settlement is relevant to a class certification," and that the Court of Appeals' opinion "bears modification in that respect."¹³ Yet even though "that court should have acknowledged that settlement is a factor in the calculus," the majority did not remand for application of the correct legal standard, as Justices Breyer and Stevens in

¹⁰ The majority opinion closes with the concession that a nationwide administrative claims processing regime would probably provide the most secure, fair, and efficient means of compensation for asbestos victims. But the majority acknowledges that Congress has not adopted such a solution and its decision forecloses the ability of courts to establish such a structure under Rule 23. A practically oriented person, such as a district court judge faced with thousands of asbestos cases, might reasonably ask what alternatives this leaves her with. The majority suggests "less bold aggregation techniques, including more narrowly defined class certifications." 117 S. Ct. at 2252. Those who have struggled first-hand with the asbestos litigation problem for more than a short time are likely to find this suggestion naive at best, and cruelly disempowering and dismissive of workers' health, safety, and welfare interests at worst.

¹¹ See, e.g., *id.* at 2250 n.19. The majority noted that, unlike *Ahearn*, the *Georgine* settlement involved no "limited fund" that implicated Rule 23(b)(1)(B), which contains no predominance requirement. *Id.*

¹² See *Ortiz v. Fibreboard Corp.*, 117 S. Ct. 2503 (1997); *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997) (the "*Ahearn* litigation").

¹³ See *Amchem*, 117 S. Ct. at 2248.

dissent would have done. The majority felt that the appeals court "homed in on settlement terms in explaining why it found the absentees' interests inadequately represented."¹⁴

The majority provided future guidance on a district court's role in ruling on a request for settlement-only class certification, holding that "a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial."¹⁵ On the other hand, the majority stated that "other specifications of the rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context" because of the inability to "adjust" the definition of the class during subsequent litigation activities.¹⁶ Thus, settlement counts, but not one-way:¹⁷ it could cut in favor of certification or against it. The crux, however, is that district courts should focus on whether there is sufficient "class cohesion that legitimizes representative action in the first place" — prior to settlement, not after.¹⁸

In a concurring and dissenting opinion, Justices Breyer and Stevens agreed with the Court's basic holding that settlement is relevant to class certification, but faulted the majority for not giving sufficient weight to settlement-related issues on the predominance requirement, and for substituting its determination for that of the District Court on the adequacy of representation and notice issues. Specifically, Justices Breyer and Stevens questioned how the majority could say that settlement counts in reviewing class certification, and then dismiss the effect of settlement when focusing on the predominance question. But the dissent's most trenchant criticism was of the majority's substitution of its own fact-based determinations for those of the District Court, without the benefit of review by a court of appeals employing the correct legal standard.¹⁹ They would have remanded for reconsideration by the appeals court, applying the correct legal test and an abuse of discretion standard.

¹⁴ See *id.* at 2247.

¹⁵ See *id.* at 2248 (citing FED. R. CIV. P. 23(b)(3)(D)).

¹⁶ *Id.*

¹⁷ *Id.* at 2248 n.16.

¹⁸ See *id.* at 2249.

¹⁹ See *id.* at 2255-56 (Breyer, J., concurring in part and dissenting in part).

Accepting the central points on which the majority and dissent agreed — (1) settlement is a relevant factor in reviewing class certification, and (2) settlement is not a one-way street; “proposed settlement classes sometimes warrant more, not less caution on the question of certification” — the majority’s decision that “the requirements of Rule 23 . . . cannot be met for a class so enormously diverse and problematic as the one the District Court certified”²⁰ is puzzling. In the context of a settlement class, as opposed to a class action that must be litigated (if settlement is relevant, then at least it means that this context is the relevant procedural status in which to think about the certification question), why should the predominance requirement of 26(b)(3) mandate consideration only of ex ante common legal and factual issues? And why should problems with adequacy of representation doom the settlement rather than being grounds for remand and further consideration?

If the explicit language of the rule does not compel these interpretations, then protection of what values and whose rights does? Certainly not the settling defendant’s rights, nor the values typically protective of unimpaired, competently represented defendants. This was a settlement. The defendants in *Amchem Products* voluntarily settled and were vigorously defending the settlement. If any defendants are protected by *Amchem Products*, it is non-settling defendants in mass-tort cases who fear any kind of aggregation, especially class actions, beyond almost any other procedural device. Certainly the interests of the trial court and the values of sound judicial administration do not compel these interpretations. The trial court conducted extensive hearings on the request for certification and determined that the requirements of the rule were satisfied, that the settlement was fair, reasonable, and adequate, and that class settlement was the superior method of resolution.

This leaves the plaintiff class members. But assuming the adequacy of notice, a class member could freely choose to remain in the class or opt out if the class member felt that the settlement was not in her interest, or simply wanted an individual trial in which all of the particular pre-settlement legal and

²⁰ Id. at 2249 n.17 (emphasis added).

factual issues pertaining to the class member could be aired in isolation. Again, assuming the adequacy of notice, the majority's approach appears to give inadequate weight to all the common benefits of settlement that the non-opt out members of the class must be presumed to have considered and found to outweigh any individual factors and the benefits of separate or even subclass representation. The "cohesion" and "unity" among class members, demanded by the majority, is supplied by the voluntary participation in the common benefits of settlement of the non opt-outs after considering the risks of going it alone.

Arguably, the flaw in this analysis is assuming the adequacy of notice and the effectiveness of the opportunity to opt out. The hearings of the Advisory Committee on Civil Rules, chaired by Judge Niemeyer of the Committee on Rules of Practice and Procedure of the Judicial Conference, in considering the proposed amendments to Rule 23, have "renewed more philosophical questions as to the proper role of Rule 23."²¹ Central to this debate are questions whether a class should be opt out or opt in, and the adequacy of notice. Opt out was the decision when Rule 23(b)(3) was adopted in 1966, with the Reporter to the Committee, Ben Kaplan, suggesting that it would take a generation to acquire enough experience to learn the consequences. The recent Advisory Committee Minutes observe:

In a world of perfect communication, there would be no difference between opt out and opt in. Each class member would actually receive notice, would fully understand the nature of the litigation and the consequences of being in the class, would form a sophisticated judgment as to the desirability of being in the class, and would opt in or opt out as the rule might demand. All the testimony, however, confirms the Committee's sense that there is an enormous difference between opt in and opt out. The "default" mechanism is vitally important.²²

The Advisory Committee indicated it would be taking a closer look at this question in future hearings, but the rule as it now stands employs the notice and opt out approach. The majority

²¹ Draft Minutes, Civil Rules Advisory Committee 12, II. (May 1-2, 1997), reprinted in Proposed Rules: Amendments to Federal Rules, Amendment to the Federal Rules of Civil Procedure 23, 931 F. Supp. CLV, CLXXXVIII (1996), 167 F.R.D. at 550-51.

²² *Id.* at 12-13, II., 167 F.R.D. at 565-73.

in *Amchem Products* chose to base its rejection of the class certification on the predominance and adequacy of representation requirements rather than face the notice issue head on. Arguably, the majority got it upside-down. In the context of the settlement of a costly and vigorously contested litigation, such as the asbestos litigation, adequate notice and an effective right to opt out cures whatever ails the class with respect to the predominance calculus and the varying interests of differently injured class members.

If the Court had to decide the certification question on the notice issue, the result might have been the same. However, a decision on that basis would appear to give more appropriate weight to the settlement context and would shift the focus to improving notice to satisfy constitutional and rule-based requirements, including the possibility of a "back-end opt out." Such an approach would also have kept alive the possibility of garnering the experience to which Professor Kaplan alluded in the context of mass-tort settlement classes, a potentially valuable procedural device for large numbers of victims of mass torts. Most importantly, perhaps, it would have placed the onus on the district courts (rather than the courts of appeal, the Supreme Court, or the rules committees, as favored by the majority) as the part of the judicial system closest to the problem and arguably most competent to deal with it, to devise fair and effective structures and procedures to respond to modern mass litigation with modern procedures. On this issue of institutional power and competence, the majority and dissenting justices clearly disagree.

Postscript: The Import of *Amchem Products, Inc. v. Windsor*

Judith Resnik*

What had been known as "*Georgine*" has turned — with the issuance of the Supreme Court's opinion — into "*Amchem*"; a brief summary of the decision and a few additional comments are thus in order. When presented with a district court's certification and approval of a nation-wide asbestos current and "future" claims settlement, the Third Circuit held that class certification had to be considered "without taking into account the settlement."¹ Finding an absence of commonality and typicality between the named representatives and the class, and concluding that class treatment was not superior because the case "could not be tried," the Third Circuit reversed both the district court's certification and its approval of the settlement.²

In its June 1997 decision, *Amchem Products, Inc. v. Windsor*, the United States Supreme Court both agreed and disagreed with the Third Circuit.³ While affirming the Third Circuit's judgment, the majority (written by Justice Ginsburg on behalf of six members of the Court) rejected the Circuit's view that class certifications could only be made upon a finding that all of Rule 23's criteria for certification were met "as if the case were going to be litigated."⁴ The Court expressly "modified" that

* © 1997 Judith Resnik.

¹ See *Georgine v. Amchem Prods., Inc.* 83 F.3d 610, 623, 626 (3rd Cir. 1996).

² *Id.* at 631-34.

³ 117 S. Ct. 2231 (1997). Two days later, the Court vacated the Fifth Circuit's decision in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), and remanded it for consideration in light of the decision in *Amchem*. See *Ortiz v. Fibreboard Corp.*, 117 S. Ct. 523 (1997); *Plausagan v. Ahearn*, 117 S. Ct. 523 (1997).

⁴ *Amchem*, 117 S. Ct. at 2243. Here, I would propose substituting the word "tried" for the term "litigated." See Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 848-51 (1997). Because the Court determined that, despite the Third Circuit's statement that it considered the proposed certification independent of the proposed settlement, the Third Circuit had "in fact" considered the terms of the settlement when evaluating whether Rule 23's criteria were met, the "Third Circuit's appraisal is essentially correct," and its decision was therefore affirmed. *Amchem*,

formulation by concluding that "settlement is relevant to a class certification,"⁵ and should be considered as a "factor in the calculus" when a court determines if the criteria for certification under Rule 23(a) and (b)(3) are met.⁶

The Court's posture towards the "settlement factor" is made complex by its agreement with the Third Circuit that the fairness of the settlement could not be used to justify certifying a class⁷ and by its discussion of how an agreement to settle may weaken a class's bargaining position.⁸ Justice Breyer, joined by Justice Stevens⁹ (both of whom concurred and dissented) complained: how does one acknowledge the fact of a proposed settlement without using that settlement in part to ascertain what links and what divides a proposed group under conditions of settlement?¹⁰ The majority's response was that it was explicating the text of Rule 23, which speaks of "claims and defenses," and hence of what legal or factual arguments would be raised in litigation.¹¹ While not directly addressing how affirmatively to use a proposed settlement,¹² the majority's rejection of the as-

117 S. Ct. at 2249.

Justices Breyer and Stevens, concurring and dissenting, parted company with the majority's willingness to rely on the circuit's opinion, believed by them to be "infected by a legal error" (specifically, the refusal to consider the settlement as relevant to certification). The concurrence argued that, rather than rule on the certification, the Court should have remanded so that the circuit could, under an abuse of discretion standard, reconsider whether the district court's certification and approval of the settlement had been proper. See *id.* at 2253 (Breyer, J., concurring in part and dissenting in part).

⁵ *Amchem*, 117 S. Ct. at 2248.

⁶ *Id.* at 2249. Further, the Court found that, in settlement classes, "a district court need not inquire whether the case, if tried, would present intractable management problems, see FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial." *Id.* at 2248.

⁷ *Id.* at 2249.

⁸ *Id.*

⁹ Justice O'Connor did not participate.

¹⁰ "How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow?" *Amchem*, 117 S. Ct. at 2254 (Breyer, J., concurring in part and dissenting in part).

¹¹ See *id.* at 2249 n.18 (also referring to Rule 24's criteria for permissive intervention).

¹² Arguably the Court required heightened scrutiny. Rejecting the Third Circuit's attention to manageability at trial, it stated that

other specifications of the rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceed-

bestos certification rested primarily on insufficient showings of the predominance of common issues and of adequacy of representation; also mentioned were problems of notice.

In the course of its ruling, the majority recounted the history of the 1966 revisions of Rule 23 to underscore that (b)(3) classes were the "most adventuresome" innovation¹³ and that this kind of class had been crafted not for mass torts, but to enable access to courts for small claims in which individual recoveries would provide too little incentive to sue.¹⁴ Indeed, the majority reminded its readers of the 1966 Advisory Committee's note, which cautioned against mass-tort class actions but did not prohibit them. As the majority explained, the use of Rule 23 in such torts has increased in the last decade.

The majority offered two cautions of its own. First, the Court charged district judges with making a serious inquiry into the cohesion of a proposed class. Be it at settlement or prior to litigation, a district court faced with a proposed class had to insist on "unity" of class members to ensure sufficient representation that permits absentees to be bound.¹⁵ That litigants shared an interest in settlement was insufficient; they had to share law or fact to "assure the class cohesion that legitimizes representative action in the first place."¹⁶ The Court criticized the proposed asbestos class for its "sprawling" array of members,¹⁷ for the "disparity" between claimants currently injured and those who had been exposed to asbestos but who exhibited no symptoms as yet, and for the "diversity within each category."¹⁸ Given the divergences, the Court objected to the absence of "structural assurance of fair and adequate representation"¹⁹

ings as they unfold.

Id. at 2248.

¹³ *Id.* at 2246 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969)).

¹⁴ *Id.* (citing and quoting both Kaplan, *supra* note 13, and *Mace v. Van Ru Credit Corp.*, 109 F.3d 938, 944 (7th Cir. 1997)).

¹⁵ *Amchem*, 117 S. Ct. at 2248. For decisions rejecting class certification and invoking *Amchem*, see, e.g., *Kane v. United Indep. Union Welfare Fund*, 1997 U.S. Dist. LEXIS 10534 (E.D. Penn. 1997).

¹⁶ *Amchem*, 117 S. Ct. at 2249.

¹⁷ *Id.* at 2250.

¹⁸ *Id.* at 2251.

¹⁹ *Id.*

but did not specify what those structures might look like. Second, the Court warned that "judicial inventiveness" was limited by the text of Rule 23, produced by the structure of rulemaking process; judges were not "free to amend a rule outside" that process.²⁰

The two opinions in *Amchem* diverged, not only on how to use a proposed settlement "as a factor," but also on which way the factor might cut and on which level of judge (trial or appellate) had the most authority to make that judgment. The majority called for some kind of special scrutiny of class certifications when settlement was in the offing²¹ and charged the concurrence with appearing to argue that the settlement could be used to support a certification;²² Justice Breyer responded that the fact of a proposed settlement added information about the degree of divergent or common interests.²³ He also objected to what he termed the "tenor" of the majority's opinion that "seems to suggest that the settlement is unfair";²⁴ he instead was more "agnostic" on the quality of the settlement and wanted to defer a conclusion pending additional proceedings.²⁵

In the short term, *Amchem* directs district judges to insist that members of classes be linked in a variety of ways other than sharing in a settlement, to be leery of mass-tort aggregates with widely varying degrees of injury and differing forms of exposure, and to search for means of creating subclasses when possible. Further, by refusing the Breyer formulation that many of the decisions within Rule 23 fall under the umbrella of factfinding deserving of deep deference to the district court, the majority gives broad power to appellate courts to oversee district judges' judgments.

The opinions in *Amchem* thus echo the problems — and the lack of ready solutions — that haunt courts in the United States in the late twentieth century. First, group processing of claims is unavoidable when similar problems present themselves; contem-

²⁰ *Id.* at 2248.

²¹ *Id.* at 2248 n.16 ("For reasons the Third Circuit aired, . . . proposed settlement classes sometimes warrant more, not less caution on the question of certification.")

²² *Id.*

²³ *Id.* at 2255 (Breyer, J., concurring in part and dissenting in part).

²⁴ *Id.* at 2252.

²⁵ *Id.* at 2256.

porary litigation abounds with efforts to devise modes of aggregate decisionmaking, and while the Court did not use *Amchem* to endorse the large tort aggregate, neither did it prohibit exploration of more appropriately grouped claims.²⁶ Second, settlement has strong appeal; none of the justices in *Amchem* wanted to disown its function.²⁷ Third, settlement has become a state of being (like being injured), which could provide some (unspecified) bases for unifying dispersed individuals. Fourth, the quality of settlements is always a worry. The two opinions in the Court offer both sides of whether the underlying agreement was fair ("good" might be the better descriptor) and reflect the ever-present question: fair or good (in terms of both outcome and process) as compared to what? What percentage of these individuals would have received what form of recovery in what time period under the settlement? What percent of these individuals will receive compensation, in what form, without the settlement? What did the absentees think of the settlement proposal and of the processes from which it derived? What will those who do receive compensation in the future understand about their rights and the processes provided by the United States to hear their claims? None of us know.

²⁶ The case can be read more or less broadly; while some commentators see it as closing down mass-tort class actions, I do not read it to do so. However, as the Honorable Lisa Hill Fenning suggested to me, after *Amchem*, bankruptcy becomes an appealing alternative, although not one that eliminates the problems of identification and representation of absentees. See, e.g., *Epstein v. Official Comm. of Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995); *Kewanee Boiler Corp. v. Smith*, (*In re Kewanee Boiler Corp.*), 198 B.R. 519 (Bankr. N.D. Ill. 1996); *Fairchild Aircraft Corp. v. Campbell* (*In re Fairchild Aircraft Corp.*), 184 B.R. 910 (Bankr. W.D. Tex. 1995).

²⁷ The role of settlement in a subset of civil litigation — involving constitutional or statutory rights — has become more complex. Congress has limited its utility in the prisoners' rights context, see Resnik, *supra* note 4, at 838 n.14, and on the same day that *Amchem* was decided, four members of the Court objected to a settlement in a voting rights case. A majority of five upheld the settlement, concluding that a district court was not obliged to adjudicate liability before settlement of such issues. See *Lawyer v. Dep't of Justice*, 117 S. Ct. 2186 (1997). Justice Souter, on behalf of Chief Justice Rehnquist and Justices Stevens, Ginsburg, and Breyer, explained that "[i]n most civil litigation, and in this suit in particular, 'the judicial decree is not the end but the means. . . . The real value of the judicial pronouncement — what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion — is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.'" *Id.* at 2194 (quoting *Hewitt v. Helms*, 482 U.S. 755 (1987)).

Finally, the settlement of absentees' claims (be they "future" or "present" claimants) remains the hardest case; what lawyers and judges can do to ease the angst is to rely on process. For Justices Breyer and Stevens, the process can be provided by district judges "thoroughly familiar with the facts [and] charged with the responsibility of ensuring that the interests of no class members are sacrificed"²⁸ and superintended to some extent by an appellate court under a forgiving abuse of discretion standard. In contrast, for the majority, both levels of judges need supervision by a rulemaking process that confines their discretion and curbs their inventions.²⁹

The Court in *Amchem* has thus remitted the questions discussed in this symposium to two avenues — to local decisionmaking in specific litigations if the sites are small and sufficiently discrete, and to rulemakers (judicial or congressional) when the boundaries of the aggregate widen. In aggregates framed narrowly or plainly linked (by a mass disaster such as an airplane or train crash or by use of a very particular product), class certifications and settlements may be used to fashion mini-administrative regimes to process a bundle of claims. But when the aggregate purports to achieve "global" settlement via its own "global" proportions, judges will have to pause before blessing the proffered agreements. By recounting the history of the 1966 revisions of Rule 23, by citing the judiciary's calls for a legislative solution to asbestos litigation, by warning against extra-rule inventions, by invoking process as the source of "legitimacy,"³⁰ the majority has expressed its hope for collective rulemaking and has refused ad hoc solutions. As such solutions have not yet come from Congress, the Advisory Committee's current review

²⁸ *Amchem*, 117 S. Ct. at 2256 (Breyer, J., concurring in part and dissenting in part).

²⁹ As is evidenced by my initial comments and the draft rule that Jack Coffee and I prepared, I am obviously sympathetic to the majority's call for structure and its insistence on recognition of "diversity" and "disparity" within an aggregate. See Resnik, *supra* note 4, at 858-59, 866-72.

³⁰ Justice Ginsburg's opinion opens with the sentence: "This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class action certification sought to achieve global settlement of current and future asbestos-related claims." *Amchem*, 117 S. Ct. at 2237. The decision closes with discussion of the calls for a "nationwide administrative claims processing regime," but notes that Congress has not created one and Rule 23 "cannot carry the large load" of such a scheme. *Id.* at 2252.

of Rule 23 provides an important occasion in which to offer structure, to face the diversity of interests and individuals within an aggregate, and to insist on judicial oversight of interests of absentees, even at the expense of some settlements.