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ARTICLE

AGGREGATION AND SETTLEMENT OF MASS TORTS

EDWARD H. COOPER[†]

INTRODUCTION

It is the way of symposia that, after conveners assign topics for discussion, participants interpret those topics to cover subjects that interest themselves. I understand my assignment to be discussion of "nonbankruptcy closure" and "settlement." The Judicial Conference Working Group on Mass Torts suggests possible approaches that might facilitate closure of mass tort claims by litigation or by settlement.¹ This paper will explore two models prepared to illustrate the challenges that confront any approach to fair and efficient closure. The first model is the "All-Encompassing Model,"² while the second is a draft of settlement-class provisions for Federal Rule of Civil Procedure 23.³ Before exploring the models, however, I will consider many of the doubts provoked by reflecting on the Working Group's experience. These are equal-opportunity doubts. There are powerful reasons to doubt the virtues of individual litigation of individual claims that arise out of a mass tort. These reasons support exploration of mass aggregation and mass settlement. At the same time, there are powerful reasons to doubt the virtues of mass aggregation and mass settlement. These reasons support the argument for making only modest changes or none at all.

In the end, there will be no firm conclusion. Indeed, not even the doubts will be expressed in firm or fully developed terms. The issues raised in this debate go to the core of adversary civil litigation. They also test tort doctrine for nonintentional wrongs, the multifarious

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¹ The efforts of the Working Group are presented in ADVISORY COMM. ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999) [hereinafter REPORT ON MASS TORT LITIGATION].

² See *id.* app. F-7 (All-Encompassing Model).

³ See *id.* app. F-5 (Settlement Classes).

character of state tort law as applied to conduct and injuries that span the nation, the role of federal courts in choosing and applying state law, the practices of representation that have substituted for individualized litigation, and more. Our received traditions in all of these areas are treasured, and properly so, but none of them fares well when subjected to the test of mass tort litigation.

Only drastic remedies offer hope for effective change. Even those who are prepared to accept drastic changes, however, may draw back from predicting the benefits that would justify the costs. We may be better advised to pursue small changes, anticipating only small benefits. All that is offered here is support for the argument that the changes that might achieve a coherent system are indeed drastic. In some measure, these doubts carry over even to the modest goal of facilitating the hope for global peace through settlement by revising Federal Rule of Civil Procedure 23 to address the problems that thwarted two brave attempts to establish massive asbestos settlements.⁴

There is a particular reason for setting a high threshold of justification for changes by statute or court rule. Both with and without resort to Rule 23, state and federal courts, prodded by lawyers for plaintiffs and defendants, have proved remarkably inventive in addressing the demands of mass torts. Stratagems accepted as routine today would have been dismissed as unthinkable a scant decade ago. Although founded in part on court rules and statutes, the evolution has been very much a common-law process. It is often observed that each new mass tort presents different problems, requiring different procedural solutions than any of its predecessors. If that is so, it may be better to leave judges free to adapt to the challenges without interference from statutes and rules framed for the last war by Congress and the rulemaking committees. There is a risk that lower courts, confronted with overwhelming burdens, may act from expediency rather than principle. Yet there is a hope that new principles will emerge from their inventive adaptations.

One last prefatory caution is in order. In talking about mass torts, it may seem desirable to offer a definition of the subject. One of the two words, "tort," is easy. This discussion does not involve every conceivable injury within a broad concept of tort law. We are talking

⁴ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 2323 (1999) (rejecting a class action certification as failing to satisfy the requirements of a Rule 23(b) limited-fund class action); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (rejecting class certification as failing to satisfy the predominance and adequacy of representation requirements of Rule 23).

about injuries at the center of traditional tort doctrine: personal injury and substantial injury to physical property, real or personal. The wrongs defined by modern regulatory legislation—antitrust, securities, and the like—seem different. And even with personal injury, we are seldom dealing with wrongs that are intentional in any but a very refined sense. The second word, “mass,” is not so easily defined. It is possible to pick a numerical threshold, and that may be desirable for reform legislation. The number is likely to be rather high. Two hundred and fifty actions arising from common facts, or one thousand, may be handled by the collective resources of state and federal courts without significant disruption. But something more than the impact on the judicial system must affect the choice of a number. It must also take account of the impact on the tort claims. The broad model described below would have drastic consequences indeed, affecting choice of forum, choice of law, aggregated disposition, and more. Large numbers should be required for this sort of approach. Even for aggregated settlement, many models entail similar consequences in gentler guise. The more drastic the consequences that flow from a mass tort characterization, the greater the care needed in framing the definition.

I. THE DOUBTS

A. Individual Adjudication of Tort Claims

We ask a great deal of tort theory and judicial institutions in tort litigation. When considering aggregating devices as mechanisms of tort reform, it is important to ask whether, if we had judicial resources for the task, it would be better to enable every plaintiff who wishes to do so to sue independently and to sue as many times as there are defendants to sue. Many arguments favor this result. The force of these arguments is augmented by the weight of tradition.

Traditionally, the plaintiff begins by choosing a court. The rules of subject-matter jurisdiction, coupled with the reality that most of the central defendants in mass torts are corporations, often give a choice between state and federal courts. Adept framing of the litigation can lock the case into federal court. As between state courts, contemporary views of personal jurisdiction and venue often give a substantial range of choice as well. This choice can be exercised to tactical advantage by considering such matters as local aggregation practices (including settlement), jury proclivities and the degree of judicial control, choice-of-law rules, docket congestion, and attorney conven-

ience. Often, putting aside constraining class action practices, the individual plaintiff chooses when to bring suit, whom to associate as co-plaintiffs, and whom to make defendants. Individual plaintiffs also can choose whether to push for prompt disposition and early relief, whether to emphasize liability or damages, how to pursue discovery, and—often above all—what terms to accept in settlement.

Apart from the effects of these many and elusive choices on outcome, we celebrate the “process values” that go with individual control. The sense of participation and control are believed to affect the level of satisfaction or dissatisfaction with litigation and the acceptability of the process. We tend to focus on plaintiffs in praising these values, perhaps in part because we—some of us, at any rate—do not care as much about the process-value experience of corporate defendants, and perhaps in part because we believe that defendants who face many adversaries can achieve a substantial measure of participation and control in aggregated litigation in ways that individual plaintiffs can not.

Frank discussion of the charms of individual litigation adds values that represent escape from the cold rationality of legal rules. As to most issues in mass torts, the burden of persuasion will be stated as a preponderance of the evidence. The preponderance of the evidence, however, is an extraordinarily fluid standard that is shaped by many subtle factors. The context of specific parties and injuries may have a powerful impact on the willingness of either judge or jury to accept a given level of uncertainty. This flexible response to factual uncertainties joins with equally flexible response to legal uncertainties. Fault, contributory fault, causation, as well as the fancier frills that may decorate tort theory, all bend to individual factors. Such adaptability seems to some to speak ill of the institutions that administer our law, but to many it represents a triumph of justice over law.

This summary recital of the advantages of individual litigation would read to many observers as a recital of disadvantages. To take one narrow illustration, defendants bewail the opportunities plaintiffs often enjoy to select a court, while plaintiffs decry the occasional opportunities that defendants seize to defeat that initial choice. When dealing with individualized events that involve no more than a few people, nonetheless, these concerns have not led to any general change or prospect of change.

Dissatisfaction with individual adversary litigation of tort claims takes on a new tone when addressed to mass torts. With essentially unique events, we have few ways to measure the correctness of judg-

ments. It is relatively easy to take it on faith that most judgments are wise. Mass torts, however, support frequent repetition of the litigation experiment. Frequent repetition invites inconsistent results, both on the merits and in measuring damages.⁵ The inconsistencies, moreover, are confused by the efforts of both plaintiffs and defendants to manipulate the results by jockeying to bring to trial the cases that seem most favorable as measured by fact, sympathy, law, and tribunal. The inconsistency and manipulability of results leads to regular debates about "maturity." It is regularly suggested that a mass tort becomes mature only through a substantial number of individual trials. When the results begin to converge, maturity is reached and values are established. Until then, the fear is that a single adjudication cannot reliably resolve all claims. The value of repose justifies acceptance of the first fair trial of an individual claim, but not of many claims.

Quite a different challenge to individual litigation asks whether individual plaintiffs always enjoy truly individual representation. There are, to be sure, some attorneys and firms who limit their involvement in mass tort litigation to representation of a small number of clients, treating each case in much the same way as the same number of unrelated cases would be treated. Many plaintiffs, however, come to be represented by a small number of specialized firms that represent enormous "inventories" of clients. This broad-scale common representation is seen as another form of aggregation, and a form that operates free of the procedural safeguards that surround formal aggregation. Under this view, aggregation is a fact and individualized representation for individualized litigation is largely a myth. The only meaningful questions go to the forms of aggregation.

These doubts about the institutional and procedural capacities of courts commingle with doubts about our abstract tort theories. In part the doubt is whether our institutions and procedures are able to

⁵ An intriguing perspective on this variability is suggested by a footnote in the *Amchem* opinion. In recounting the Third Circuit's opinion, the Supreme Court commented on the wide variations in the factual circumstances and legal rules encountered by individual asbestos class members. The footnote records the objectors' assertion that the statewide average recovery for mesothelioma victims in California is \$419,674, more than double the maximum specified in the settlement for any but "extraordinary" mesothelioma claims. See *Amchem*, 521 U.S. at 610 n.14. For class action practice, the obvious question is whether distinctions must be drawn among class members, either in settlement or adjudication, depending on their propensity and ability to sue in high-verdict states. For purposes of reflecting on the consequences of individual litigation, the observation is more datum than question—similarly situated victims do indeed receive different levels of compensation in different courts, even when there is no identifiable difference in defining the elements of compensation.

administer our abstract tort theories, either in individualized torts or in mass torts. The administration problems raised by mass torts, however, also raise substantive questions about the theories themselves.

Another doubt peculiar to mass torts is the frequently expressed fear that "premature" aggregation will create a mass tort where more sober procedures would show that none exists. One version of this fear is that a few plaintiff victories in unusually sympathetic cases brought in particularly favorable forums will stampede many claimants into premature filings, intimidate courts into aggregation, and force capitulation. A more sensible process of repeated trials of typical cases might reveal that there is no mass of victims.

Mass torts do not seem to have much effect on the substantive doubts about the tort theories that define liability-creating conduct. Negligence, product-liability, environmental contamination, and like theories are challenged and defended on essentially the same grounds. New point is given, however, to the rules that focus on victims. The point often is made in addressing the "predominance" requirement for certifying a class under Rule 23(b)(3). Questions of causation, plaintiff fault, and damages are treated as unique to each plaintiff, and to predominate over common issues of the defendant's responsibility. We are driven to ask, however, whether these distinctions really should be made, at least when common injuries are inflicted on thousands, tens of thousands, or even greater numbers of victims. Why, for example, should the "make whole" view of tort law award more money to the victim who enjoyed the fortune of making more money, and thus suffered the misfortune of losing a greater stream of future income? How can we possibly presume to distinguish the value of the anguish, pain, suffering, and like intangible injuries of victims who have suffered the same physical impairment? Why should we care that, statistically, smokers are more likely to be injured by asbestos exposure than nonsmokers? If we cannot trace the causal connection with respect to a particular plaintiff, why take account of the statistical probability—unless it is to support a contribution claim on an aggregated basis by asbestos defendants against tobacco manufacturers? As measured by these traditional notions, it is indeed "weird" that a settlement of blood-solids litigation should award \$100,000 to each victim without accounting for any of these distinctions;⁶ a less

⁶ Chief Judge Posner observed of the settlement: "That *all* the members of the class should receive the *identical* payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird." *In re* Factor VIII or IX Concen-

tradition-bound view might see the result as profoundly wise.

Substantive doubts about tort doctrine bear on aggregation in another way. Different state-law systems threaten to destroy the commonality that supports aggregation, whether by class action or other device. If we become impatient with these obstacles, it is easier to subordinate state-law differences to achieve the advantages of aggregation.

B. *Aggregation*

Aggregation has many advantages. It offers promise of "a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a 'mass tort.'"⁷ At least after "maturity" has been achieved, there is a single determination for all parties. The single determination avoids the inconsistencies that arise from separate adjudications, achieving the like treatment of like claims that eludes us, at times as to liability and inevitably as to remedies, when we cling to individual litigation. A once-for-all-who-remain adjudication can command litigating resources and judicial attention in a way that may enhance the prospect of fair disposition. Even if the result is no more fair—if, indeed, even uniformity generates as much unfairness as fairness—it may reduce drastically the costs that attend individual litigation.

The costs of aggregation vary with the form. Voluntary small-scale consolidation by permissive joinder or similar procedural devices presents few problems. Aggregation by inventory was noted earlier. Aggregation by consolidation of actual cases actually filed may seem the next, more coercive step. The effect of consolidation, however, is little different from class certification if any substantial number of actions are involved.

Opt-in class aggregation offers an alternative that has found little support. The possible advantages are considerable. An opt-out class imposes a burden on the unwilling; the burden includes responsibility to read, understand in a sophisticated way, and respond to the opportunity to request exclusion. The level of informed consent represented by a failure to opt out is likely to be as high in body-injury mass torts as anywhere, but still leaves much to be desired. A claimant who has an attorney may not be given sound advice about the opt-out deci-

trate *Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998).

⁷ Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 947 (1998).

sion and many claimants—particularly those who have only “future” claims—may not have attorneys at all.

An opt-in class, on the other hand, involves only those whose consent is as real as the consent that personal injury victims give to much of anything in the course of litigating their claims. The class can be certified on terms that avoid many of the problems of an opt-out class, including specification of a choice of law, methods for compensating both class counsel and counsel for those who opt in, methods for resolving individual issues, and so on.⁸ An opt-in settlement class might have particularly attractive advantages. The class would in effect involve an offer to settle extended to all victims after negotiation by representatives whose skills and result are likely to be respected. The central objection to this procedure seems to be that it would not work. Too few claimants would choose to opt into a litigation class, and too few would choose to accept the offer of settlement by intervening. The pragmatic view is that a settlement offer would be viewed as a new floor, assuredly available to anyone who fails to opt in but supporting more favorable terms for most. Even a litigation class would have the same effect: No one would opt in, expecting that any class victory would establish a similar floor for later settlements.

Broader and more coercive forms of aggregation entrench the disadvantages that must be set against the potential advantages. Most apparent are the loss of individual control and the risk that the efficiently achieved and uniform result will be wrong. Defendants frequently complain that there is no chance of winning on the merits—even a defendant willing to risk the full damages liability that would follow a fair adjudication of liability will settle for fear that the sheer mass of self-identified victims will overwhelm reason and force a finding of liability. The rewards of successful broad aggregation, moreover, encourage a race to aggregate first, or at least to bring the first aggregated action to judgment.

Class action aggregation emphasizes the problem of conflicting interests among plaintiffs. The problem exists in any aggregation, but is highlighted by Rule 23 requirements. A searching inquiry into potential conflicts could easily lead to so many subclasses as to defeat any

⁸ An opt-in class model was included in a comprehensive draft of a revised Rule 23 prepared for the Civil Rules Advisory Committee in 1996. See 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 55, 57, 76-78 (May 1, 1997) (setting forth prerequisites for opt-in classes, and discussing, in the draft notes, the values of opt-in classes as well as their attractiveness to litigants when compared opt-out classes).

hope of either global settlement or a single trial. Conflicts will exist based on differences in extent and character of injuries, optimal choice of law, comparative responsibility, causation, and other easily identifiable positions. Individual victims, given free choice, likely would differ as well with respect to more elusive choices of litigation tactics, most particularly settlement. Workable control over a comprehensive consolidated proceeding is likely to be achieved only by resolutely ignoring many of these conflicts. This result can be achieved by pretending that the conflicts do not exist, by asserting the advantages of efficiency and discounting the importance of the conflicts, or by forthrightly concluding that many distinctions drawn by traditional tort rules for individualized litigation do not justify recognition of an "interest" that defeats aggregation. With a choice-of-law question, for example, it can be asserted that all relevant laws are essentially the same, that the differences are too trivial to upset efficient disposition, or that the differences do not justly warrant different treatment—that like treatment should be accorded victims from all states.

A very special problem of conflicting interests arises from the desire to defer aggregation to the point at which a mass tort has matured through the pretrial, trial, and settlement of an informative number of individual actions. The lawyers best equipped to manage the later aggregated litigation are those who brought the dispute to maturity. They are the ones we want. The anticipation of aggregation, however, may make it difficult to handle the individual actions without regard to, and distortion by, the anticipated future proceedings. The steps taken to settle individual-client asbestos claims in preparation for settlement of a broad class claim provide a familiar example.⁹

Repeated aggregation of different mass torts creates risks of a different sort. Depending in part on the means of aggregation, mass torts may come to be dominated by a small number of specialized and well-financed lawyers, litigating before a small number of specialized judges. The results may be similar to the problem of "regulatory capture." All participants know what to expect, and they expect to repeat the strategies that have brought resolution in the past. Tactics may be shaped by the expectation that all players will meet again in future and different mass tort actions. Settlements in particular may reflect

⁹ See, e.g., *Ortiz*, 119 S. Ct. at 2318 (noting the conflict of interest for attorneys who represented both the plaintiffs involved in the litigation and members of a settlement class of pending claims whose payment depended on the resolution of plaintiffs' claims).

received traditions and the expectation of future negotiations.

Finally, effective aggregation presents severe challenges to received notions of federalism. The challenges are illustrated by the features of the proposed "broad aggregation" model. Stated simply, most courts are excluded from the action. Choice-of-law traditions are ignored. Common appeal control is asserted even when the aggregation court invokes the assistance of other courts. These challenges will seem daunting to some, but trivial to others. They are explored in annotating the model.

II. BROAD-SCALE AGGREGATION

Abstract discussion has its charms, but often lacks point for want of focus. A model can help. The following draft is offered for discussion, to concentrate attention on common elements. The draft is far from polished. It incorporates, with only modest revisions, a model that was prepared to stimulate discussions that, perhaps mercifully, never emerged in the several conferences arranged by the Mass Torts Working Group.¹⁰ Although it was not deliberately shaped for shock value, it may have that effect. It offers one view of the level of control that will be required, in some form, if we are to develop a system that permits a "single, uniform, efficient, and fair" adjudication of a mass tort. Many observers will conclude that we cannot possibly accept the sacrifice of traditional values embodied in this model. If they are right, the stage will be set for reducing our aspirations. Rather than seek "closure" on an all-disposing basis, we may face quite different questions about the shape of possibly desirable changes or the need for *any* formal changes in statutes or rules.

Here, then, are the statute and rule that together comprise the model. This model involves both statute and rule because both legislative and rulemaking processes seem appropriate to address different aspects of the problem. Congress must control jurisdiction, as well as many other aspects of the model. The process of the Rules Enabling Act,¹¹ however, is better adapted to the more purely procedural issues. If a comprehensive approach is to be taken to mass torts issues, without simply replacing present state tort law by a wholly new compensation system, some such coordination of legislation and rulesmaking must be achieved.

¹⁰ The original model is set out in the REPORT ON MASS TORT LITIGATION, *supra* note 1, app. F-7.

¹¹ 28 U.S.C. §§ 2072-2075, 2077 (1994).

Broad-Aggregation Model: Sketch

Proposed 28 U.S.C. § 1335A Mass Tort Actions.

- (a) **Mass Tort Action.** A mass tort action is an action filed by any person against whom more than 100 persons have asserted claims aggregating more than \$10,000,000 for personal injury or death, or physical property damage, arising out of a common course of conduct by the person filing the action.
- (b) **Jurisdiction.** A district court has original jurisdiction of a mass tort action arising under this section when any two parties are citizens of different states.
- (c) **Filing and Transfer.**
- (1) A mass tort action may be commenced by filing a complaint with the judicial panel on multidistrict litigation established by § 1407 of this title.
 - (2) The panel must dismiss the action if it is not properly brought as a mass tort action and may, in its discretion, dismiss the action if transfer under paragraph (3) is not desirable.
 - (3) If the panel does not dismiss the action, the panel will transfer the action to a district court or a state court selected by the panel after considering:
 - (A) the capacity of the receiving court to administer the action;
 - (B) the convenience of parties and witnesses;
 - (C) the location of the events giving rise to the action;
 - (D) the sources of law likely to be chosen to govern the claims, issues, and defenses of the parties; and
 - (E) the capacity of the receiving court to supervise proceedings required to resolve issues that affect only individual claimants.
 - (4) The panel may transfer to a state court only if the receiving court is competent under its own law to adjudicate the action, an appropriate state judicial authority agrees to accept the transfer, and the court undertakes to exercise the powers and adhere to the procedures established by this section.
- (d) **Parties.** The complaint in a mass tort action must name as parties-claimant all persons who have or may accrue claims arising out of

the common course of conduct identified in the complaint, all persons who may be liable to these claimants, and all persons who may owe indemnification or contribution to those who are liable to the claimants. The parties may be named as members of classes or subclasses when they cannot be individually identified or are too numerous to be named individually.

- (e) **Procedure.** The Supreme Court of the United States has power to prescribe rules governing the conduct of a mass tort action brought under this section, following the procedures established by § 2073 and § 2074 of this title.
- (f) **Stay, transfer, or dismissal of related actions.**
 - (1) All actions in any state court or court of the United States that relate to a mass tort action must be stayed when notice of a complaint brought under subsection (c) is filed in that court. If the complaint is transferred to a mass action court, these actions, and all later-filed actions that relate to the mass tort action, must be transferred to the mass tort action court if transfer is requested by a party or if transfer is ordered by the mass tort action court or by the court where the action is filed.
 - (2) The mass tort action court may order the stay, transfer, or dismissal of any action in any state court or court of the United States that relates to the mass tort action.
- (g) **Individual proceedings.** Issues that relate only to the specific circumstances of an individual claimant may be resolved by the mass tort action court or may be transferred by the mass tort action court to any court that is competent under its own law to entertain the issues and that is agreed upon by the parties or chosen by the mass tort action court.
- (h) **Additional judges.** The Chief Justice of the United States may designate and assign temporarily any United States circuit judge, district judge, or judge of the Court of International Trade to perform judicial duties as a judge of a district court where a mass tort action is pending. A judge designated and assigned to the mass tort action court acts under the supervision of the mass tort action court, and may exercise the court's authority anywhere in the United States.

- (i) **Personal Jurisdiction.** A mass tort action court has personal jurisdiction over:
- (1) all United States citizens;
 - (2) all persons in the United States; and
 - (3) to the extent consistent with the Constitution of the United States and international law, all persons outside the United States.
- (j) **Choice of Law.** The mass tort action court must choose the law of a single state or country to govern all tort issues not governed by the laws of the United States. The court should choose the law that most nearly reflects the substantive mode of the laws that might reasonably be applied, having regard to:
- (1) the location of the parties' conduct;
 - (2) the habitual residences and places of business or incorporation of the parties;
 - (3) the places where personal injury or physical property damage occurred; and
 - (4) the extent to which the law of each affected state departs from the general mode of the laws of each affected state.
- (k) **Limitations.** A claim for relief arising out of the common course of conduct involved in a mass tort action must be filed within four years from the time the claim accrues.
- (l) **Bankruptcy.** A bankruptcy proceeding in which the debtor is a person against whom a claim for liability, indemnification, or contribution is made in a mass tort action must be filed in the district where the mass tort action is pending and must be consolidated with the mass tort action. If the mass tort action is pending in a state court, the action must be transferred to the district court for consolidation with the bankruptcy proceeding.
- (m) **Appeals.**
- (1) An appeal from an order of the judicial panel on multidistrict litigation dismissing or transferring a mass tort action may be taken to the court of appeals for any circuit where the appellant regularly transacts business or habitually resides by filing a notice of appeal with the panel. Any subsequent appeal from the same order must be taken to the court of appeals desig-

nated by the first-filed notice of appeal.

- (2) The court of appeals for the circuit where a mass tort action is pending in a United States district court may grant permission to appeal an interlocutory order when the court of appeals determines that immediate appeal is likely to advance the orderly administration of the action.
- (3) Sections 1291 and 1292 of this title apply to decisions and orders of a District Court entertaining a mass tort action.
- (4) A final determination by a United States District Court that a party is liable to persons injured by the course of conduct giving rise to a mass tort action is a final determination appealable under § 1291 of this title whether or not a determination of damages is made with respect to any individual claimant. Failure to appeal the determination within the time provided by Rule 4 of the Federal Rules of Appellate Procedure forfeits any right to appellate review of the liability determination.
- (5) If any part of a mass tort action is transferred by a district court to another district court or a state court for final disposition, appeals from orders of the receiving court must be taken to the court of appeals for the circuit of the mass tort action court.
- (6) Appeal jurisdiction over orders and judgments of a state court entertaining a mass tort action following transfer under subsection (c) is governed by state law. If the state court transfers any part of the mass tort action to another court, the decision of the receiving court must be entered as a judgment of the transferring court and any appeal must be taken under the law of the transferring state.

(n) Judgment.

- (1) The judgment in a mass tort action binds all persons made parties under subsection (d).
- (2) The judgment in a mass tort action may be vacated on motion made not less than five years and not more than ten years after the judgment became final by appeal or otherwise. The judgment may be vacated only when newly available evidence establishes the liability for a claim, indemnification, or contribution of a person who was adjudged not liable for that claim, indemnification, or contribution.

(o) **Attorney fees.**

- (1) The court must set fees for an attorney appointed to represent persons suffering death, bodily injury, or physical property damage arising from the course of events giving rise to a mass tort action at a level that is reasonable in relation to the extent and quality of the work performed and the financial risks borne in the course of the representation. The fees may be awarded from any amount recovered or, if no amount is recovered and the court so directs, from the represented persons.
- (2) The court may set fees to be paid by a client for individual representation with respect to a claim that is compensated under the judgment in a mass tort action.

Proposed Rule 23.3 Mass Tort Actions

- (a) **Applicability.** This rule applies to mass tort actions brought under 28 U.S.C. § 1335A. All matters not covered by this rule are governed by other provisions of these rules that are not inconsistent with this rule.
- (b) **Claimants.** A claimant is a person who has suffered, or who in the future will suffer, death, personal injury, or physical property damage alleged to grow out of the course of conduct giving rise to a mass tort action.
- (c) **Claimant participation.** An individual claimant may file a complaint and participate as an individual party in a mass tort action, but may not request exclusion. The court may regulate the participation of an individual claimant by means calculated to serve the uniform, just, and efficient disposition of all claims.
- (d) **Claimant representation.**
 - (1) The court must certify as many claimant classes and subclasses as are necessary to assure representation of all claimants who do not appear individually by a class representative who does not represent significantly conflicting interests. Claimants whose claims have not yet accrued may not be included in a class with claimants who have present claims. When a claim accrues to a member of a future-claims class, that member becomes a member of the most appropriate present-claims class.

- (2) The court must assure that claimants designated as representatives are the most capable representatives available from the represented class or subclass.
- (3) The court must designate counsel for each class and subclass, considering the preferences of the representatives, and taking account of general experience, experience in litigating claims growing out of the course of conduct giving rise to the action, arrangements for fees and expenses, and ability to participate effectively in managing the litigation. The time at which counsel first sought to represent a class is not relevant to designation as class counsel.

(e) Notice.

- (1) Notice of a mass tort action must clearly and concisely describe the course of conduct giving rise to the action, the nature of the claims, defenses, and issues that may be involved in the action, the initial categories of classes established to represent claimants, the right of a claimant to participate as a party, and the stay and transfer provisions of 28 U.S.C. § 1335A(f).
- (2) The person that initiates a mass tort action must:
 - (A) file notice of the mass tort action in all pending actions against that person that grow out of the course of conduct giving rise to the mass tort action; and
 - (B) send notice of the mass tort action by ordinary mail [(i)] to all persons (or appropriate representatives) known to have suffered death, personal injury, or property damage growing out of the course of conduct giving rise to the mass tort action[; and [(ii)] to all persons known to have been exposed to that conduct if past exposure may give rise to future death, personal injury, or property damage].
- (3) The mass tort action court must direct notice to members of each claimant class and subclass by the best means practicable, including individual notice to each member that can be identified through reasonable effort. Notice also must be directed to a central judicial authority in each state, and must be published in suitable popular media at yearly intervals for the duration of the action.
- (4) The cost of notice under Rule 23.3(e)(2) must be borne by the party that initiated the mass tort action. The cost of notice under Rule 23.3(e)(3) may be allocated by the court among the parties other than claimants or claimants' representatives.

(f) Settlement.

- (1) A class or subclass representative may settle class or subclass claims with the court's approval after notice of the proposed settlement is given to class members in such manner as the court reasonably directs and after a hearing.
- (2) Any class or subclass member may object to a proposed settlement. An objector must be afforded discovery reasonably calculated to disclose the course of settlement negotiations and the terms of any incidental agreements or understandings. The court must award as costs the actual reasonable expenses (including attorney fees) incurred to support a successful objection, and may award the actual reasonable expenses (including attorney fees) incurred to support an unsuccessful objection.
- (3) In reviewing a proposed settlement, the court should consider, among other factors:
 - (A) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;
 - (B) the extent of participation in the settlement negotiations by class members or their unofficial representatives, a judge, a magistrate judge, or a special master;
 - (C) the probable outcome of a trial on the merits of liability and individual damages;
 - (D) the total resources available to the parties agreeing to pay money under the settlement;
 - (E) the existence and probable outcome of claims by other classes and subclasses;
 - (F) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants;
 - (G) whether class or subclass members are accorded the right to opt out of the settlement;
 - (H) whether any provisions for attorney fees are reasonable;
 - (I) whether the procedure for processing individual claims under the settlement is fair and reasonable; and

(J) the apparent intrinsic fairness of the settlement terms.

The issues posed by the model can be identified by simple annotation, following the order of the statute and rule.

A. *The Model Statute*

(a) *Mass Tort Action.* The definition of a mass tort may be too broad. As drafted, it requires only that 100 claims have been asserted. Claims do not automatically become actions. Even if the threshold were set at 100 actions, 100 actions involving no more than \$10,000,000 would not be enough to unleash the heavy artillery employed here. The minimum stakes surely should be at least ten times those figures. The problem of framing a statute, however, is to establish a trigger that allows for anticipation of filings yet to come. A relatively low threshold is set in the expectation that litigants will invoke the process only when the anticipated stakes far exceed the threshold, in part because of the expectation that consolidation will be ordered only in such circumstances. The discretion accorded the panel by subsection (c) provides essential support for this low threshold.

The provision for filing by the mass tort defendant is a central aspect of this structure. As drafted, there is nothing that prevents class actions filed by plaintiffs or other forms of aggregation from becoming mass tort actions. It is the defendant's choice whether to invoke this new one-court, mandatory aggregation system. Initiation by the defendant reduces the prospect that a new aggregation scheme will trigger yet another form of premature racing to file.¹² It enhances the prospect that aggregation will await maturity—it does not seem likely that many defendants will want to bring massive aggregation down on themselves without a compelling need demonstrated by large numbers of actions, pending and certainly impending. Nor does it seem likely that a defendant will invoke this system until it seems apparent that it will be defeated in a high proportion of these actions. Concerns about enforcement by entrepreneurial plaintiffs' lawyers are sharply reduced. The companion provision in Rule 23.3 for court appointment of counsel further reduces these concerns.¹³

This draft identifies a mass tort as claims "arising out of a common course of conduct by the person filing the action." That is only a cursory attempt to direct attention to the element of relatedness that es-

¹² See discussion of premature aggregation, *supra* Part I.

¹³ See Rule 23.3(d)(3), *supra* Part II.

establishes one mass tort, not two or more mass torts or a diffuse congeries of individual torts. There is an obvious similarity to such familiar phrases as Civil Rule 15(c)(2)'s "conduct, transaction, or occurrence,"¹⁴ but it is better to avoid adoption of a specific phrase that has a different purpose. Even if the Judicial Panel should come to adopt some test such as the "logical relationship" test used under Civil Rule 13, there will be little harm so long as it is recognized that the driving logic is the logic of aggregating mass tort litigation, not the logic of compulsory counterclaims, crossclaims, or the like.

The mass tort definition does not include any element of dispersion. As drafted, it could reach a series of events, actors, and victims confined entirely within a single state. Reliance is placed on the discretion and common sense of the Judicial Panel in making decisions under subsection (c). Perhaps some express multistate element should be added.

(b) *Jurisdiction.* Subject-matter jurisdiction is rested on "minimal" diversity, requiring only that any two parties be citizens of different states. Minimal diversity seems adequate to the basic task of establishing an Article III foundation.¹⁵ It would be possible to rely instead on the powers to regulate interstate and foreign commerce, to implement the Full Faith and Credit Clause, and conceivably the Fourteenth Amendment.¹⁶ These powers may be needed to justify later provisions of the statute; this draft does not include a recital of the findings about mass torts that would be relied upon to assert these powers. The recital and express invocation of these powers would, however, be useful, particularly to justify the several provisions that depart from current *Erie* doctrine. (The Article III authorization of diversity jurisdiction should be read to support legislation that authorizes, for example, independent choice of law in diversity cases, but there is no reason to fight unnecessary battles.)

(c) *Filing and Transfer.*

(1) *Judicial Panel.* Initial filing is set in the Judicial Panel on Multidistrict Litigation. There is no reason to empower a single district judge to make the determinations required by this scheme, and there

¹⁴ FED. R. CIV. P. 15(c)(2).

¹⁵ See U.S. CONST. art. III, § 2 ("The judicial power shall extend . . . to Controversies . . . between citizens of different states . . .").

¹⁶ See *id.* (extending judicial power to all cases arising under the laws of the United States).

are good reasons to prevent deliberate forum shopping. Those who are nervous about filing an action with a "panel" could be placated by renaming the Panel as the Court for Multidistrict Proceedings.

(2) *Dismissal*. Dismissal is obviously called for if the action does not qualify as a mass tort action. The discretionary power to dismiss is important as part of the initial decision to set an artificially low objective threshold in subsection (a). It is more important as a protection against overuse of broad-scale aggregation. Many alternative forms of aggregation are available between the extremes that recognize only individual actions and mandatory joinder of all present and future victims in a single proceeding. The Judicial Panel will enter this new regime with a wealth of experience with large-scale pretrial consolidations,¹⁷ and will develop comparable experience that should support far more discerning decisions than any statute could dictate.

(3) *Transfer*. Although it seems safe to establish the Judicial Panel as a specialized tribunal to make the consolidation decision, there should be no attempt to make it a specialized mass torts court. The limit of its authority should be selection of a good court. The authority to transfer to a state court is noted in paragraph (4).

The five factors offered to guide the selection of a court are deliberately general. Only one demands comment. The location of the events giving rise to the action is important for functional reasons—the law of that place may be chosen, and the court where the events giving rise to the action took place may be a convenient focal point for gathering evidence. There is also symbolic value in trying a case close to an important center of events.

(4) *State Court*. A state court may be best suited to control the aggregated proceeding. There are far more state-court judges than federal judges. If it is desirable that the law of a particular state apply to all issues, or to central issues, wise adjudication is advanced by courts that can make authoritative pronouncements on that law. There is little reason to suppose that only a federal court can provide the cosmopolitan sensitivity to competing interests required for fair disposition. It would be strong medicine, however, to attempt to draft a reluctant state court into this scheme, and still worse to attempt to define state-court jurisdiction by federal statute. The conditions in this paragraph are designed to ensure that a state court is drafted only if it is competent under its own law, it has agreed to accept the trans-

¹⁷ See 28 U.S.C. § 1407 (1994 & Supp. IV 1998) (authorizing the Judicial Panel on Multidistrict Litigation to transfer cases to a single district for coordinated or consolidated pretrial proceedings).

fer, and it has agreed to adhere to the federal procedure.

The full scheme creates one special difficulty that may arise from an initial transfer to a state court. Subsection (g) authorizes transfer of individual claims to other courts. This power may be indispensable; there may be no individual court that has the resources to try all individual aspects of a mass tort, and there is little reason to attempt to funnel sufficient resources to any single court. Individual trials, moreover, may be much better held in courts convenient to the individual claimants. Subsection (m), however, seeks to establish uniform appellate review even after transfer of individual claims. Transfer of individual claims by a state court may lead to proceedings in state and federal courts in many places. The solution offered in subsection (m) is to bring all appeals back to the state of the mass tort action court, addressing the conceptual problems by directing that decisions of the other courts be entered as judgments of the mass tort action court. This system may be too complicated to be worth the effort. If so, it may be better to delete state courts from the new structure. Still, it seems worth substantial effort to keep them in the statute as potential consolidation courts.

(d) *Parties.* The mandatory joinder provision of subsection (d) is nearly as broad as can be imagined. That is the nature of closure. Full closure can be achieved only by gathering all victims, actual and potential; all “defendants”; and all potential indemnitors and contributors. In addition, full consistency can be achieved only if all of these interrelated claims and demands are resolved by the same tribunal—and even then, full consistency may be difficult to achieve. This is one of the points of particular distress. One court is given authority, out to the expansive personal-jurisdiction limits of subsection (i), over everyone. The patient in Maine, and the doctor who prescribed the diet drug in Maine, may be sucked into litigation in California involving tens of thousands of other parties and massive confusion. The model, in addition, would frequently lead to adjustment of legal relations between these Maine parties by the law of some other state. As drafted, the model would even include as parties the pharmacy and doctor who might in the future be held liable to a plaintiff who has not yet recognized a latent injury. But holding any party out from the consolidation will defeat closure. If the Maine patient is left free to pursue the Maine doctor in Maine, the doctor should not be denied the right to pursue contribution or indemnification from the drug manufacturer. Multiplied by all of the claimants,

potential defendants, and combinations of indemnification and contribution relationships, exceptions would break the system down irreparably. The burden imposed on the individual defendants, moreover, need not be great. The mass tort action court will inevitably remit the individual issues to another court, commonly a court at the location of the individual plaintiff or defendant. Joinder in the mass action is intended primarily to serve two purposes. Joinder enables the mass tort action court to establish an orderly progress from disposition of the common issues to disposition of the individual issues. Joinder also serves as a substitute for an expanded concept of "privity"—such as "virtual representation"¹⁸—to justify binding all parties by the common adjudication of common issues. There is very little real difference between nonparty preclusion and this form of joinder as parties of countless people who cannot effectively participate, but the theory is easier to explain in traditional terms.

The provision for naming parties as classes or subclasses makes no provision for requesting exclusion, and none is provided in the companion Rule 23.3. This provision is not limited to classes of claimants. Classes of intermediaries seeking indemnification or contribution, such as the retailers who are sued for selling a defective product, are also contemplated. It also may prove possible to identify defendant classes. A defendant class might make excellent sense, for example, in a "market-share" liability setting in which many manufacturers made a defective product and it is difficult to identify which defendant made the product that actually injured each victim.

(e) *Procedure.* This specialized Rules Enabling Act is deliberately drafted to adopt the procedures of the original Enabling Act, but to establish an independent rulemaking authority. A court rule governing mass tort proceedings under this statute is not limited by the full sweep of the 28 U.S.C. § 2072(b) restriction that a rule of procedure "shall not abridge, enlarge or modify any substantive right." The attempt to integrate the statute with court rulemaking requires this added degree of flexibility.

¹⁸ CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 18 FEDERAL PRACTICE AND PROCEDURE § 4457 (2d ed. 1992 & Supp. 2000) [hereinafter WRIGHT, MILLER & COOPER] (defining virtual representation as "a theory of nonparty preclusion" which "would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a nonparty").

(f) *Stay or Dismissal of Related Actions.*

(1) *Consolidation.* Consolidation is authorized only when numerous individual actions have already been filed. It would be possible to draft an automatic stay that nullifies any action taken in any independent proceeding after the mass tort proceeding is filed, but such drastic measures do not seem necessary. Little harm will be done if one or more individual actions are brought to a close during the early stages of the consolidation. The defendant that initiates the consolidation has power under the draft to win a stay of any individual action by filing a notice in the court where the action is pending. Other parties will have the same power, somewhat deferred by the need to have notice of the mass tort action.

Consolidation of an individual action into the mass tort proceeding can be accomplished by request of any party, by order of the court where the action is pending, or by order of the mass tort action court.

The test for stay and consolidation is deliberately flexible. It requires only that the action "relate to a mass tort action." This term is broad, but it seems no broader than the mandatory party-joinder provisions of subsection (d). All the independent actions are likely to involve parties and claims that must be made in the mass tort action.

(2) *Other Actions Stayed or Dismissed.* Paragraph (2) confirms the power of the mass tort action court to transfer any related proceeding to itself. It adds the useful power to stay any related action in another court, or to order that the action be dismissed. As drafted, this power literally authorizes the mass tort court to direct dismissal of an action in another state or federal court. If that direct assertion of authority is too much to bear, it might be better to adopt the slightly more deferential—but redundant—procedure of directing transfer to the mass tort action court, to be followed by the mass tort action court's order of dismissal.

(g) *Individual Proceedings.* Centralized determination of common issues need not entail disposition of all individual issues. The proposed system is made much more workable by providing that individual issues can be adjudicated by the mass tort action court or transferred to other courts. In a nationwide mass tort, transfer back to courts in every state is probable. In the alternative, it is possible, although obviously awkward, that transfers will be made to most state courts but not to those that seem particularly suspect to the mass tort action court. A pattern of particularly high or low damages awards in the actions brought to judgment before consolidation is one likely

ground for suspicion.

The advantages of farming out individualized issues cannot be won without risk. One risk is conceptual. Comparative responsibility provides a clear illustration. The determination that a product is defective does not establish any useful basis for comparing the manufacturer's responsibility with the responsibility of any particular person injured by the product. Full trial of the comparison requires full re-trial of responsibility on all sides; it is confusing and stultifying to direct that in the individual proceeding some level of manufacturer responsibility be found even though the evidence seems to indicate there was no manufacturer responsibility at all. This risk might be reduced by retaining decision of the individualized issues in the mass tort action court, although this would require an elaborate administrative system.

Another risk is more practical. The courts that receive the individual actions may not be persuaded by the rulings of the mass tort action court. The appeal provisions of subsection (m) are an attempt to avoid subversion of the mass tort action court's determinations of common issues in the guise of resolving individualized issues. Even if the structure can be built, however, recalcitrant trial courts may find ready ways to defeat effective appellate review.

(h) *Additional Judges.* This provision expands the judicial power of a federal mass tort action court. Other Article III judges may be appointed to the court without limit, and may exercise their powers as judges of the court without even leaving their home bases. There may be some awkwardness in authorizing a single district judge to "super-vise" a large number of other judges, some of whom occupy hierarchically superior positions. The benefits of this scheme, however, seem to justify the potential difficulties. Appointment of additional judges to the mass tort action court may prove an effective alternative to the formal transfer of individualized determinations—proceedings are held in a location convenient to the individual victim, but centralized authority is maintained.

This provision assumes that a state-court judge cannot be assigned, even temporarily, to be a judge in a federal court. For similar reasons, it forgoes any attempt to assign federal judges to state courts, or to assign a judge of one state to a court in another state. It might be possible to overcome the manifold constitutional objections to less timid schemes, but the possibility seems too slender to pursue.

(i) *Personal Jurisdiction.* Full closure dictates personal jurisdiction to the limits of constitutional authority. It is not particularly adventuresome to assume that a United States District Court can assert personal jurisdiction over all United States citizens, wherever they may be, and over all persons in the United States. The provision for other persons outside the United States is a familiar long-arm statute strategy: the statute invokes the limits of constitutional and international law.¹⁹

It may seem more adventuresome to provide similar state-court authority by federal statute. It is a federal tribunal that selects the state court, however, and this added protection should suffice to ensure that a state court can do whatever might be done by a federal court sitting in the same state.

(j) *Choice of Law.* The assumption of this provision is that a single law should govern all the tort issues arising from a mass tort that has spread so wide as to come into this system. That assumption is debatable, but the terms of the debate need not be elaborated here. It is enough to suggest that current choice-of-law theories do not support any argument that there is a single "correct" answer to the choice of law for each individual dispute within the mass tort, and that this correct choice vests a "right" that cannot be undone by a contrary choice. The choice process is much too open-ended, uncertain, and forum-dependent.

The wish for a single law does not dictate that the single law be that of a single state or country. The statute could establish federal substantive rules, although the difficulty of reaching all of the issues that might arise in a mass tort would be formidable. The statute could authorize federal courts to develop judge-made tort law for this purpose, and direct that a state court receiving a mass tort action from the Judicial Panel do its best to follow this federal common law. Alternatively, the statute could direct the courts to develop a "consensus" view of the laws of the several states that might be chosen if a conventional choice of law were made, although that approach could easily generate a combination of doctrines for different issues that no court would embrace as its own. There is no compelling ground to choose one alternative over another. Reliance on the entire law of a single real jurisdiction, however, does provide an external constraint that reduces the danger of an arbitrary set of rules developed for the

¹⁹ Compare this provision with Federal Rule of Civil Procedure 4(k)(2).

ad hoc purposes of a specific case.

The central direction guiding the choice of law is to pick "the law that most nearly reflects the substantive mode of the laws that might reasonably be applied."²⁰ This direction is not as novel as it might seem. The purpose is to decide a set of tort claims, taking account of contemporary perceptions of tort policy. The modal view of state courts provides greater assurance than any loftier theory of the purposes of tort law. In addition, this approach reduces the seeming unfairness that might be found in choosing the eccentric law of one state to govern the many claims that may have tenuous connections to that state. Four paragraphs enumerate relationships to be considered. These criteria are completely unremarkable, unless it is remarkable to omit any reference to the places of the relationships among the parties.

The choice-of-law provision is restricted to tort issues. This term is intended to include invocations of warranty theory to mimic product-liability doctrine. It also is intended to include ordinary tort claims for contribution or indemnification, despite the contractual incidents of such claims. It is intended to exclude disputes about liability insurance coverage. Although it is tempting to designate the law that governs the tort claims to cover insurance disputes as well, that step may do too much violence to the prospect that insurance relationships may involve actual reliance on an expected choice of law.

(k) *Limitations.* The limitations provision is a place-keeper, designed only to identify the question whether a uniform federal limitations law should be substituted for the untidy array of state laws. Simply providing a four-year period from the time a claim "accrues" does not accomplish much. It does establish federal authority to determine when a claim accrues and to establish uniform rules for the doctrines that surround any limitations statute.

Several additional provisions will be desirable. One would address directly the questions raised by future claimants, both those who have been exposed to the circumstances that may cause injury first detectable in the future and also those who have not yet been exposed. The appropriate system might well provide for registration, allowing a person who has been exposed to avoid any future limitations problem without the need to file an action to ensure tolling. The approach to future claimants might be integrated with the party-joinder provisions

²⁰ Proposed 28 U.S.C. § 1335A(j), *supra* Part II.

in subsection (d), which require joinder of every person who “may accrue” a claim. Another provision might wrestle with the problems presented by claims that arose and perhaps expired before the mass tort action was filed: should the federal law, triggered by initiation of the mass tort action, reach back to revive claims barred by state law? It may be important to deal with limitations issues, but it is not clear what provisions should be made.

(l) *Bankruptcy*. The purpose of the bankruptcy provision is simple enough. The liability associated with a mass tort may be associated with the bankruptcy of the tortfeasor or the bankruptcy of a person with a contribution or indemnification obligation to the tortfeasor. The tort liability may be a primary cause of the bankruptcy filing, but it need not be. Whatever the role of the tort liability, it is important to establish common control of the mass tort litigation and the bankruptcy proceedings. When this formal mass tort action procedure has been invoked, it seems best to establish common control in the mass tort action court. Control need not mean everlasting consolidation; it means only that the court can determine the most appropriate course of action free from competition between the tort and bankruptcy proceedings. The provision that the debtor must file for bankruptcy in the district where the mass tort action is pending defeats the venue choices the debtor might otherwise have, but that seems better than the alternative of assigning the mass tort action court to the district that the debtor chooses for the bankruptcy proceedings. Giving free rein to the debtor’s choice of venue before a mass tort action is assigned by the Judicial Panel to a mass tort action court, however, makes sense. The statute might be expanded to provide for assignment of the judge responsible for the mass tort action to the district chosen by the debtor for the bankruptcy proceeding, and to provide that this judge will be assigned to the bankruptcy proceeding.

(m) *Appeals*. Designating the court to hear appeals in mass tort action proceedings is no easy task. It is a fair question whether there should be any opportunity to review an order of the Judicial Panel with respect to initiation of a mass tort action. This draft provides for appeal from an order dismissing or transferring a mass tort action. There is no obvious circuit to choose for such appeals; the draft adopts a common model by allowing the first appellant to choose any circuit where the appellant regularly transacts business or habitually resides. Later appeals go to that circuit. There is no provision for re-

solving apparent dead heats; perhaps the procedures of 28 U.S.C. § 2112 for administrative review should be adapted for this purpose.²¹ It might also be desirable to deny any right to appeal dismissal of a mass tort action by the Judicial Panel. Whether based on discretion or misinterpretation of the statute, refusal to invoke this extraordinary procedure simply leaves matters where they lie under present rules. Rather than prolong proceedings and the resulting uncertainty, the Judicial Panel might well be given the final word. The same argument might be made against any review of an order that establishes a mass tort action, but the consequences seem so grave as to warrant a right to appeal.

Once a mass tort action is assigned to a United States District Court, the ordinary rules of appeal jurisdiction seem adequate to most needs. Paragraph two provides the court of appeals with discretion to permit an interlocutory appeal without certification by the district court, going beyond 28 U.S.C. § 1292(b) in much the same way as new Rule 23(f) does for orders granting or denying class certification. This provision should reduce, and indeed displace, any need for extraordinary writ practice.

Special provision is made for appeal from a decision that determines liability, even though there is no "final judgment" in the traditional sense that damages have been measured and a collectible judgment is entered for at least one claimant. Timely appeal may, and indeed must, be taken from a final determination of liability, or the determination passes beyond any appellate review. The determination of liability is crucial to all that follows. Immediate appeal may be desirable even if all subsequent proceedings will be held in the mass tort action court. Immediate appeal is important if there is any prospect that some part of the remaining proceedings will be transferred to other courts.

Dispersion of individual proceedings from the mass tort action court creates thorny problems of appeal jurisdiction. There is a great risk that appeals to many or all of the circuits, and within many or all state-court systems, could undo most of the gains made in the mass tort proceeding. The answer given here is that all appeals should go to the federal court of appeals for the circuit of the mass tort action

²¹ See 28 U.S.C. § 2112(a)(3) (1994) (providing that if an agency, board, commission or officer receives two or more petitions for review of an order, it must notify the Judicial Panel on Multidistrict Litigation, which randomly selects one court of appeals from those in which a petition for review was filed and consolidates the petitions for review in that court).

court. This answer is not startling when the individual proceeding is held in a federal district court outside the circuit of the mass tort action. It is startling when the individual proceeding is held in a state court. Appellate review through the ordinary state-court processes, followed by certiorari review in the Supreme Court of the United States, however, would not answer the needs of the situation. Review of even a state trial court in any federal court but the Supreme Court will prove unpopular, and will surely encounter constitutional challenges based on the Article III, Section 1 provision for "one Supreme Court."²² The draft remains the first choice nonetheless. It is desirable both to make use of state court capacities to resolve individual disputes and to ensure unified appellate review.

If the mass tort action court is a state court, there is no need to brave the storms of protest as to appeals from the mass tort action court. Appeals can be resolved in the state court system in the ordinary course of state practice. It may be that some states provide inadequate opportunities for interlocutory review, but federal dictation seems too much to bear. There is a problem, however, if the state mass tort action court sends individualized proceedings to other courts. The draft provides a logical solution: all appeals come back to the state system of the mass tort action court. If the logic is apparent, the constitutional challenges are even more apparent. Providing by federal statute that the courts of one state can review the judgments of courts in another state is outside most concepts of our federal structure. Even adoption of this scheme by interstate compact or reciprocal legislation would strain most concepts. And if the individual proceeding is held in a United States court, the prospect that the judgment of an Article III court might be reviewed by a state court is even more unthinkable. At this point the draft can stand only as an illustration of the fully sensible elaboration of the scheme, not a plausible candidate for enactment. Once the Judicial Panel on Multidistrict Litigation transfers an action to a state court, the federal courts and the courts of other states must bow out. The result will be to deter transfer to state courts.

Some formal substitute might yet save the day by facilitating state-court participation on terms that provide common review without the appearance of direct appeal. One form would provide for a limited transfer: the state court accepts transfer for trial of specified issues

²² U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

and then remits the case to the mass tort action court. The mass tort action court could then enter the formal judgment, subject to appeal in its own system.²³

(n) *Judgment.* The object of a mass tort action is to establish final resolution of all claims. This section begins by declaring the binding effect of the judgment on all persons made parties under subsection (d). Because subsection (d) is all-embracing, so is the judgment.

The risk of final resolution, of course, is that it may be wrong. The way of mass tort litigation to date suggests that there is little risk that liability will be improperly denied. Nonetheless, the risk is there. The scientific proof of causation that underlies some mass tort claims has been sketchy, and an unusual combination of court and parties may actually come to resolve a claim on the merits and against liability. Later scientific evidence may fill the gap in earlier understanding. The provision for vacating a judgment denying liability responds to this possibility. This provision seems unduly favorable to tort victims, but it should increase the court's courage to deny liability in the face of weak evidence. It might seem that equal treatment requires a provision for vacating a judgment of liability when exculpatory information later emerges. Shattering the repose of successful tort plaintiffs may be fair, but it is not likely to win many supporters.

(o) *Attorney Fees.* The provision for attorney fees is included in the statute to resolve any doubts whether a court rule can regulate attorney fee awards. The attorney-appointment process is governed by draft Rule 23.3(d)(3). The provision that fees may be awarded against the represented persons is most likely to be invoked if the mass tort action judgment establishes liability but leaves determination of individual awards to individual proceedings. The fee order could be limited to individual plaintiffs who actually recover damages. The further provision that allows the court to set fees paid for individual representation addresses the possibility that an individual claimant, having vicariously contributed to the award of class fees, might otherwise confront a substantial contingent fee charged for very little work and essentially no risk.

²³ A rough analogy might be found to the procedures that have been created to support appeals within the federal system following post-judgment removal from a state court. See 15A WRIGHT, MILLER & COOPER, *supra* note 18, § 3901 n.5.

B. *The Rule*

Draft Rule 23.3 would be supported by the special enabling provisions drafted as 28 U.S.C. § 1335A(e).²⁴

(a) *Applicability.* Rule 23.3 applies only to mass tort actions brought under § 1335A. Reform of procedures not addressed in Rule 23.3 would be undertaken independently, if at all. No attempt is made to adopt a comprehensive procedure for mass tort actions. Most matters, such as pleading, motions, pretrial practice, and disclosure and discovery, would remain within current Rules, which provide sufficient flexibility to adapt to the needs of a mass tort action.

(b) *Claimants.* This provision—as later provisions—is drafted in reliance on § 1335A. The reference to “the course of conduct giving rise to a mass tort action” is the illustration for this subdivision. The inclusion of future injuries in the definition of a “claimant” is one of the points at which the special enabling provision in § 1335A(e) may be useful. The challenges that must be encountered in dealing with future claims are recounted in Professor Hazard’s paper and need not be revisited here.²⁵

(c) *Claimant Participation.* A personal-injury plaintiff’s interest in disposition of an individual claim is likely to involve a substantial amount of money, an amount of money that is important in relation to the plaintiff’s need for basic care and support, and an intensely personal sense of aggrievement. It is desirable to ensure the opportunity to participate as an individual party, going beyond the rather vague provision for entering an appearance in Rule 23(c)(2)(C). At the same time, meaningful participation by more than a small number of individual claimants could destroy any attempt to achieve effective disposition of common issues. As compared to the rather shadowy reality of individual participation in most methods now used to resolve mass torts, there is not much meaningful sacrifice in the provision that allows the court to assert control “to serve the uniform, just, and efficient disposition of all claims.” The mandatory character of the mass tort action is maintained by the provision that bars individual claimants from requesting exclusion.

²⁴ See *supra* Part II.

²⁵ See Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000).

(d) *Claimant Representation.* The three paragraphs of this subdivision deal with distinctive questions.

The first paragraph addresses the need for multiple classes and subclasses in open-ended terms. The goal is to assure representation of all claimants "by a class representative who does not represent significantly conflicting interests." This language is intended to support a pragmatic assessment of potential conflicts, with an eye to holding the number of classes down to a manageable level. Although reference is made to classes and subclasses, no attempt is made to draw meaningful distinctions between creation of separate classes and division of one class into subclasses. It might be better to refer only to separate classes. The familiar conflicts between present and future claimants support the prohibition against including both present and future claimants in the same class. Transfer from a futures class to a present class seems obvious enough, but practical implementation may prove awkward. More work needs to be done on the process for shifting members between classes.

Imposing responsibility on the court to assure designation of capable representatives is a first response to the common desire to provide a real "client" to superintend counsel. There is real force to the objection that imposing this responsibility injects the court too far into the adversary process, picking one of the parties. Yet self-selection—which often amounts to selection by counsel—is still less attractive.

Imposing responsibility on the court to designate counsel represents another incursion into the adversary process. It is justified, however, by the common concerns about the entrepreneurial process that has privatized a procedure that has significant public elements. Some relief from the race-to-file may be found in the provision that no attention should be paid to the time at which counsel first sought to represent a class. The sketchy criteria for selecting counsel do not afford much protection against the risk that a small network of lawyers will repeatedly take command of mass tort litigation. It would be unwise to forgo the great benefits of the experience of such lawyers with mass tort litigation. A Committee Note, however, should warn against the comfortable habit of relying only on familiar players. Taking account of arrangements for fees and expenses provides explicit authority for "bidding" among prospective counsel, but does not attempt to define the process in more particular terms.

(e) *Notice.* Notice is a sensitive part of any class-like action and is

seldom fully satisfactory. The character of mass tort actions underscores the need for effective notice because of the importance of individual claims, even apart from the challenge of notifying class members who have not yet experienced an injury. These notice provisions are a first attempt to address these problems.

The basic notice provision is no doubt a vain attempt to require notice language that is likely to be comprehensible to most class members. The contents of the notice seem unremarkable. The "course of conduct giving rise to the action" corresponds to the definition of a mass tort action in § 1335A(a). Reference in the notice to the stay and transfer provisions of § 1335A(f) facilitates implementation of those provisions when a copy of the notice is filed in another court.

The burdens imposed by paragraph (2) on the person who initiates the mass tort action are reduced by the fact that actions against that person should be known. Filing the notice in those actions should be easily accomplished. Notice by ordinary mail to all present claimants who have not filed actions seems sufficient, although return-receipt mail or commercial delivery deserve consideration. Imposing the costs of this notice on the person who initiates the action seems a reasonable price to exact for seeking global resolution. The brackets indicate uncertainty whether enough good would be accomplished to justify the cost and confusion of requiring notice from the person initiating the mass tort action to future claimants.

The provision for general notice to class members, including individual notice to individuals who can be identified through reasonable effort, is not a satisfying means of notice to future claimants. The supplemental provisions for notice to a "central judicial authority in each state," and for yearly notice in "suitable popular media," are an attempt to do a bit more. It remains possible that the difficulty of satisfactory notice may defeat the attempt to bind future claimants by the proceeding. The best hope may lie not so much in more ingenious ways to effect actual notice as in concepts akin to limitations doctrine. So long as a future claimant is assured a reasonable opportunity to bring suit after an injury arises, the provision for notice to state judicial authorities and the interest of the defendant should serve to channel the claims into an appropriate tribunal for resolution.

Allowing the court to allocate the costs of notice after the initial paragraph (2) notice seems sensible. Protecting claimants and their representatives against bearing the cost of notice also seems sensible, but may not be inevitably right.

(f) *Settlement.* The settlement provisions of draft Rule 23.3 track the draft Rule 23(e) set out below, with only one modest variation and two important differences. The variation is that Rule 23.3(f)(1) refers only to settlement. The authority to dismiss or compromise is deleted in an attempt to focus on positive settlement. Dismissal without prejudice should remain available, but not as a matter of agreement between the claimants' representatives and the defendants. The first and more important difference is that Rule 23.3(f) does not allow a claimant to opt out after the terms of settlement are announced. The opt-out provision, certain to be controversial in the Rule 23 setting in any event, would defeat the very purpose of global disposition through Rule 23.3. The second difference is that the provision for discovery by objectors does not extend to the merits of the underlying claims or defenses. The omission of such discovery reflects the assumption that a mass tort action will be created only after sufficient development of the merits in other proceedings to satisfy all reasonable needs for information to support effective objections.

The purpose of the remaining settlement provisions is discussed in the draft Committee Note appended to draft Rule 23(e) below.

C. *Alternatives*

Many different models for comprehensive joinder and global resolution could be built. The variations, however, would play on the same themes. Adoption of any scheme of such magnitude will be resisted on two basic grounds. The first is that it is not desirable to seek comprehensive resolution in a single proceeding, even if there were no other costs attached to doing so. The second is that even if it is desirable to achieve comprehensive resolution in a single proceeding, the costs are too great. It is difficult to believe that these grounds of resistance will be overcome. That leaves the way open to ask whether substantial benefits would flow from adopting some aspects of the comprehensive approach without going all the way. A few of the more likely partial solutions may be sketched to illustrate the possibilities.

(a) *Limit State-Court Class Actions.* Congress has expressed interest in limiting the scope of class actions in state courts. The approach that has attracted most support is to establish federal subject-matter jurisdiction on the basis of minimal diversity and to provide for removal to federal court whenever any member of a plaintiff class is a citizen of a state different from any defendant. There are provisions to remand an "intrastate case" on showing both that the claims will be

governed primarily by the laws of the state in which the action was originally filed, and also showing that both a substantial majority of plaintiff class members and the primary defendants are citizens of that state.²⁶ That approach calls for judgments that may be difficult to administer, involving determinations about what law should apply and who are the “primary” defendants. If it is feared that class actions and class action settlements may be “shopped” too easily among the many states, seeking an acquiescent forum, it might be better to legislate direct limits on the breadth of state-court class actions. One approach would be to deny the opportunity to entertain a nationwide class action in state court. State actions could be limited to classes whose members are citizens of the state or were injured in the state. It is tempting to allow also classes whose members were injured by conduct in the state, reflecting a conduct state’s manifest regulatory interest. This temptation might better be resisted. Often, it would be possible to locate a sufficient conduct relationship to support a nationwide class. It is at least conceivable, moreover, that some defendants might deliberately move their conduct to hospitable states.

(b) *Overlapping Classes.* Overlapping and competing classes might be constrained by recognizing the power to enjoin rival proceedings. It would have to be decided whether to allow an injunction by the first court that wants to seize control, or whether some order of preference should be established. Preference to the court where the first action is filed would invite races to file. Preference to the court first to certify a class would invite a somewhat different kind of race. Preference to federal courts might reduce the opportunities for racing, particularly if it were coupled with flexible procedures for transfer or coordination of rival classes.

(c) *Repetitive Class Requests.* Forum shopping could be reduced substantially by prohibiting any court from certifying a class that is substantially similar to a class that has been rejected by another court. An exception should be made if certification was denied because the class claims were not “mature.” Some means might be found to address the danger that the first action was collusive, brought for the

²⁶ See, e.g., H.R. 1875, 106th Cong. § 3(b)(2) (1999) (granting federal subject-matter jurisdiction to class actions based on minimal diversity, but exempting “intra-state cases[s]” in which the primary governing law will be that of the state in which the action was originally filed and a “substantial majority” of the plaintiffs and “the primary defendants” are from that state).

very purpose of defeating certification. Perhaps it would suffice to rely on the general principle that a class is not bound by inadequate representation. The difficulties, however, suggest particular caution in approaching this question.

(d) *Settlement Shopping*. It might be easier to craft a statute that prohibits any court from approving a class settlement substantially similar to a settlement that has been rejected by another court. Although this approach would give broad power to the first court asked to approve a settlement, it has great attraction, particularly if coupled with an effective means for supporting objections to the settlement when it is first proposed.

(e) *Mandatory Class*. It may be within reach of the rulemaking process to adopt a no-opt-out class action rule for mass torts, either as part of present Rule 23 or as a separate rule. There would be no need to worry about identifying a "limited fund." If "futures" claimants were included in the class, this approach could achieve a high level of consolidation. Although it would be a strain to stretch the Enabling Act to include a choice-of-law provision, it seems likely that creative approaches would reduce the problems that arise from applying different bodies of law to different class members or to different defendants.

(f) *True Limited Fund*. There is a special attraction to comprehensive consolidation and unified disposition when there is a real prospect that a defendant's assets are not sufficient to answer to reasonably foreseeable tort claims. If we were not accustomed to the thought, it would seem unthinkable that limited assets might be apportioned to the first to file in the swiftest courts, without regard to others presently injured or those whose injuries might not become apparent until some future time. Whether or not the bankruptcy power is invoked, the most obvious solution would be to legislate some version of the settlements that have been worked out in these circumstances. Complete ownership of the defendant is transferred to the claimants, with a reversion to the original owners if indeed the assets prove adequate. Again, the settlement device of a trust seems highly attractive. All claims are redirected—"channeled"—against the trust. The trust can retain ownership of the defendant, or sell the defendant free from that entire mass of tort liabilities. The trust, as owner of the liability, also would become owner of all insurance and other rights of indem-

nification or contribution.²⁷ Disposition of individual claims could be left to essentially administrative mechanisms, perhaps with presumptive schedules of benefits, priorities for payment based on severity of injury or need, deferral of lesser injuries to ensure adequate compensation for greater injuries, and so on.

(g) *Federalized Choice of Law.* A modest step could be taken by adopting a federal choice-of-law statute, either for actions in federal courts or for all actions. The object would be to reduce the number of laws applied to a common course of conduct. If nothing else is done, it would help to free federal courts from the obligation to attempt to follow local state choice-of-law rules.

III. SETTLEMENT WITH OR WITHOUT SETTLEMENT CLASSES

A. Introduction

Settlement seems to hold out the best promise for resolving large numbers of mass tort claims at one time, on consistent terms that achieve some measure of similar treatment for similar injuries, and with substantial savings in litigation costs. It seems safe to infer that these gains are achieved on terms that mimic, behind a curtain, the methods proposed for effective aggregated litigation. The charm of settlement is that it tends to ignore choice-of-law issues—indeed the settlement rests on an amalgam that is not the “law” of any place; disregards many other differences that in legal theory also should vary the awards for similar injuries similarly incurred; effectively prevents further inter-court competition; and establishes peace within its self-defining limits.

A different description of settlement’s siren charms is that settlement is blatantly alegal when compared to the results that actually would be achieved by individual adjudication under the law. The attempt to achieve effective individual adjudication is abandoned, even when elaborate individual claims procedures are established to resolve disputes within the narrowing framework of the settlement agreement. Worse, bargaining in the impenetrable shadows cast by fifty or

²⁷ Difficult questions may arise from “claims made” insurance policies that cover only claims made during the policy period. Establishment of a claimants’ trust might be treated as an assertion of claims on behalf of all, but the relationship between federal law and state law, and the relationship between this procedural device and insurance-contract law, lie beyond the scope of present speculation.

more state laws applies no law at all. The settlement is more legislative than judicial. The private legislation may be better, even far better, than the official law that courts apply. But it binds class members by a process that is no more official than the review provided by a court that is informed primarily by parties who seek to win approval, not to provide a full adversarial debate about the settlement.

Even if it be assumed that the adjudicating alternative to settlement is at best a frail device, however, it will not do to embrace mass settlement too warmly. Settlement is just that—a private agreement that substitutes for adjudication. It provides none of the safeguards that attend adjudication by a neutral judge. When the agreement is made by the person who surrenders a claim with the person who surrenders the right to defend, we have substantial grounds to accept the result even though it may be driven by fear of the costs and occasional irrationalities of adjudication. When the agreement is made by a representative of the person who owns the claim, however, we must be more careful. If, as in much contemporary class action litigation, the representative is a self-appointed champion who seeks to surrender the claims of hundreds, thousands, or even hundreds of thousands of victims whose claims are individually important, we must be extremely careful.²⁸

The next Part presents draft Rule 23 provisions that confirm the practice of certifying settlement classes and that expand the process for reviewing proposed settlements. The draft would apply to all class actions, not mass tort classes alone. The draft Committee Note provides much of the commentary, but the succeeding part supplies additional commentary.

²⁸ The Supreme Court has alluded to the tensions between the tradition that every party should have an individual day in court and the theory of representation that substitutes for an individual day in court.

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. . . .

And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S.Ct. 2295, 2315 (1999) (citation omitted).

*B. Class Action Settlement Draft***Rule 23 Settlement Class****(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified.**

An action may be ~~maintained~~ certified as a class action for purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied, and in addition * * * .

(e) Settlement, Dismissal, ~~or~~ and Compromise.

(1) A class or subclass representative may, with the court's approval, settle, dismiss, or compromise all or part of the class or subclass claims, issues, or defenses.

(2) The court may not approve settlement, dismissal, or compromise of all or part of ~~An~~ an action certified as a class action ~~shall not be dismissed or compromised~~ without a hearing, and notice of ~~the~~ a proposed settlement, dismissal, or compromise ~~shall~~ must be given to all members of the class in such manner as the court directs.

(3) A settlement, dismissal, or compromise of a class action binds a class member only if the class member was afforded an opportunity to request exclusion from the class after notice of the terms of the settlement, dismissal, or compromise, unless the class member had an opportunity to request exclusion after notice of a proposed settlement, dismissal, or compromise that was less favorable to the class member.

(4) Any class or subclass member may object to a proposed settlement. An objector must be afforded discovery reasonably calculated to appraise the apparent merits of the class claims, issues, or defenses, and to disclose the course of settlement negotiations and the terms of any incidental agreements or understandings. The court must award as costs the actual reasonable expenses (including attorney fees) incurred to support a successful objection, and may award the actual reasonable expenses (including attorney fees) incurred to support an unsuccessful objection.

(5) In reviewing a proposed settlement, the court should consider, among other factors:

(A) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, and other facts that

- bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;
- (B) the extent of participation in the settlement negotiations by class members or their unofficial representatives, a judge, a magistrate judge, or a special master;
- (C) the cost and probable outcome of a trial on the merits of liability and individual damages;
- (D) the total resources available to the parties agreeing to pay money under the settlement;
- (E) the existence and probable outcome of claims by other classes and subclasses;
- (F) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants;
- [(G) whether class or subclass members are accorded the right to opt out of the settlement;]
- (H) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the nature or absence of any agreements affecting the fees to be charged for representing individual claimants or objectors;
- (I) whether the procedure for processing individual claims under the settlement is fair and reasonable; and
- (J) the apparent intrinsic fairness of the settlement terms.
- (6) A proposal to settle, dismiss, or compromise part or all of an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposal. The expenses of the investigation and report and the fees of a person specially appointed will be paid by the parties as directed by the court.

Committee Note

Subdivision (b) is amended to confirm the ruling in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997), that it is proper to certify a class for settlement, even when the court might not certify the same class—or any class—for trial. Settlement classes have become a familiar and useful means of resolving some disputes. The common use of settlement classes is reflected in T.E. Willging, L.L. Hooper,

and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996).

This amendment permits certification of a settlement class so long as the subdivision (a) prerequisites are satisfied and certification is proper under any paragraph of subdivision (b). The terms of proposed Rule 23(e) protect the interests of class members in many ways, including the right to request exclusion from the settlement. The right to request exclusion from the settlement applies even if the class is certified under subdivision (b) (1) or (b) (2).

Experience seems to show three rough settlement categories. The simplest category occurs when a class is certified for all purposes and then settles. This category is not as distinct as may seem, however, since the parties may anticipate settlement at the time of certification. A second category occurs when a class is certified for purposes of settlement at a time when there is no settlement agreement. This category blends by imperceptible degrees into the third, where—in its pure form—the action is initially filed with a request for certification after would-be class representatives have negotiated the terms of settlement with the class adversary. Although there may be many shades along the spectrum that ends in settlement, these three categories identify a progression of concerns that surround class action settlements.

Binding class members by settlement is least dangerous if a class is certified for trial at a time when there is no understanding as to possible settlement. In this situation the class representatives have all the bargaining power that derives from representation of the class and the threat of enforcement through trial. The court has the greatest opportunity to become familiar with the merits of the litigation and thus the best prospect of effective review of any proposed settlement. If it seems desirable, the court also has the best opportunity to control the designation of class representatives—including class counsel—and to control the settlement process.

Certification only for settlement purposes weakens the court's position, and also weakens the position of class representatives. The class adversary's incentive to settle is driven by the prospect of litigation in some other form, not by litigation against this class. This incentive may remain powerful, and indeed may be more powerful than the incentive that derives from the threat of litigating with this class. Settlement with a broad class may reduce the defendant's transaction costs so far, and offer so substantial a reward in global peace, as to be more valuable than any alternative mode of disposition. The court

may have valuable reassurances of the quality of class representation and the cogency of the settlement terms, moreover, if there has been substantial precertification litigation, establishing the maturity of the underlying dispute and ensuring the experience of class counsel. At the other end of the spectrum, however, there is much less negotiating power if class members typically hold small claims that would not support litigation by other means. There is substantial concern that in these circumstances it may be possible for a class adversary to engage in a "reverse auction" by threatening to negotiate a more favorable settlement with others willing to represent the same class in a different court. The court, moreover, may be completely dependent on class representatives and their adversary for information about a proposed settlement—and when all appear to argue in favor of the settlement they have reached, there is little assurance that the court can reach a satisfactory appraisal of the probable merits of the class position, the costs of pursuing the position through litigation by any means, and the value of the relief proposed.

The court may in some ways be in the weakest position when a settlement is negotiated before class certification is requested. There is little opportunity to influence the selection of class representatives or counsel, and no litigation basis in this action to provide information beyond that revealed in the process of seeking settlement approval. Neither is there any opportunity to seek to structure the settlement process. The prefiling cooperation among the parties may raise real concerns whether a genuine case or controversy is presented. On the other hand, the first notice of the class action will include the terms of the settlement, affording maximum opportunity for class members to appraise the proposed settlement and to request exclusion.

Subdivision (e) is amended to strengthen the process of reviewing proposed class action settlements. It applies to all classes, whether certified only for settlement or certified for all purposes.

Paragraph (1) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. The reference to settlement is added as a term more congenial to the modern eye than "compromise."

Paragraph (2) confirms the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The factors to be considered under paragraph (5) are complex and should not be presented simply by stipulation of the parties. A hearing should be held to explore a proposed settlement even if the

proponents seek to waive the hearing and no objectors have appeared.

Paragraph (3) recognizes the essential difference between disposition of a class member's rights by official adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how careful the inquiry into the settlement terms, settlement does not carry the same reassurance of justice as an adjudicated resolution. A class member is better protected by a right to request exclusion after the terms of a proposed settlement are known. But there is no need for a second opportunity to request exclusion if there was a right to request exclusion after a proposed settlement and a new settlement is reached on terms that are unambiguously more favorable to class members. The right to opt out does not mean much when there is little realistic alternative to class litigation, although even then there may be an incentive to negotiate a settlement that encourages class members to remain in the class. The protection is quite meaningful as to class members whose individual claims will support litigation by individual action, or by aggregation on some other basis, including another class action. The settlement agreement can be negotiated on terms that allow any party to withdraw from the agreement if a specified number of class members request exclusion. The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.

Paragraph (4) increases the support provided those who wish to object to a proposed settlement. This support is important even though there also is a right to request exclusion—class disposition may be the most efficient means of resolving class members' claims, and often may be the only means. Discovery as to the apparent merits of the class position is particularly important if the settlement agreement has been reached without substantial discovery in the class action or in other litigation. The need for discovery as to the settlement negotiations will be affected by such factors as the risks of conflicting interests among class members or between counsel and class members, the alternative protections built into the negotiation process by the court, and the maturity of the claims. Discovery as to any "incidental agreements or understandings" should extend to all arrangements proximately related to the class settlement, including contemporaneous settlements of other claims, agreements with respect to

representation of future clients, and understandings as to attorney fees. The provisions for awarding expenses to objectors recognize the vital importance of objections in the settlement review process. Our judicial system is designed to depend on adversary presentation. Effective adversary exploration of a proposed settlement can be provided only by objectors. The reasonable expenses of making a successful objection must be compensated. An objection may be counted as successful for this purpose if it provokes changes in a proposed settlement without the need for a court ruling. Even an unsuccessful objection can provide valuable reassurance about the quality of the settlement for the court, class members, and the general public. The discretion to award compensation for unsuccessful objections should be exercised freely when these values have been secured.

Paragraph (5) sets out an incomplete list of factors that should be considered in determining whether to approve a proposed settlement. See *In re: Prudential Ins. Co. of America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316-24 (3d Cir. 1998). Many of these factors reflect practices that are not fully described in Rule 23 itself but that may bear on the probable fairness of the settlement.

The maturity of the underlying substantive issues, described in subparagraph (A), is more important in some cases than in others. The concern with maturity is greatest with respect to mass torts that inflict serious personal injury or extensive property damage in events that are dispersed in time and place. Individual litigation is possible, and often is pursued. Settlements in these circumstances should be attempted only after it is clear that additional litigation is not likely to improve significantly the information available to inform decision. Many class actions, on the other hand, grow out of unique and closed events, and often present issues that cannot realistically be litigated outside the class action context. In these circumstances, there may be little reason to hope for improved understanding through independent litigation.

Negotiation of a class action settlement entirely among class lawyers and their adversaries may generate understandable concerns about the fairness and effectiveness of the settlement terms. Subparagraph (B) does not require that others participate in the negotiations, in part because attempts to control the negotiation process by rule may often do more harm than good. But subparagraph (B) does encourage efforts to engage class members, unofficial representatives of class members, or judicial personnel. If a judge or other judicial officer is involved, review of the settlement must be provided by a differ-

ent judge. Although not described in subparagraph (B), participation by a class guardian, class steering committee, or other independent class representative also should be viewed favorably.

The cost and probable outcome of trial, including damages, are the most important measures of settlement fairness. Unfortunately, often they are the most unmanageable. Predictions of cost will be made by those with a motive to bolster the settlement, and predictions of staggering costs will draw force from comparison to the vast sums that have been spent on complex actions. Attempts by a court to second-guess expenditure predictions, or to control actual expenditures, may intrude deep into the adversary process. With respect to single-event transactions that have not been litigated in separate actions, the only secure basis for predicting the outcome might be an actual trial. Subparagraph (C) serves as a reminder of these central factors, but without attempting to detail the ways in which they may prove elusive.

Settlement is a pragmatic process that must take account of a defendant's ability to pay. If a settling party asserts that its ability to answer claims is constrained by its resources in relation to these and other claims against it, a showing should be made as to its assets and claims. Discovery on these issues will be an important part of the review process.

A settlement on behalf of a class that does not include all potential claimants is properly affected by the existence and probable outcome of claims by other classes or subclasses. This subparagraph (E) factor, and the corresponding subparagraph (F) factor, seem to invite speculation as to the comparative merits of other class claims. Some exploration of these comparisons may be appropriate, but the court must guard against the risk of litigating claims not before it. The claims of non-class members present other difficult questions when a defendant may lack resources sufficient to pay all claims. The defendant's ability actually to perform the settlement may be affected by the unresolved claims. And actual performance of a present settlement may impair the ability of others to win comparably effective relief. Response to these problems may be complicated. Concern for other claimants cannot readily be implemented by disapproving a settlement as too generous to the class before the court, but might warrant an effort to bring the other claimants into the proceedings. One approach might be to expand the class definition and then establish subclasses to represent groups with conflicting interests. Concern for class members may require modification of settlement terms to establish adequate assurances of performance.

Both in negotiating settlements and in appraising a particular settlement, people naturally consider the actual or probable disposition of similar claims. Subparagraph (F) recognizes the importance of this factor.

[Subparagraph (G) is inserted in the expectation that the paragraph (3) right to opt out will prove controversial. If there is always a right to opt out of the class after notice of settlement terms, subparagraph (G) will be deleted. If paragraph (3) is deleted, the Note observations will be modified to suit subparagraph (G).]

The reasonableness of attorney fees provided by settlement is important to the public perception of fairness. Excessive fees also raise the image of conflicting interests, in which attorneys have bargained away possible class relief in favor of their own fees. Application of subparagraph (H) should be affected by the negotiation process and the source of fees. There are structural reassurances of reasonableness if fees are negotiated separately after conclusion of the class-relief portion of the settlement, and if the fees are to be paid by the class adversary rather than out of class relief.

Settlements often establish procedures for processing individual claims. Proofs of claim often are required and may be indispensable, and there may be systems for resolving disputed facts. Other procedures may be very useful in providing low-cost and accurate resolution of individual entitlements under the settlement. Subparagraph (I) underscores the importance of ensuring that these procedures are fair and reasonable.

All of the factors enumerated in paragraph (5), and others that might be named, bear on fairness. Fairness often is measured by a process that is not readily articulated. Subparagraph (J) recognizes the legitimacy of considering apparent intrinsic fairness on a partly gestalt basis that draws from accumulated judicial wisdom and experience.

Paragraph (6) establishes an opportunity to acquire independent information about the wisdom of a proposed class action settlement. The parties who support the settlement cannot always be relied upon to provide adequate information about the reasons for rejecting the settlement. Information may be provided through objections by class members, and paragraph (4) is designed to enhance the objection process. But objectors often find it difficult to acquire sufficient information, and the burdens of framing comprehensive and persuasive objections may be insurmountable. A magistrate judge or person specially appointed by the court to make an independent investigation

and report may be better able to acquire the necessary information and, with expenses paid by the parties, better able to bear the burdens of acquiring and using the information. The opportunity provided by this paragraph should, however, be exercised with restraint. In most cases it is better that the trial judge assume responsibility for directing the parties to provide sufficient information to evaluate a proposed settlement. Direction by the judge will ensure that the judge receives the needed information and bears the primary responsibility for evaluating the settlement in light of this information.

The choice whether to appoint a magistrate judge to conduct the paragraph 6 investigation will depend on a variety of factors. The costs to the parties are reduced because there is no need to pay fees for the magistrate judge's time. A magistrate judge provides the reassurances of expertness and impartiality that attach to public office. Appointment of a private person to undertake the inquiry may be desirable, however, if the inquiry is to extend beyond the traditional judicial role of receiving information provided by the parties. It may seem out of role for a magistrate judge to undertake or direct an active investigation of the sort traditionally left to adversary parties. If the judge contemplates an investigation of the sort that might be taken by a well-supported but impartial objector, it may be better to appoint a private person.

An appointment under paragraph (6), whether of a magistrate judge or a private person, is not made under Rule 53 and is not subject to its constraints.

C. Settlement Questions

The range of questions that might be addressed to the model set out above includes questions both about what it does and about what it does not do. One of the most important questions is whether a class action settlement presents a justiciable case or controversy, particularly if the class is certified only for settlement. That question may be affected by the narrower questions, and is discussed last.

(a) *Structural Safeguards.* Settlement models commonly seek to enhance fairness by a variety of means. The model set out above relies on the right to opt out, increased support for objectors, a long checklist of factors to inform the fairness review, and the opportunity for independent inquiry by a court-appointed officer. Although there will be disagreement about the details, all of these strategies are familiar. All of them together may not provide as much reassurance as there

should be. If it were possible, it would be desirable to provide some structural substitute for negotiations that involve only some number of representatives for the class and the party opposing the class. Designing such a structure, however, may prove impossible.

One step would be to require certification that there has been no tentative negotiation before filing the action. This requirement would strengthen any other structural protection that might be devised. The result would be to defeat the practice of agreeing on a settlement before filing the action, but this defeat is the very purpose of providing structures to guide or control the negotiations.

Another step might require that the court appoint some or all of the class representatives, both class members and counsel. A variation would call for appointment of a steering committee of class members to advise and review settlement proposals. Another would call for a professional "guardian" to review the work of class counsel, free from any interest in the fees that will flow from successful settlement. Creation of multiple subclasses to reduce conflicts of interest among those who might be classed together is commonly suggested. But all of these approaches come at a cost. The Supreme Court has recognized that "at some point there must be an end to reclassification with separate counsel."²⁹ Proliferation of the numbers who must join may frustrate the prospect of any agreement and accentuate potential differences of individual advantage that might better be bargained away in an averaging settlement. Unless subclasses are made very small, moreover, they may generate the worst of all worlds: class representatives continue to struggle with all the temptations that confront any class representative, and the occasions for explicit strategic trading are multiplied. A guardian may have no better sense of fairness than the original negotiators, whether the guardian participates in the original negotiations or undertakes a subsequent review. Expansion of the number of class representatives who participate may provide a better proxy "client" for the lawyers than a faceless class, but the risk of numbers persists.

Interjecting the court into the settlement process itself might provide greater protections. If this approach is taken, the judge who performs the ultimate fairness review must have no connection to the ju-

²⁹ *Ortiz*, 119 S. Ct. at 2320. This statement was followed by the observation that a settlement that treats equally claimants who are differently situated "is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen." *Id.* at 2320. It is difficult to integrate these two observations.

dicial officials who participated in settlement negotiations. Even with that safeguard, it ill becomes the judicial office to broker a settlement. The judge-negotiator may be less well informed than the judge who reviews a final settlement; the efforts of the parties to persuade each other as well as the judge may confuse more than clarify. Suggestions by a judge frequently create the risk of undue impact, and suggestions by an ill-informed judge may be all the more risky. It is intriguing to speculate about structural safeguards, but this does not yet seem a promising path.

(b) *Opt-out.* The opportunity to request exclusion from a class settlement is likely to provide effective protection for many class members when the class deals with substantial individual claims for personal injury. Unlike most "small claims" classes, many class members will have professional advice, so that a decision not to request exclusion represents understanding consent to be bound. Understanding consent helps to resolve any lingering doubts whether the settlement conflicts with the Seventh Amendment jury-trial right.³⁰ The protection is not perfect; some class members may not have professional advice, and the advice may not always be good. There is no protection at all for many latent-injury claimants, unless the opportunity to opt out continues for a reasonable period after the injury becomes known.

A contrasting problem is that the opt-out protection may be too effective. The protection may easily be too effective if the objective is to secure massive disposition all at once. It also may be too effective if measured by the desire to achieve fair and consistent treatment of many claimants. One threat to fair and consistent treatment may arise from conflicting interests that lead an attorney to recommend exclusion that benefits the attorney more than the client. A different threat may arise from wise advice based on the perception that the class member who opts out may achieve a particularly powerful strategic or "nuisance" value, so long as not too many opt out. Settlement of a reasonably small number of opt-out claims may be far more attractive to the defendant than trying them, not because these claims are necessarily the strongest claims but because of the costs of defense. The terms of the class settlement are likely to be treated as the bargaining floor. But denying the right to opt out would defeat the most effective

³⁰ The Seventh Amendment concerns expressed by the Supreme Court were articulated in terms of "a mandatory settlement-only class action." *Id.* at 2314.

means of assuring the reasonable fairness of an aggregated settlement. A compromise might be found in a rule that prohibits the defendant from settling with an opted-out class member on terms that are more favorable than the class settlement. Opt-outs also might be denied the right to join in any alternative class; denial of any other form of aggregation also might be considered, although that remedy may be too costly for all concerned. The right to opt out would be preserved, but would be attractive only for class members willing to go to trial. The strategic hold-out value would be diminished substantially. We may not be prepared to accept a measure of this sort, but it deserves consideration.

(c) *Attorney Fees*. Negotiating the settlement of a mass tort on an aggregated basis, whether by class action or some other means, is an expensive business. It is likely to be expensive even if counsel for the victims have litigated many individual cases and need no further information about the liability issues. It will be still more expensive if more work remains to be done on liability. The investment in negotiation and in any added work on the merits is lost if there is no settlement and no class judgment. The risk is aggravated if liability remains uncertain, if there is an opportunity to opt out and so many members seize the opportunity that the settlement is defeated, if there are competing classes that may offer more attractive settlement terms, and so on. Counsel negotiating for the plaintiffs have a powerful interest in reaching an agreement and winning compensation for both expenses and attorney fees.

This interest in achieving settlement suggests an imperfect analogy to the rulings in *Tumey v. Ohio*.³¹ The Ohio Prohibition Act was deliberately designed to create an incentive for a small village to prosecute liquor violations in other parts of its county because the legislature feared that some local governments would not prosecute violations. The 1140-person Village of North College Hill embarked on an entrepreneurial campaign to find, prosecute, and convict liquor violators. The state law rewarded the village with one-half of the fines collected. The village mayor, presiding in the village court, recovered costs of twelve dollars upon each conviction, and nothing for acquittal. The mayor earned an average of about one hundred dollars a month in costs from convictions, and the village in a period of seven and one-half months earned nearly nine thousand dollars as its share

³¹ 273 U.S. 510 (1927).

of the fines. The Supreme Court found two due process violations in this system. The mayor, as judge, had more than a de minimis interest in the costs he would receive if, but only if, he convicted a defendant:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.³²

Due process also was denied because the village's interest in the fines could affect the mayor's judgment. The mayor, in addition to his individual interest, had an "official motive to convict and to graduate the fine to help the financial needs of the village."³³

A class lawyer negotiating a settlement is not a judge. The settlement will take effect only following review by a judge for fairness. It may fairly be urged that the principles of *Tumey v. Ohio* are inapposite accordingly. This argument, however, relies on the strength of the review for fairness. In reality, the settlement negotiations involve innumerable tradeoffs that can reasonably be resolved in innumerable ways. There is not one single reasonable settlement, but a universe of reasonable possible settlements. An enormous responsibility is borne by the lawyers for all parties, but particularly by the lawyers for the class. It is fair to ask whether due process can be reconciled with the intense interest that class lawyers have in reaching some settlement. The question can be raised, and is raised, without impugning in any way the honor of class lawyers. As the Court observed in the *Tumey* case: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."³⁴

So it is with class action settlements, particularly in mass torts, and most particularly in settlement classes. There is an entrepreneurial element in setting out to enforce the law on behalf of the class, just as there was an entrepreneurial element in the liquor law enforcement plan of the Village of North College Hill. Perhaps too much responsibility rests with the lawyers who, de facto, approach too close to the power of actual disposition.

The very distance between settlement and adjudication may suggest one line of response to the question raised by the *Tumey* princi-

³² *Id.* at 532.

³³ *Id.* at 535.

³⁴ *Id.* at 532. The passage continues with the text cited at note 32 *supra*.

ple. A mass tort settlement inevitably involves choices within a heavily populated universe of reasonable alternatives. It was suggested above that the process is as much legislative as judicial. Perhaps it is better to see the negotiators as legislators, or even a de facto regulatory agency, and to develop standards of interest uniquely tailored to the needs of the situation.

If the *Tumey* question may be raised for class actions, where judicial approval is required, it may be raised also for other modes of aggregated disposition. It can be argued, for example, that the realistic alternatives to settlement by class action or by some new but comparable device present even greater dangers. A single firm that settles an inventory of hundreds or thousands of claims, dealing with the same defendants over a relatively brief period of time, has enormous power to allocate the settlements no matter how careful the effort to preserve the forms of individual settlement. The risks of vicarious settlement may be unavoidable. For want of sufficient judicial resources to adjudicate all claims, perhaps we must swallow any due-process doubts and persist with a system that at least disposes of claims.

(d) *Shared Settlement Interest.* The district court in the *Amchem* litigation found that asbestos victims share an interest in avoiding the costs, delays, and risks of piecemeal tort litigation that transmutes into a common interest in achieving a fair settlement.³⁵ The Supreme Court found this interest inadequate under Rule 23, holding that this common interest in the fairness of the proposed settlement does not satisfy the commonality and predominance tests that must apply to "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement."³⁶

Focusing on the virtues of settlement and not its dangers, the interest identified by the district court is real and important. There is a powerful shared interest in achieving all of the things that can be achieved only by settlement. Indeed, as detailed above, the greatest charm of settlement is that it enables a disposition that cuts free from the shortcomings of substantive law as well as the fallibility of our procedural institutions. Neither individual litigation nor disposition of an aggregated litigation by adjudication can do as well. From this perspective, we would do well to focus on crafting the best settlement

³⁵ See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 316 (E.D. Pa. 1994) ("The members of the class . . . all share an interest in receiving prompt and fair compensation for their claims . . .").

³⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 607, 623 (1997).

procedure possible, and to put aside lingering doubts about the importance of individual opportunities to opt out, the enormous complexities that charge the professional responsibility of class counsel with almost unendurable pressures, as well as other doubts.

Many approaches might be taken to recognize in Rule 23 the shared interest in settlement. A simple beginning could be made in Rule 23(b)(3) by adding these words: "the court finds that questions of law or fact, or interests in settlement, common to the members of the class predominate * * *," and "The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution, or defense, or settlement of separate actions * * *."

(e) *Justiciability*. One last set of doubts about class settlement remains to be addressed here. Is a settlement class, or anything that approximates a settlement class, a justiciable case or controversy within the Article III competence of a federal court?

The temptation to translate judgments of policy into constitutional terms besets debates about aggregation of mass torts just as it enters many other debates. Several observations may pave the way for a concluding suggestion that there may, after all, be sound reason to grapple with broad questions of justiciability. All of these questions tie to the problems of mass settlement, but few of them are limited to the settlement context.

One very pointed question arises from the cooperation shown when representatives of a would-be class negotiate a settlement with the defendant before the action is filed. Simultaneous presentation of a complaint, answer, settlement, order for class certification and notice, and tentative approval of the settlement may seem collusion, not cooperation. The appearance should not control the result. Settlement moots an action in the sense that no dispute remains for the court to resolve,³⁷ but Article III does permit entry of a consent judgment.³⁸ The process of negotiation, under threat of continuing individual actions, multiple aggregated actions, or an all-embracing class action, can be vigorously adversarial. The challenge is to determine whether we can create an aggregated adversary representation system that fairly represents those who do not participate directly in manag-

³⁷ See 13A WRIGHT, MILLER & COOPER, *supra* note 18, § 3533.2 (explaining various ways by which settlement renders disputes moot).

³⁸ See *id.* § 3530 ("[J]udgment may be entered . . . on consent of the parties." (footnote omitted)).

ing the collective process. If a fair procedure can be devised, there is a case or controversy.

One modest variation arises when, as in the model of sweeping aggregation explored in Part II, a person against whom claims are asserted is allowed to take the initiative in seeking aggregation. The attempt of one asbestos defendant to turn plaintiff by suing a defendant class of claimants with the object of seeking settlement was rejected for want of an Article III case or controversy, in part because there was no allegation that the claimants had legally harmed the plaintiff by refusing to settle.³⁹ There may be real objections to a procedure that allows a defendant to select the forum and time for litigation and possibly its representative adversaries. Yet there is a real controversy with any claimant that has made a claim, and the principle that allows declaratory relief in other settings suggests that there also is a real controversy if we choose to extend declaratory remedies this far.

A second line of justiciability theory addresses the nominate categories of justiciability, particularly standing and ripeness. The Supreme Court put aside questions of ripeness and standing in the *Amchem* decision, and questions framed as standing and "feigned action" in the *Ortiz* decision.⁴⁰ The feigned action label refers to the need for true adversaries; this topic was addressed above. The doctrines of standing and ripeness have developed primarily as means of rationing access to adjudication of public issues in actions brought to challenge government action. The reasons that limit the role of courts in resolving disputes between individuals and their government, or in resolving disputes among different parts of the government, have little to do with the questions that must be faced in reckoning with mass tort aggregation. There is a superficial resemblance to the "third-party standing" theories that determine whether a party properly before the court can seek to prevail by invoking "rights" that somehow attach to someone else but not to the party. These theories, however, are avowedly matters of prudence, not Article III. More to the present point, these theories do not seek to address the question whether one person should be accorded representative standing to advance for adjudication and actual disposition the claims of others.⁴¹

³⁹ See *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993) ("Except when a party seeks declaratory relief, the plaintiff must assert that some conduct on the part of the defendants has caused . . . actual or threatened injury to the plaintiff that will be remedied or avoided by a determination of liability.").

⁴⁰ See *Ortiz*, 119 S. Ct. at 2307; *Amchem*, 591 U.S. at 612.

⁴¹ Third-party standing doctrine, also referred to at times as "jus tertii," is discussed

The concern that underlies the ripeness challenge often involves the peculiar problem of “futures” claimants. This problem most commonly focuses on people who have been exposed to a product or conditions in circumstances that may lead to active injury in the future, but that have not yet produced any measurable injury. Such claims are usually controlled by state law, which often affords no present remedy for merely latent injury. There is a cogent argument that it violates the principles of federalism established by the *Erie* decision⁴² to undertake federal adjudication of claims that would not be recognized by the state whose law controls. That argument, however, is not an Article III ripeness argument. There are many issues susceptible to present litigation and decision, and there may be compelling reasons to establish a system that will fairly regulate relationships between present claimants and future claimants. For example, if a wrongdoer is insolvent, or threatened with insolvency by the tort claims, Article III concerns surely would not prevent comprehensive disposition in bankruptcy proceedings. To the contrary, it is far better to provide present protection than to leave the future claimants to an uncertain future fate. Even absent the pressures generated by insolvency, ripeness analysis does not provide useful added insight.

There remains the vague, innominate general concept of justiciability. This concept can be used to address the proper role of courts in general terms. Justice Frankfurter, in a concurring opinion, provided one of the enduring descriptions, saying that justiciability and its various categories

mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed. The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a “case or controversy.”⁴³

Only a few years ago, the “expert feel of lawyers” would have been that “the relationship between the parties” does not establish a case or controversy when lawyers purporting to represent vast numbers of potential class members who have never heard of them sit down with a

at some length in 13 WRIGHT, MILLER & COOPER, *supra* note 18, § 3531.9.

⁴² See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (requiring federal courts in which state claims are tried by virtue of diversity jurisdiction to apply state law as formulated by the state’s highest court).

⁴³ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

potential defendant to work out a deal to be presented to the court as a complete package when an action is first filed. Only the felt pressure of mass litigation, and of asbestos litigation in particular, has led to serious consideration of such stratagems. It is not too late to consider the question further. The question, moreover, extends beyond the prepackaged settlement. It can fairly be addressed to any settlement in which a court is asked to enter a final determination of rights held by persons who have not directly participated in forming or agreeing to the settlement.

The answer to the justiciability question may well depend on the circumstances of particular cases. Settlement of a class action brought on behalf of claimants whose claims generally would not bear the costs of individual litigation may prove acceptable. Many class members, at least, will have genuine adversary claims in the sense that they are pleased to be told that they have suffered a wrong and are entitled to a remedy. There is at least the potential for genuine adversary conflict between the class representatives and the defendant. The alternative to class action disposition may be no disposition.

Acceptance of the proposition that judicial adoption of a small-claims class settlement is justiciable as proper judicial business does not force acceptance of the same conclusion when the class includes claimants whose claims realistically could be—and perhaps are—the subject of individual litigation. Many mass tort claimants have such claims. There is a realistic prospect that these claimants can play a meaningful role in determining whether to settle their claims. Why, then, allow a few claimants to appear on behalf of all, not to secure an official determination of the claims but to ask that the class action court and all other courts be foreclosed from making any official determination? How does it become the business of the courts to transfer the right to consent from the claims-holders to someone else? Why should we not at least require actual consent in the form of an affirmative choice to opt in to the settlement by each individual claimant?

In shorter terms, the question asks for development of a theory of representation that accounts for settlement as well as for adjudication. Apart from expressing the conclusion that representation is proper—as supported by the fact that we are doing it—it is difficult to find a clearly articulated theory to explain and justify the conclusion.

The answer may lie in the perceived advantages of settlement. Settlement is better than litigation, for reasons arising from the limited capacity of judicial institutions, from the frailties of judicial pro-

cedure, and from the eccentricities of diverse bodies of tort law. The settlement process is proper judicial business because it is better than other courses of judicial business. This answer may be supplemented by suggesting that aggregate litigation is better than individual litigation, but that we cannot possibly manage a form of aggregation that can be resolved only by adjudication, not by settlement. Nevertheless, justiciability expressions, alas, achieve no more in the end than providing another way of asking the questions that still have no clear theoretical framework.

IV. CONCLUSION

These comments are intended to justify the failure to offer any conclusion. The questions remain vexing because the needs are so great and our institutional limitations give good cause to reject all answers. Often the lack of persuasive theory should not stand in the way of pragmatic adjustments that seem to work in practice. With mass torts, however, it is difficult to measure what works in practice. Broad inquiry is needed, but may be frustrated at the outset by the lack of any feasible means to address the fundamental underlying questions raised by substantive state tort law. The answers that may be framed by federal legislation and rulemaking are particularly circumscribed by this limit, unless there is a will to preempt state tort law. Preemption only for purposes of "mass torts" will require an extraordinarily difficult definition that resolves the point at which numerous injuries are transported from the realms of state laws into the preemptive realm of federal mass tort law. Preemption for all purposes might seem plausible for products liability and some environmental contamination cases, but is not at all plausible for all the law of unintentional injury. We are left in a muddle. Yet it remains useful to attempt, as here, to summarize the constraints that will keep us muddled for years to come.