

ARTICLE

TOWARD A COOPERATIVE STRATEGY FOR FEDERAL AND STATE JUDGES IN MASS TORT LITIGATION

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Judges are now players in the mass tort game.¹ Whatever approach any judge takes in managing a mass tort, judicial input is a critical factor in the ultimate progress of the litigation. To certify or not to certify, for example, is a question that must be answered with profound results for the outcome of the mass tort.² Recognizing the role of judges, recent legal literature has suggested that the ubiquity and massness of the tort should lead to cooperation among judges. Through cooperation, judges can promote efficiency and horizontal equity in the adjudication.³

“Cooperation” among judges has been promoted in multiple and often confusing forms; “cooperation” has varyingly meant communication, coordination, collaboration, or cooperation in the negotiation

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¹ See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1838-41 (1995) (discussing the changing roles of judges in confronting mass torts).

² For example, in the Norplant, silicone gel breast implant, repetitive stress syndrome, and Fen/Phen litigations, the certification issue has been paramount. See *infra* Part VI (explaining the de facto implementation of a cooperative strategy among federal and state judges in four prominent mass tort cases).

³ See JAMES G. APPLE ET AL., FEDERAL JUDICIAL CTR., MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS 1 (1997) [hereinafter MANUAL FOR COOPERATION] (“This manual seeks to promote cooperation between state and federal judges and courts and to suggest many practical ways of doing so.”); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1732-33 (1992) (concluding that intersystem coordination among courts “achieved major gains in efficiency and economy”); Symposium, *National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1655 (1992) (providing articles and commentaries regarding the need for federal and state courts to coordinate with each other).

sense of seeking joint gains.⁴ In the national mass tort context, “cooperation” has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. This strategy has critical weaknesses that limit its ultimate value. It has behavioral, structural, and political impediments; it can conflict with an appreciation of the maturity⁵ and elasticity⁶ of mass torts, and it may run contrary to recent Supreme Court jurisprudence.⁷ There is an alternative cooperative strategy that has significantly more potential for benefiting judges, litigants, and the legal system as a whole. The alternative strategy can be implemented de jure or de facto and focuses at the institutional, rather than individual, level and suggests complimentary, rather than competing, roles for state and federal courts.

I. THE ROLE OF THE JUDGE IN MASS TORTS

Over the last thirty years judges have expanded their vision of themselves from umpires to managers.⁸ The most prominent judges in the first half of the twentieth century were the opinion writers;⁹ the most recognized judges now are case managers. In the context of mass torts, the role of the judge can be analogized more to a “player.”

⁴ See Schwarzer et al., *supra* note 3, at 1733-40 (providing an overview of effective coordination).

⁵ See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989) (defining mature mass torts); ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 22-25 (Feb. 15, 1999) [hereinafter REPORT ON MASS TORT LITIGATION] (describing the maturation process and its consequences in mass torts).

⁶ See McGovern, *supra* note 1, at 1827-34 (discussing the phenomenon of elasticity within the context of mass torts).

⁷ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 2297 (1999) (illustrating the inelasticity of suits within the context of federal tort claims aggregation); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-29 (1997) (same).

⁸ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (“Many federal judges have departed from their earlier attitudes . . . dropp[ing] the relatively disinterested pose to adopt a more active, ‘managerial’ stance.”). For one judge’s own comments on the judicial role in the modern era of mass tort litigation, see Judge Jack Weinstein’s book *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 89-111 (1995) and his article *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 538-60 (1994) [hereinafter Weinstein, *Ethical Dilemmas*].

⁹ Obvious examples include Justice Holmes, see G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993), Justice Cardozo, see ANDREW L. KAUFMAN, *CARDOZO* (1998), and Judge Learned Hand, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

Judges Carl Rubin,¹⁰ Jack Weinstein,¹¹ Robert Parker,¹² Tom Lambros¹³ and others have been more critical in the process leading to the outcome of mass torts than the lawyers or their clients. They were the ones who, in effect, taught the bar how to resolve large numbers of cases. Had it not been for their innovative use of single issue trials, class actions, alternative dispute resolution, and other pragmatic procedural techniques, the mass tort bar would not be the same today.

Because of both the potential elasticity of mass torts and the magnifying effects of any outcomes on other similarly situated plaintiffs, judicial management decisions inevitably are determinative, regardless of the decision.¹⁴ If a judge decides to try one case at a time, that decision has a chilling effect on the filing of new cases.¹⁵ In this era of en-

¹⁰ Judge Rubin presided over and coordinated litigation involving the Beverly Hills Supper Club. See *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 44-46 (E.D. Ky. 1977) (involving a class action suit following a fire at a restaurant). Rubin also handled the Bendectin cases. See *In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig.*, 624 F. Supp. 1212, 1249 (S.D. Ohio 1985) (holding that plaintiffs were not denied a fair trial), *aff'd sub nom. In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988).

¹¹ Judge Weinstein consolidated numerous claims against manufacturers of "Agent Orange." See *In re "Agent Orange" Prod. Liab. Litig.*, 603 F. Supp. 239, 241 (E.D.N.Y. 1985) (involving a class of Vietnam veterans and their families who were suing the U.S. government before presiding Judge Weinstein), *modified*, 818 F.2d 194 (2d Cir. 1987). For a full account of the "Agent Orange" litigation and Judge Weinstein's role in it, see PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987). Judge Weinstein also oversaw the asbestos victims' trust funds involving the Johns-Manville Corporation. See *In re Joint E. & S. Dists. Asbestos Litig.*, 151 F.R.D. 540, 546 (E.D.N.Y. 1993) (holding that quashing notices of deposition was appropriate in this class action asbestos litigation).

¹² Judge Parker consolidated thousands of asbestos cases in *Jenkins v. Raymark Industries*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd* 782 F.2d 468 (5th Cir. 1986); *Cimino v. Raymark Industries, Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990); and *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), *rev'd sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999). See also *Judgment Entered Awarding \$44.5 Million in Fees*, MEALEY'S LITIG. REP.: ASBESTOS, Sept. 22, 1995, at 14-15 (reporting that Judge Parker awarded over \$44.5 million in fees and \$1.2 million in expenses to plaintiffs' counsel in *Ortiz*).

¹³ Judge Thomas Lambros of the Northern District of Ohio was in charge of the Ohio Asbestos Litigation. See *In re Ohio Asbestos Litig.*, 16 Fed. R. Serv. 3d (Callaghan) 1169, 1169 (N.D. Ohio 1990) ("[I]nterim order issues to establish a national class of present and future plaintiffs . . . who have . . . claims for asbestos-related personal injury . . ."); see also Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 478-91 (1986) (describing the Ohio Asbestos Litigation).

¹⁴ See REPORT ON MASS TORT LITIGATION, *supra* note 5, at 16 (noting that "[w]hile courts generally have aggregated mass tort cases for more efficient disposition, the very process of aggregation can generate additional cases"); McGovern, *supra* note 1, at 1840 (noting that "[t]here is no way for a court to avoid being a player in an elastic mass tort").

¹⁵ See George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J.

trepreneurial litigation, plaintiffs' counsel are not typically eager to inventory large numbers of cases unless they think that the cases will be resolved in a timely fashion. In the context of a judicial setting that promotes timely case resolution, however, plaintiffs' attorneys will use a larger inventory of cases to create superior bargaining power. If a judge decides to create an inexpensive and expeditious case management procedure via trial or settlement, the judge invites new filings. "If you build a super-highway, there will be a traffic jam."¹⁶

Recently there has been a major shift in the mass tort litigation area. The Supreme Court and various federal courts of appeals have rejected many of the pragmatic case management approaches developed by the trial judges in the trenches. The high water mark of aggregation or collective case processing, at least for certain purposes, has been reached. *Amchem Products, Inc. v. Windsor*,¹⁷ *Ortiz v. Fibreboard Corp.*,¹⁸ *Cimino v. Raymark Industries, Inc.*,¹⁹ *Wadleigh v. Rhone-Poulenc Rorer, Inc.*,²⁰ *Castano v. American Tobacco Co.*,²¹ *In re Three Mile Island Litigation*,²² and other opinions suggest that certain fundamental principles of our system of litigation have triumphed over pragmatism.²³ The model of one-by-one resolution of each individual's rights, either plaintiff's or defendant's, in the context of our system of federalism is the predominant model. Circumventing those principles, even if it means a more efficient overall outcome, is not acceptable.²⁴

The prevailing litigation environment places more emphasis on corrective justice values such as individual autonomy and fundamental principles of due process, and less of a focus on efficiency.²⁵ It also

LEGAL STUD. 1, 4 (1984) (discussing factors that contribute to the economic decision to pursue litigation).

¹⁶ McGovern, *supra* note 1, at 1840.

¹⁷ 521 U.S. 591 (1997).

¹⁸ 527 U.S. 815, 119 S. Ct. 2295 (1999).

¹⁹ 151 F.3d 297 (5th Cir. 1998).

²⁰ 157 F.R.D. 410 (N.D. Ill. 1994).

²¹ 84 F.3d 734 (5th Cir. 1996).

²² 605 F. Supp. 778 (M.D. Pa. 1985).

²³ See Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 602 (1997) (noting that "[t]he current phase in this saga recognizes the recent chilly reception of mass tort class actions in federal courts").

²⁴ Compare the Fifth Circuit's comment that:

We are also uncomfortable with the suggestion that a move from one-on-one 'traditional' modes is little more than a move to modernity. Such traditional ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial and the case and controversy requirement of Article III.

In re Fibreboard Corp., 893 F.2d 706, 710-11 (5th Cir. 1990).

²⁵ See David G. Owen, *Foreword* to PHILOSOPHICAL FOUNDATIONS OF TORT LAW 2

places more emphasis on federalism than on federalization.²⁶ In this context, there is an opportunity for the judiciary to develop new strategies for resolving mass torts. Rather than viewing cooperation at the judge-to-judge level, a more productive form of cooperation at the state judiciary-to-federal judiciary level has the potential to accommodate and advance both of these sets of goals. A strategy of cooperation from an institutional perspective can achieve far more joint gains in the sense of integrative bargaining than the prevailing individual efforts at cooperation.

This concept of cooperation is closely akin to the notion of cooperation in negotiation theory.²⁷ Cooperation in this context means seeking a mutually beneficial outcome by transforming a zero sum game into an opportunity for achieving joint gains. By working together in exploring the true interests of the parties, sharing information, and taking advantage of differences in those interests, it may be possible to agree on a solution that is more satisfactory to all parties. This cooperative strategy attempts to take advantage of both the revised value set imposed on the trenches by appellate judges and the realities of the relationships currently in practice among federal and state judges, among the varieties of plaintiffs' counsel, and between defense counsel and their clients.

II. UNPACKING THE CONCEPT OF COOPERATION AMONG JUDGES IN MASS TORTS

Chief Justice Burger,²⁸ Chief Justice Rehnquist,²⁹ Federal Judicial

(David G. Owen ed., 1995) (noting that "[m]odern Anglo-American scholarship of tort law and philosophy was preceded by, and to a large extent engaged in reaction to, important economic efficiency theories of tort liability").

²⁶ See Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 31 (1997) (noting that "the locus of [the reform] efforts reflects a proper response to federalism concerns about the tort system").

²⁷ See Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 775 n.62 (1996) (detailing that under a cooperative view of negotiation both parties are highly committed to arriving at a reasonable and fair result and both assume that each side can succeed) (citing GERALD WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 53 (1983)); Roger Fisher & William Ury, *Getting to YES, in APPROACHES TO PEACE* 70, 70-75 (David P. Barash ed., 2000) (describing the benefits of cooperation in negotiation).

²⁸ See William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1659 (1992) (noting that Chief Justice Burger encouraged the formation of the National Council for State and Federal Courts, which fosters strategies for cooperation among judges).

²⁹ See *id.* at 1657 ("[N]o time is more important than now to focus on better relationships among the federal and state courts.").

Center Directors Schwarzer and Zobel,³⁰ Professor Dan Meador,³¹ the State Justice Institute ("SJI"),³² and others have promoted cooperation among judges in order to assist in the fair, timely, and efficient resolution of litigation. These thoughtful proposals have generally focused on communication and coordination. Their goals have been twofold: eliminating redundancy and promoting consistency. Any cooperation beyond communication and coordination has, in practice, been translated into a zero-sum game: state judges defer to federal transferee judges, and federal transferee judges make the decisions. The imbalance in judicial resources and the scope of jurisdiction are simply too great to develop reciprocal cooperative efforts. Any joint gains, therefore, stem only from the reduction of duplicative efforts and the increase in consistency amongst outcomes, but do not extend further.

Other approaches to "cooperation" suggest collaboration not only in joint scheduling and division of labor, but also in the sense of joint decision making. There has also been the prospect of "cooperation" in the sense of integrative bargaining, i.e., state and federal judges "negotiating" to achieve more preferable outcomes for managing mass tort litigation.

In reality, communication and coordination, particularly in the early stages of a case's life cycle, are often quite successful. There have been major strides in overcoming the behavioral impediments inherent in judicial cooperation, and there have been significant benefits to both judges and litigants in achieving efficiency goals by joint scheduling and division of labor. Collaborative decision making has been less common. True integrative bargaining has proven generally unachievable.

In addition to this general plea for cooperation among judges in mass torts, there has been a second theme: "cooperation" as a means of achieving centralization of control over the litigation in a federal court. Various judges and academics have developed a procedure for

³⁰ See MANUAL FOR COOPERATION, *supra* note 3, at 1 ("This manual seeks to promote cooperation between state and federal judges and courts and to suggest many practical ways of doing so."); Schwarzer et al., *supra* note 3, at 1-2 ("This Article tells the stories of how several state and federal judges forged into uncharted territory to coordinate complex litigation pending in their courts.").

³¹ See Daniel J. Meador, *Concluding Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1895, 1895 (1992) (describing the need for more cooperation among federal and state judges).

³² See *Editorial Note*, 78 VA. L. REV. 1655, 1655 (1992) (introducing the 1992 National Conference on State-Federal Judicial Relationships and noting that it was sponsored by the State Justice Institute).

resolving mass torts that focuses on consolidation and aggregation, thereby enhancing the chances for a global resolution. The aim is to resolve an entire mass tort with finality by centralizing control in one locus. It becomes critical to have individual judges “cooperate” so that the litigants do not have competing forums in which to operate. State judges, in particular, could create venues that would thwart this centralization strategy if they did not defer to the federal judge.

The separate themes of (1) communication and coordination and (2) centralized litigation are easily confused when they are both described as “cooperation.” The former has achieved substantial success with only limited downside; the latter is subject to major problems.

There are substantial risks of error costs by over-centralization. If, for example, discovery is limited to a single opportunity, the chances of fully sharing information are reduced. The history of the Dalkon Shield litigation illustrates the limitations inherent in one-shot discovery.

Unless there is complete centralization, there may be disparate verdicts creating difficulties for assembling consistent data points to inform an accurate settlement.³³ Typically state judges who do not defer tend to be in non-representative jurisdictions. As a result, trial outcomes, and even settlement values, can skew any comprehensive analysis.

There is also the risk of error from the consolidation itself. The stakes of litigation can often rise to such a level that defendants are forced to settle or risk losing their entire assets. Alternatively, control of the consolidation may end up in the hands of attorneys more intent on resolution than accuracy. Whenever plaintiffs’ counsel are able to raise the ante in a single trial or otherwise engage in a “piling on” strategy, the impetus for settlement tends to dwarf issues of scientific merit. Most risk-averse defendants will choose to settle for higher amounts than may otherwise be warranted. At the same time the capital markets are not usually enamored of ever-changing litigation risk. These investors may, then, overvalue finality. Recent legal literature³⁴

³³ The concept of data points contemplates all aspects of a litigated tort outcome—the substantive law as well as any jury award. The process of judicial decision making can involve multiple data points as tort law evolves. See McGovern, *supra* note 5, for discussion of “maturity.”

³⁴ See REPORT ON MASS TORT LITIGATION, *supra* note 5, at 38-39 (offering competing arguments about the quality of representation as it impacts the overall utility of class action suits in the mass tort context); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346 (1995) (“[T]his article recognizes that individual plaintiffs have weak to nonexistent control over their attorneys

and cases³⁵ have also explored the pitfalls of agency failure in the settlement of mass tort litigation.

State judicial deferral to federal courts also has potential negative implications for our system of federalism. Our concept of federalism connotes independence on the part of the states to make legal decisions that are final, at least on certain governmental issues. This idea of independent, autonomous authority in state courts is limited by de facto federal decision making, particularly when the ultimate authority on substantive tort common law is held by the states. There is little opportunity for truly cooperative decision making: federal courts make *Erie*³⁶-educated guesses to retain or to certify issues to state supreme courts. With a few limited exceptions,³⁷ efforts to develop a predominant federal common law, or federal consensus law, to trump state law in mass torts has not been successful. There are substantial differences between federal and state evidence and procedure, particularly in regard to experts, that create quite different playing fields. Even the issue of choice of law has been enormously controversial when the aim is to apply a uniform substantive law to a given mass tort. The current trend in Supreme Court decision making is certainly not toward additional federal authority in this regard.

The judicial rules of ethics, the adversarial process, and the customs of litigation all allow judges to communicate and coordinate amongst themselves but do not contemplate collective decisions by independently elected or selected trial level judges. Appellate judges collaborate in this manner, but trial judges do not view their role as seeking out other trial judges for ex ante consensus building. The trial process seeks mightily to convert complex disputes into discrete, zero-sum games so that the judge or jury can provide unequivocal responses to each dispute. Decision making in this context is explicitly either/or. Rules of procedure are specifically designed for this purpose.

There is a final downside risk associated with the attempts at ad hoc cooperation: unpredictability. The contours of a contextual and

across the mass tort context for reasons that are inherent to the economics of mass tort litigation.”).

³⁵ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

³⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (determining a standard for choice-of-law issues in federal diversity actions).

³⁷ See Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 380 (1996) (noting that admiralty law aims to create efficient and fair tort rules).

personality driven effort at cooperation typically vary from case to case, and an inevitable lack of predictability can create inefficient opportunities for tactical, strategic, and satellite gaming by lawyers. These opportunities can unnecessarily prolong and complicate the litigation by inducing counterproductive opportunities for pretrial maneuvering. If, for example, one set of counsel believes that it can achieve more favorable results in a given forum or before a given judge, there will inevitably be skirmishes to test the limits of judicial cooperation as an independent issue.

III. THE EFFORT FOR TOP-DOWN REFORM

Lacking a unified method to resolve competing judicial authority in mass tort litigation, there have been multiple efforts to impose a mandatory, unified, rational, and coherent approach on state and federal courts. These efforts have focused upon the problems of excessive transaction costs, delayed access to courts, lack of horizontal equity in outcomes, and the overall challenges to the legitimacy of the judicial process in the resolution of mass torts.

Most of the recent approaches for unified case management originated in the electrical equipment conspiracies³⁸ that confronted the federal judiciary in the 1960s. Facing multiple cases with similar allegations, federal judges cooperated as much as was feasible. Notwithstanding this cooperation, these judges concluded that a statutory mechanism was necessary to aggregate cases and to provide consistent case management guidelines for their resolution. The result was the creation of the Judicial Panel on Multidistrict Litigation³⁹ and the *Manual for Complex Litigation*.⁴⁰ The Multidistrict Litigation ("MDL") approach allows a panel of judges appointed by the Chief Justice to aggregate all similarly situated federal cases into one transferee court for pretrial discovery.⁴¹ The original *Manual* provided for rule-like "waves" of discovery that would instruct a standardized management

³⁸ See *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59, 60 (S.D.N.Y. 1964) (adjudicating a "large number of private actions that followed the criminal and civil injunctive proceeding brought by the United States Government against electrical equipment manufacturers in 1960 in the Eastern District of Pennsylvania"); CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES* (1973).

³⁹ See 28 U.S.C. § 1407(a) (1994) (consolidating actions with similar questions of fact).

⁴⁰ FEDERAL JUDICIAL CTR., *MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION* (West 1969) [hereinafter *MANUAL FOR COMPLEX LITIGATION 1ST*].

⁴¹ See 28 U.S.C. § 1407(a), (b).

process.⁴² Recently, federal judges have viewed the MDL process more expansively, not restricting their authority to transfer solely for pre-trial purposes but to aggregate cases in order to pursue overall settlement or initiate a conclusive trial.⁴³

The Supreme Court ruled in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* that the transferee judge does not have the authority to try transferred cases.⁴⁴ There is newly proposed legislation to amend § 1407 to allow for trial consolidation.⁴⁵ The *Manual* has been revised to eliminate the standardized rule-like approach and to substitute a menu of case management techniques that can be tailored to each case.⁴⁶ The current wisdom among judges is that there is no one proper model for resolving a mass tort. Instead, each case must be viewed as unique. Although the MDL approach has been enormously successful within its limitations, its use to rationalize mass tort resolution has been restricted by its application to federal-only cases, its lack of authority to try all transferred cases, the complexities of *Erie*-related educated guesses on substantive law, its inherent procedural unpredictability, and, as will be seen, the self-selection of cases filed in federal court.⁴⁷

The American Law Institute, recognizing the need for alternative solutions to the balkanization of mass tort resolution, initiated two projects that embody exquisite rationality.⁴⁸ The Complex Litigation Project has created the most comprehensive proposal for simplifying

⁴² See MANUAL FOR COMPLEX LITIGATION 1ST, *supra* note 40, § 21.422 (describing phased, sequenced, and targeted discovery).

⁴³ See REPORT ON MASS TORT LITIGATION, *supra* note 5, at 52-53 (discussing the recommendation "that § 1407 be amended to establish judicial authority to transfer for trial as well as for pretrial proceedings" and other possible amendments to § 1407).

⁴⁴ 523 U.S. 26, 28 (1998) (holding that a district court does not have the authority to assign a transferred case to itself for trial, so that cases not disposed of during the MDL process must be remanded before the conclusion of the pretrial process).

⁴⁵ See H.R. 2112, 106th Cong. § 2 (1999); AMERICAN LAW INST., COMPLEX LITIGATION PROJECT 31 (Proposed Final Draft 1993) [hereinafter COMPLEX LITIGATION PROJECT] (noting various legislative proposals to amend § 1407).

⁴⁶ See FEDERAL JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (2d ed. 1985) [hereinafter MANUAL FOR COMPLEX LITIGATION 2D]; FEDERAL JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (3d ed. 1995) [hereinafter MANUAL FOR COMPLEX LITIGATION 3D].

⁴⁷ See *supra* notes 36-37 and accompanying text (discussing difficulties related to developing a predominant federal law approach to mass torts).

⁴⁸ See COMPLEX LITIGATION PROJECT, *supra* note 45, at 1-7 (describing the motivations for, and the general outline of the Complex Litigation Project); 2 AMERICAN LAW INST., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter PERSONAL INJURY PROJECT] (summarizing the ALI's various proposals for reform of the tort system).

approaches to complex litigation.⁴⁹ Thoughtfully constructed with a reconciliation of practical, theoretical, and doctrinal concerns,⁵⁰ it is the most respected model available. It has not, however, been implemented.⁵¹ Nor has the ALI Enterprise Responsibility for Personal Injury Project, another intellectually coherent approach to our tort process, been utilized in practice.⁵² Both of these top-down efforts have been overcome by political and strategic realities.⁵³

The American Bar Association's Mass Tort Commission⁵⁴ has met a similar fate. Although less comprehensive and ambitious than the ALI Complex Litigation Project, the Commission's proposal for a unified methodology to resolve mass torts nevertheless did not pass the ABA House of Delegates.⁵⁵

Proposed federal legislation—most recently H.R. 1875, the Interstate Class Action Jurisdiction Act of 1999⁵⁶—has met a similar fate, with one notable exception. This exception, the federalization of Y2K lawsuits,⁵⁷ may partially provide at least one rationale for the inability of these reform measures to pass political muster: there were few entrenched and vested interests at risk because of the prospective nature of the Y2K litigation. That has not been the case with mass tort per-

⁴⁹ See COMPLEX LITIGATION PROJECT, *supra* note 45, at 1 (stating the Project's aim to develop ways to "alleviat[e] the complex litigation problem").

⁵⁰ See *id.* at 7 (citing three specific "overriding concerns" considered in the Project's proposals).

⁵¹ See *id.* at xxxi (noting that the material is only "a proposed Final Draft").

⁵² See PERSONAL INJURY PROJECT, *supra* note 48, at 580 (suggesting that the Project occupies a status "midway between abstract scholarly theorizing and precise doctrinal or legislative foundation").

⁵³ For a discussion of why the Complex Litigation Project and its inherent flaws are impracticable and unenactable, see Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 979 (1994) (arguing that the Complex Litigation Project "failed to address the myriad problems that collectively characterize complex mass tort cases"). A similar argument regarding the Personal Injury Project's impracticability can be found in Frank J. Vandall, *The American Law Institute Is Dead in the Water*, 26 HOFSTRA L. REV. 801, 811 (1998) ("The reason for the failure of the [Personal Injury Project] is that it represented almost pure economic theory and was felt to have very little to do with products liability case law.").

⁵⁴ See AMERICAN BAR ASS'N, COMMISSION ON MASS TORTS, REPORT TO THE HOUSE OF DELEGATES (1989).

⁵⁵ See Francis E. McGovern, *Judicial Centralization and Devolution in Mass Torts*, 95 MICH. L. REV. 2077, 2080-81 (1997) (discussing the lack of support for both the ALI and ABA proposals as well as academic reaction to other similar arguments for consolidation).

⁵⁶ H.R. REP. NO. 106-320 (1999).

⁵⁷ See generally Andrew S. Crouch, Comment, *When the Millenium Bug Bites: Business Liability in the Wake of the Y2K Problem*, 22 HAMLINE L. REV. 797, 844 (1999) (discussing the federalization of Y2K lawsuits via the "Year 2000 Fairness and Responsibility Act").

sonal injuries.

Another damper on the prospects for rationalization of mass tort resolution by federal legislation can be viewed by analogy to the area of securities litigation. Notwithstanding the passage of significant securities litigation reform, substantial literature suggests that the desired outcomes have not been achieved.⁵⁸ Innovative strategies by the ever-creative plaintiffs' bar have at least partially circumvented the statutory restrictions.⁵⁹ This lack of consolidation of mass torts by statute is history, and the future may hold more opportunities for federal legislation. Given the recent financial success of the mass tort litigation plaintiffs' bar⁶⁰ and their willingness to support political allies, the conditions for reform do not currently seem auspicious.

IV. THE EFFORT FOR BOTTOM-UP REFORM

Contemporaneously with the top-down efforts at mandating a more unified approach to resolving mass tort litigation, there have been multiple endeavors to foster federal-state cooperation voluntarily without the need for authoritative structures. The Federal Judicial Center ("FJC"), the National Center for State Courts ("NCSC"), the State Justice Institute, the Judicial Conference of the United States, the Conference of Chief Justices, and the National Judicial Council of State and Federal Courts have been quite active in this regard. There is a *Manual for Cooperation Between Federal and State Courts*⁶¹ published by the FJC, NCSC and SJI. There is the "State-Federal Judicial Observer" which was published by the FJC and the NCSC.⁶² There is the Mass

⁵⁸ See Herbert S. Wander, *Developments in Securities Law Disclosure*, in ADVANCED SECURITIES WORKSHOP 1998, at 209, 266-70 (PLI Corp. Law & Practice Course Handbook Series No. B0-004Y, 1998).

⁵⁹ See *Private Securities Litigation Reform Act of 1995: Testimony Before the Subcomm. on Sec. of the Senate Comm. on Banking, Hous. and Urban Affairs*, 105th Cong. (1997) (statement of Brian Dovey, President of National Venture Capital Associates), available in 1997 WL 414096, at *6-7 (asserting that the proposed legislation would effectively stop the problem of litigation brought in state courts in order to evade application of federal law to the suit).

⁶⁰ One obvious example, of course, is the fee award earned by the attorneys representing the plaintiffs against Big Tobacco in the state settlements. See Ann Davis, *Cashing In on a Tobacco Bonanza*, WALL ST. J., Dec. 15, 1998, at B1 (calling the award "the biggest legal tab in U.S. history"); see also Matthew Scully, *Will Lawyers' Greed Sink the Tobacco Settlement?*, WALL ST. J., Feb. 10, 1998, at A18 (stating that the novel settlement plan took much ingenuity on the part of the lawyers, but calling attention to the problems caused by the size of the award and the future cap on damages).

⁶¹ MANUAL FOR COOPERATION, *supra* note 3.

⁶² The ST.-FED. JUD. OBSERVER (Fed. Judicial Ctr.) was regularly published.

Tort Litigation Committee of the Conference of Chief Justices and the Federal-State Jurisdiction Committee of the Judicial Conference.⁶³ There are innumerable federal-state judicial committees in the various states and circuits. And there was the National Conference on State-Federal Judicial Relationships⁶⁴ and the National Mass Torts Conference⁶⁵ published, respectively, in the *Virginia Law Review*⁶⁶ and *Texas Law Review*.⁶⁷

There are, however, major problems with the momentum of these efforts. The "State-Federal Judicial Observer" is no longer being published. The Mass Tort Litigation Committee is no longer in existence. The SJI has had its funding drastically curtailed.⁶⁸ Reports from the various federal-state committees suggest that their levels of activity, with a few exceptions, have been on the wane.⁶⁹ There have been no new appointments of special masters to assist in federal-state cooperation in mass tort litigation. A survey of the legal literature does not reveal much intellectual activity in this area, although most mass tort

⁶³ See MANUAL FOR COOPERATION, *supra* note 3, at 31 (discussing the functions of the Mass Tort Litigation Committee); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16-17 (1999) (discussing the Committee on Federal-State Jurisdiction's recommendation regarding "federal court jurisdiction over Y2K class actions").

⁶⁴ For a discussion of the aims of the conference, see Rehnquist, *supra* note 28, at 1657 (stating that the conference will focus on improving relations between federal and state judiciaries).

⁶⁵ For a similar discussion about this conference, see William H. Rehnquist, *Welcoming Remarks: National Mass Tort Conference*, 73 *Tex. L. Rev.* 1523, 1524 (1995) (expressing his hope that "this conference . . . can graduate from generalized observations about the desirability of [federal-state] coordination to rather specific and concrete proposals . . . which will accomplish this result").

⁶⁶ See Symposium, *National Conference on State-Federal Judicial Relationships*, 78 *VA. L. REV.* 1657 (1992).

⁶⁷ See Symposium, *National Mass Tort Conference*, 73 *TEX. L. REV.* 1523 (1995).

⁶⁸ The SJI has faced numerous difficulties in securing funding over the years. See John K. Hudzik, *Financing and Managing the Finances of the California Court System: Alternative Futures*, 66 *S. CAL. L. REV.* 1813, 1879 (1993) (describing how the SJI "recently survived a scare to cut its funding by upwards of 40%"); Malcolm M. Lucas, *Don't Pull the Rug Out from Under the State Justice Institute*, *LEGAL TIMES*, Sept. 25, 1995, at 21 (noting the irony that the House Appropriations Committee took steps to kill the State Justice Institute, "one of [Chief Justice Burger's] most important legacies," on the day of the late Chief Justice's funeral).

⁶⁹ See, e.g., Letter from Paula L. Hannaford, Senior Research Associate, National Center for State Courts, to Francis McGovern, Professor, Duke University College of Law (Apr. 21, 2000) (on file with the *University of Pennsylvania Law Review*) (noting the decline in the activity of state-federal judicial councils).

conferences for practitioners include a panel on federal-state cooperation.⁷⁰

At the level of individual cases, there are few signs that voluntary cooperation is on the ascent. Although federal and state judges often talk the talk, in many cases they do not walk the walk. In most of the mass tort litigation, for example, the mantra of cooperation is ubiquitous.⁷¹ The federal and state judges communicate regularly, espouse "cooperation," and then pursue independent strategies.⁷² The federal asbestos cases, for example, have been aggregated before one judge, and the court controls the docket by setting for trial only those cases that involve severe injuries without considering punitive damages.⁷³ As a result of the lack of trial settings, plaintiffs' counsel have filed very few new asbestos cases in federal court and have concentrated their efforts in the state courts.⁷⁴ The federal and state systems operate independently.

In the state courts, the judges run their own asbestos fiefdoms and pursue a variety of case management approaches.⁷⁵ They set cases for trial individually or in small groups, sometimes conducting full trials and at other times utilizing reverse bifurcation or other abbreviated formats. Generally, the era of mass aggregation has passed, in large

⁷⁰ One such seminar is Mealey's Judicial Management Seminar, Palm Beach, Fla.

⁷¹ See, e.g., Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1858-64 (discussing efforts at judicial cooperation in asbestos litigation).

⁷² For example, Judge Holland made public statements regarding his cooperation with state judges in the Exxon-Valdez litigation. See Hon. H. Russel Holland, *The Exxon-Valdez: Was There a Second Disaster?*, Presentation at the National Mass Torts Conference, Cincinnati, Ohio 1, 8-12 (Nov. 10, 1994) (detailing the state and federal judicial efforts to coordinate discovery and case preparation), cited in Judith Resnik, *Afterword: Federalism's Options*, 14 YALE J. ON REG. 465, 482 n.83 (1996). Judge Holland later pursued his own agenda with respect to that case.

⁷³ As a result of the MDL panel's decision to transfer asbestos cases to the Eastern District of Pennsylvania, Judge Wiener assumed responsibility for almost 30,000 asbestos cases. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416, 422 (J.P.M.L. 1991) (explaining that the MDL Panel ordered 26,639 pending asbestos cases to be transferred to the Eastern District of Pennsylvania).

⁷⁴ See Laura A. Foggan, *Current and Future Trends in Insurance Coverage Litigation: Emerging Mass Tort and Latent Exposure Claims*, in INSURANCE COVERAGE LITIGATION 1999, at 9, 13 (PLI Litig. & Admin. Practice Course Handbook Series No. 598, 1999) (stating that "the number of asbestos cases filed in recent years in federal courts . . . has declined").

⁷⁵ The state court judges have, however, engaged in efforts to coordinate their asbestos case management efforts. See McGovern, *supra* note 71, at 1863 ("Contemporaneous with the federal judicial efforts to achieve some level of cooperation among courts, various state judges were urging joint efforts.").

part because of recognition of the elasticity of the asbestos cases. There is now a rough equilibrium between case filings and case resolutions.⁷⁶ Plaintiffs' counsel have in the main recognized that judges do not view mass filings favorably. There are major individual exceptions,⁷⁷ however, and overall case filings have increased but with a wider geographical distribution so that the impact on any given court has decreased.⁷⁸

In the silicone gel breast implant litigation,⁷⁹ the federal transferee judge achieved the zenith of cooperation by appointing a special master⁸⁰ to act as a catalyst for cooperation. The court encouraged group meetings of all interested judges, conducted hearings jointly with other judges, and deferred on occasion to the discovery or rulings of state judges. Virtually every effort was made at litigation to overcome barriers to negotiation. There was an attempt to address the problems of communication failure, counterproductive negotiation skills, lack of information, emotionalism, and good faith disagreements. Major energy was devoted to accommodating the typical behavioral impediments to negotiation, such as fixed pie bias, positional bargaining, framing error, anchoring and adjusting, and overconfidence bias.⁸¹ The right people were at the right place at the right time and in the right way.

In reality, "cooperation" had only two speeds—defer or don't defer. On most occasions in the silicone gel breast implant litigation, usually the state judges deferred to the federal judge, particularly dur-

⁷⁶ See Foggan, *supra* note 74, at 13 ("Although fewer asbestos cases have been filed, asbestos cases continue to clog court dockets because many cases are still unresolved. Policyholder counsel have estimated that for each asbestos claim that has been resolved, another one is still pending.").

⁷⁷ See Stephen Labaton, *Top Asbestos Makers Agree to Settle 2 Large Lawsuits*, N.Y. TIMES, Jan. 23, 2000, at A22 (discussing the largest per-victim settlement in an asbestos suit which involved plaintiffs from at least five states).

⁷⁸ See Foggan, *supra* note 74, at 13; see, e.g., OWENS-CORNING FIBERGLASS CORP., 1993 ANNUAL REPORT 54 (1994) ("Contingent Liabilities"); OWENS-CORNING FIBERGLASS CORP., 1994 ANNUAL REPORT 65 (1995) (same); OWENS-CORNING FIBERGLASS CORP., 1995 ANNUAL REPORT 66 (1996) (same); OWENS-CORNING FIBERGLASS CORP., 1996 ANNUAL REPORT 66 (1997) (same); OWENS-CORNING FIBERGLASS CORP., 1997 ANNUAL REPORT 67 (1998) (same).

⁷⁹ See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995).

⁸⁰ That special master was the author of this Article.

⁸¹ See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOTIATION L. REV. 1, 30-56 (1999) (analyzing psychological principles relevant to legal negotiation).

ing discovery,⁸² but also in setting trial dates and in the timing of dispositive rulings. There were a few exceptions, however, that eventually became critical to the outcome of the litigation.

The tide has turned against the bottom-up front. Absent renewed efforts, there is no general sense of optimism that a grassroots voluntarism will provide greater cohesiveness to our process for resolving mass tort litigation.

V. THE OUTLINE OF AN INSTITUTIONAL COOPERATIVE STRATEGY

If we look at the mass tort phenomenon through a slightly different set of lenses, however, there may be an alternative approach available to accommodate the requirements of case-by-case resolution of mass tort litigation in a federal system while pursuing a coherent case management plan. The key to this approach is distinguishing between micro and macro decision making.⁸³

If we view case-by-case resolution as a series of local decisions, there are global strategies for courts that can lead to a more coherent resolution of mass tort litigation. One such strategy would treat each case resolved by traditional litigation as a data point, while treating the overall litigation process as an information system. Eventually, an adequate number of cases will be resolved, providing sufficient information to make informed decisions regarding the litigation as a whole; the mass tort will become mature. At this point, it might be possible to achieve a global outcome. This strategy would accept the

⁸² Except where, for example, there were differences in discussing rules and the federal judge deferred to a state judge.

⁸³ This approach borrows from the cognitive science paradigm of "local" and "global" decisions. "Local" decisions involve a discrete decision node that refers to a specific juncture of place and time; "global" decisions focus on the consequences of each individual local decision, as well as on the connections among those local decisions and the end game, or overall dénouement. Each local decision affects ultimate paths or processes as well as their sequencing or patterning. For example, local decisions impact the degrees of freedom of global decision making. In a sense, local decisions are tactical and short term, while global decisions are strategic and long term.

Another way of analyzing this revised question is to use methods designed to achieve the desired outcome through analogy, including game theory, decision theory, optimal route analysis, path analysis, dynamic programming, reverse induction and others. Each of these analytic methodologies is designed to assist a decision-maker in determining the most appropriate "strategy" to employ. A cooperative strategy could exist harmoniously with disparate individual judicial activities in mass tort litigation. The cooperation would be at the macro or strategic level, not at the tactical or micro level.

inefficiencies and inequities of case-by-case resolution as an information cost, necessary to an informed, overall resolution. In effect, the mass tort would be allowed to mature sufficiently so that the parties could more effectively pursue an end game, either through bargaining, trial, or otherwise. To phrase the same thought more bluntly, try cases individually and in a systematic manner to set value, and then resolve globally.⁸⁴

The institutional cooperative strategy is thus a hybrid approach, attempting to accentuate the strengths of the case-by-case model of litigation and federalism, while minimizing the model's inefficiencies and inequities. At the same time, this cooperative strategy recognizes the interests of the plaintiffs' bar and of defendants in the world of mass torts by providing appropriate roles for everyone.

At least four sets of diverse interests exist within the plaintiffs' bar.⁸⁵ First are the boutique, or "horse and buggy," lawyers who prefer the traditional model of case-by-case adjudication. These lawyers tend to screen their clients carefully, prepare their cases individually, set each one for trial, and seek premium individual compensation. Their fees in each individual case are contingent on their success.

Class action lawyers compose the second interest group. Their expertise arises from their ability to resolve large numbers of cases in a collective fashion. They typically have few individual clients but represent an entire class certified by a judge. Their fees are established by the class action court.

A third group of plaintiffs' lawyers deal at the wholesale level. They have large numbers of individual clients and either refer them to the boutique lawyers or free-ride on the class action settlements. Their fees are contingent upon the success of these other two groups of lawyers.

Finally, there is a small group of law firms capable of pursuing any strategy—boutique, class action, or wholesale—depending upon the opportunities presented by each mass tort.

The conflicts that arise among these lawyers are critical factors that both contribute to the uniqueness of mass torts and make individual mass torts so difficult to manage. The boutique lawyers view class action lawyers as their mortal enemies: the boutique lawyers in-

⁸⁴ See McGovern, *supra* note 5, at 690 (proposing "a hybrid process that would reduce transaction costs without sacrificing the individualized treatment and intangible values associated with existing civil procedure").

⁸⁵ For a supplemental discussion of the four types of plaintiffs' lawyers, see McGovern, *supra* note 1, at 1828.

vest in a tort, become successful in a few cases, and then, rather than continuing to receive the benefits of their initial success by settling one case after another, watch the class action lawyers sweep the universe of clients into a single class action settlement. The boutique lawyers believe that class action lawyers deprive them of their justly earned rewards and, even worse, that class action lawyers are not “real” trial lawyers. They often contend that class action attorneys just free-ride on previously conducted discovery, spend needless hours of new discovery to pad bills, and resolve cases for plaintiffs who would never have brought a “real” case anyway.

Needless to say, the class action lawyers do not agree with this characterization. They view themselves as presenting an efficient procedural mechanism for resolving large numbers of cases, particularly for plaintiffs who could not otherwise have benefited from the overly expensive case-by-case litigation process. As might be expected, there also is pervasive conflict among plaintiffs’ counsel over compensation, a conflict that can explain some of the lack of cooperation among courts.

This intense warfare among plaintiffs’ counsel typically dismays defendants.⁸⁶ This dismay is compounded because defendants are selective in their evaluation of aggregative or collective treatment of cases. Defendants typically love consolidation for discovery purposes because of the savings in transaction costs, the reduction in repetitive discovery, and the natural advantages of limiting discovery to one round. On the other hand, defendants despise aggregation for trial purposes because it lowers the transaction costs for plaintiffs’ counsel and generally attracts cases that otherwise would never have entered the tort system. This latter characteristic of mass tort cases may be one of the major differences between mass financial and mass personal injury cases. If one plaintiff sues in a financial case, there can be fairly high predictability as to the universe of plaintiffs. With personal injury plaintiffs, however, there is little collective knowledge of their identities. Further, their propensity to sue is quite low unless there is some major media event, i.e., administrative recall, attorney advertising, bankruptcy or class action. These factors combine to form the critical characteristic of elasticity in mass personal injury torts.

Once they are enmeshed in a mass tort, however, defendants typically love class actions because Rule 23 provides virtually the only

⁸⁶ For a supplemental discussion of defendants’ responses to mass tort claims filed against them, see *id.* at 1834-36 (highlighting both “traditional” and “modern” mass tort defense strategies).

method to obtain global peace.⁸⁷ Bankruptcy can certainly resolve a mass tort,⁸⁸ but this process is generally not acceptable to most corporations. *Daubert v. Merrell Dow*⁸⁹ and Rule 706⁹⁰ experts have the potential for achieving a final resolution based upon the lack of scientific evidence, but defendants have not usually been successful with this approach.⁹¹

The defendants' attitudes toward aggregation are in large part justified. Class action plaintiffs' counsel, in particular, love to raise the stakes in any litigation to a "bet your company" level. The net effect of the class action is to make trial unpalatable to either side because the risks are simply too great. The defendant thus never has a real opportunity to prove it has no liability if there is aggregation. Yet, usually, the only potential for bringing global peace to the litigation is through a class action settlement. In recent years, however, the value of class action "peace" has been undercut by the Supreme Court.⁹²

If there is no aggregation and plaintiffs' lawyers file cases in a geographically dispersed manner, a defendant may still be precluded from proving a no liability case. The transaction costs associated with such widespread litigation may simply be too expensive to bear. Instead of the typical scenario where a defendant imposes large transac-

⁸⁷ See REPORT ON MASS TORT LITIGATION, *supra* note 5, at 18 (noting that defendants who wish to obtain global peace encourage additional filings and seek maximum consolidation).

⁸⁸ As one commentator has noted, "a limited fund class action settlement is in some sense a 'designer bankruptcy.'" S. Elizabeth Gibson, MASS TORTS LIMITED FUND & BANKRUPTCY REORGANIZATION SETTLEMENTS: FOUR CASE STUDIES, in REPORT ON MASS TORT LITIGATION, *supra* note 5, at app. E, at v. There have been several such "bankruptcies" to resolve mass tort disputes, including three studied in-depth in one Federal Judicial Center study from last year. See *id.* (describing four mass tort resolutions, three limited fund class action settlements, and one bankruptcy reorganization).

⁸⁹ 509 U.S. 579, 592-97 (1993) (discussing the standards for the admissibility of expert scientific testimony).

⁹⁰ FED. R. EVID. 706 (detailing the requirements and duties of court-appointed experts).

⁹¹ See, e.g., 6th Circuit Finds Error in Use of 'Physical Facts' Rule To Support Dismissal, MEALEY'S DAUBERT REP., Feb. 2000, at 7 (discussing decision by court of appeals reversing summary judgment for General Motors because its experts did not uncontrovertibly disprove plaintiff's testimony (construing *Harris v. General Motors Corp.*, 201 F.3d 800 (6th Cir. 2000))).

⁹² For the prerequisites for limited fund settlement classes, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 2323 (1999) (stating that, at minimum, it would "be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential . . . that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses.").

tion costs on a plaintiff to force a settlement, multiple plaintiffs' counsel may impose large collective transaction or logistical costs on a defendant to compel settlement.⁹³

Given this landscape, there needs to be a federal and state case management strategy that can accommodate case-by-case resolution, federalism, efficiency, equity, and the interests of plaintiffs and defendants as well as their counsel. This alternative strategy could build upon generally accepted models for resolving local mass torts, such as the use of test plaintiffs for discovery and trial, with settlement discussions based upon the results of the test cases.⁹⁴ The first step in such a strategy would be to determine if a tort has any viability at all by conducting case-by-case discovery and trials for a subset of the mass tort plaintiffs. If plaintiffs' counsel knew that there were a strong potential for filed cases to be subject to extensive discovery, there would be fewer initial filings. If there were no viability to the cases filed, the natural economic incentives for plaintiffs' counsel would deter future filings. If there were viability, a second step in the strategy would involve trying or settling sufficient numbers of cases to establish values. Finally, once the litigation became more mature, there could be sufficient information to promote settlement or other end games such as bankruptcy or continued trials.

VI. DE FACTO IMPLEMENTATION OF A COOPERATIVE STRATEGY AMONG FEDERAL AND STATE JUDGES

Lest there be fear that this proposal is out in the academic ether, note that a quite similar de facto strategy for the judicial management of mass torts has been occurring in the real world. The Norplant,⁹⁵ California silicone gel breast implant,⁹⁶ and repetitive stress syndrome cases⁹⁷ illustrate the value of determining the vitality of the liability issues prior to ultimate aggregation. The Fen/Phen litigation illustrates

⁹³ See REPORT ON MASS TORT LITIGATION, *supra* note 5, at 16 ("Mass torts alter th[e] dynamic. . . [D]efendants, faced with company-threatening liability, may elect to settle cases earlier and faster and to pay a higher value than they would under the ordinary tort process . . .").

⁹⁴ See Joseph C. Kearfott et al., *Toxic Tort Litigation at the Millenium*, 67 ALI-ABA 35, 46-47 (1999) (discussing generally the use of test plaintiffs).

⁹⁵ See *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996).

⁹⁶ See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995).

⁹⁷ See *In re Repetitive Stress Injury Prods. Liab. Litig.*, No. MDL-955, 1992 WL 403023 (J.P.M.L. Nov. 27, 1992).

how parallel federal and state proceedings can complement each other.⁹⁸

The MDL judge in *Norplant* decided to defer class certification issues until after the court had tried several cases one-by-one.⁹⁹ After a series of plaintiffs went through the traditional trial process, the parties had an opportunity to negotiate a global resolution based upon the outcomes of the resolved cases.

This same type of process was used in the consolidated California silicone gel breast implant cases. All the California-filed cases were brought together in a state MDL for pretrial.¹⁰⁰ Roughly 100 cases out of the approximately 4000 plaintiffs were selected to be fully prepared for trial. The state MDL judge then set trial dates and systematically assigned cases to other judges for trial or tried them himself. Once the marketplace of litigation determined values by settlement or verdict, it was easier for counsel to negotiate individual, group, and global settlements.

In the repetitive stress syndrome litigation, the Judicial Panel on Multidistrict Litigation declined to transfer and consolidate the multiple federal cases.¹⁰¹ As a result, there was a marketplace of litigation in federal and state courts that provided information for parties to evaluate the litigation.

The Fen/Phen litigation is the most recent example of the de facto implementation of an institutional cooperative strategy.¹⁰² The Judicial Panel on Multidistrict Litigation consolidated the federal cases in the hands of a transferee judge.¹⁰³ The transferee judge then appointed class action oriented plaintiffs' lawyers to lead the litigation

⁹⁸ See *In re Diet Drugs Prods. Liab. Litig.*, No. MDL-1203, CIV.A. 98-20594, 1999 WL 782560, at *2-3 (E.D. Pa. Sept. 27, 1999) (noting that state proceedings were occurring simultaneously with the federal proceedings).

⁹⁹ See *Norplant*, 168 F.R.D. at 578 (denying a motion for class certification because "individual trials are necessary in order to allow the court to make an informed decision regarding whether common issues predominate and whether certification of a class is superior to other methods for handling th[e] litigation").

¹⁰⁰ For a further discussion of this litigation, in which the author served as special master, see McGovern, *supra* note 1, at 1839.

¹⁰¹ See *Repetitive Stress Injury Prods. Liab. Litig.*, 1992 WL 403023, at *1 ("[W]e are not persuaded . . . that the degree of common questions of fact among these actions rises to the level that transfer under Section 1407 would best serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of this entire litigation.").

¹⁰² See *Diet Drugs Prods. Liab. Litig.*, 1999 WL 782560, at *1 (E.D. Pa. Sept. 27, 1999).

¹⁰³ See *id.* at *2 (referring to the December 12, 1997, order from the Judicial Panel on Multidistrict Litigation transferring several federal Fen/Phen cases to the Eastern District of Pennsylvania).

and imposed a fee on all cases to fund that group of counsel.¹⁰⁴ Other plaintiffs' lawyers, seeing that control of the MDL was in the hands of the class action lawyers, chose to avoid federal court by filing in state courts, notably in New Jersey, the home of the defendant.¹⁰⁵ Thus, there were only a small number of individual cases filed in federal court and a larger number of individual cases and class actions filed in state courts.

The composition of the plaintiffs' committee to lead the Fen/Phen litigation differed from that of the lead counsel in the silicone gel breast implant litigation. In the silicone gel class action, the MDL judge mixed a variety of plaintiffs' counsel on the same committee, forcing them to make joint decisions.¹⁰⁶ In the Fen/Phen litigation there was substantially less internal conflict among the MDL plaintiffs' counsel; the boutique and other lawyers simply filed in state court. Thus, there were two parallel activities occurring in the Fen/Phen litigation: a class action approach in federal court and individual cases and class actions in state courts. The MDL court pursued consolidated overall discovery with a view toward global settlement, and the state courts hosted a cacophony of litigation.

The bulk of the state judges who had Fen/Phen cases deferred to the federal judge by, in effect, complying with the federal case management plan.¹⁰⁷ There were a number of outliers, however, who did not defer; they proceeded to manage their cases independently of the MDL.¹⁰⁸ Because of the inherently comprehensive nature of MDL discovery, individual and even class action cases in state courts would proceed much more quickly. As a result, cases were set for trial in

¹⁰⁴ See *id.* (stating that "[i]n order to facilitate the administration of MDL No. 1203, the court has appointed a number of attorneys to serve on the Plaintiffs' Management Committee").

¹⁰⁵ See *Judge Bechtle Conducts First Fen-Phen Status Conference; Says 'Streamline the Litigation'*, MEALEY'S LITIG. REP.: FEN-PHEN/REDUX, Jan. 1998, at 3, 3 (noting the suggestion made by plaintiffs' lawyers that the committee be more balanced, comprised of lawyers from different camps and areas of the country); see also Paul D. Rheingold et al., *State Courts Provide New Forum for Mass Torts*, NAT'L L.J., Feb. 22, 1999, at C28 (discussing the anger of plaintiffs' counsel with the fees charged by steering committees).

¹⁰⁶ See *supra* note 100 (referencing further discussion of the silicone gel litigation).

¹⁰⁷ See *Diet Drugs Prods. Liab. Litig.*, 1999 WL 782560, at *2 (noting that between December 12, 1997, and September 27, 1999, the MDL court received over 1000 cases).

¹⁰⁸ See, e.g., *Linnen v. A.H. Robins Co.*, No. CIV.A. 97-2307, 1999 WL 317434 (Mass. Sup. Ct. May 6, 1999) (denying a motion and summarizing a wrongful death action arising out of Fen/Phen use brought in Massachusetts state court); *American Home Prods. Corp. v. Bernal*, 5 S.W. 3d 344 (Tex. Ct. App. 1999) (granting rehearing on joinder issue in Fen/Phen products liability action brought by twenty plaintiffs in the Texas state court).

state courts prior to the resolution of the MDL pretrial proceedings.¹⁰⁹

Virtually all the lawyers in both federal and state cases cooperated extensively with each other in the discovery process in order to reduce their transaction costs. Innovative processes, including the MDL-standardized fact sheets and electronic library, provided models for discovery and were utilized in the parallel state actions.¹¹⁰

Fundamentally, however, there were two independent tracks: (1) the federal pretrial discovery joined by the state judges who deferred to the MDL and (2) the state case-by-case and state class action proceedings pursued independently of the MDL proceedings. The federal court provided the forum for overseeing discovery and the non-deferring state judges provided the forum for a marketplace of litigation.

As the litigation progressed, individual state cases settled and large trial verdicts were returned in Texas and Mississippi.¹¹¹ There were also several state class actions certified for medical monitoring, and a major state class action medical monitoring trial commenced in New Jersey.¹¹² As the defendant's stock price lowered and the company became vulnerable to a takeover,¹¹³ as the defendant decided to merge with another company,¹¹⁴ as the statute of limitations ran,¹¹⁵ and as the

¹⁰⁹ See Jean Hellwege, *Fen-Phen Trial Dates Come Up, Spurring National Settlement Discussions*, TRIAL, July 1999, at 114, 114 (discussing the first Fen/Phen trials, beginning in April, 1999, in Texas state courts).

¹¹⁰ See Rheingold et al., *supra* note 105, at C28 (discussing the role of MDL procedures in federal cases and the attractiveness of state claims in avoiding global settlements).

¹¹¹ See Hellwege, *supra* note 109, at 114 (discussing previous settlements and negotiating for future settlements); *Fen-Phen Suit Jury Awards \$23.4 Million to E. Texan: Drug Company Vows To Appeal the Decision*, DALLAS MORNING NEWS, Aug. 7, 1999, at 1A (noting that the verdict was based on negligence and stating that legal observers described the case as "a weak Fen-phen case").

¹¹² See Laura Johannes & Robert Langreth, *Fen-Phen Defense: Marketer of Redux, Mulling Settlement, Sees Plaintiff's Hand*, WALL ST. J., Sept. 28, 1999, at A1 (noting the New Jersey suit and testimony regarding the high volume of "adverse events" being reported to American Home Products).

¹¹³ See *Fen-Phen Maker Misled Doctors About Damage, Lawyer Says*, DALLAS MORNING NEWS, Aug. 12, 1999, at 2D (referring to American Home's stock hitting a 52-week low at the time of the New Jersey law suit).

¹¹⁴ See Robert Langreth et al, *Anatomy of a Drug Merger: How Two Leaders Courted and Struck*, WALL ST. J., Nov. 9, 1999, at B1 (reporting on the proposed merger between Warner-Lambert and American Home Products).

¹¹⁵ The statute of limitations began running in September 1998, when potential problems attributable to Fen/Phen were first identified.

The fate of Pondimin and Redux was sealed in early September, when the FDA received the results of echocardiograph studies conducted on patients

New Jersey medical monitoring trial proceeded to conclusion,¹¹⁶ some of the parties reached agreement on an overall settlement to be implemented in the federal forum with state court participation.¹¹⁷ At the end of the day, the cases in the state courts provided the information and the pressure; the federal court proceedings provided the comprehensive discovery, procedure, and jurisdiction for global resolution.

The proposed settlement also accommodated the conflicts among plaintiffs' counsel by providing two funds and a multiple opt-out. One fund was created to make payments according to a grid for plaintiffs who suffered specified harms,¹¹⁸ and a second fund was created for medical monitoring.¹¹⁹ The first fund was established by the federal class action lawyers who would be compensated accordingly.¹²⁰ The second fund was for the state class action lawyers who would be compensated accordingly.¹²¹ Plaintiffs who decided to proceed on their own could do so by opting out.¹²² The opt-out provisions were for lawyers who desired to proceed independently and be compensated through their clients' compensation. The defendant has an opportu-

who had used the drugs. Although the number of subjects was small—just 284 divided among five studies—the results were disturbing: Nearly one in three had evidence of heart valve disease.

Bob Van Voris, *Fen-Phen Suits Grow: Panel Mulls MDL Forum for Diet-Drug Litigation as Feds Urge Heart Exams*, NAT'L L.J., Dec. 1, 1997, at A1. The statute of limitations for tort actions in most states runs for two years from the date of discovery of the injury or the connection between the injury and the cause. See, e.g., COLO. REV. STAT. ANN. § 13-80-102 (West 1999); OHIO REV. CODE ANN. § 2305.10 (West 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 1999); VA. CODE ANN. § 8.01-243 (Michie 1999).

¹¹⁶ See Robert Langreth, *American Home Is Ordered To Pay \$23.36 Million in Diet-Drug Suit*, WALL ST. J., Aug. 9, 1999, at A4 (mentioning the impending opening arguments in a New Jersey class action case involving Pondimin and Redux).

¹¹⁷ See Charles Ornstein, *Fen-Phen Suits Will Be Settled: American Home Products To Pay up to \$3.75 Billion*, DALLAS MORNING NEWS, Oct. 8, 1999, at 1D (reporting on American Home's announcement that it will settle lawsuits with most of the former users of Fen/Phen and for any who develop injuries from the drugs in the coming years).

¹¹⁸ See Ellen Mazo, *The Wonder Drug That Wasn't After Reports of Heart-Valve Damage, Users of the Fen-Phen Diet Drug Consider Legal Action*, PITT. POST-GAZETTE, Nov. 2, 1999, at F1 (noting establishment of a settlement fund for persons injured by Fen/Phen).

¹¹⁹ See *id.* (stating that \$1.2 billion was set aside for medical monitoring of former Fen/Phen users).

¹²⁰ See *Nationwide Class Action Settlement Agreement with American Home Products Corporation 17* (Nov. 19, 1999).

¹²¹ See *id.* at 19.

¹²² See Robert Langreth & Gardiner Harris, *Verdict Pushes AHP To Settle Fen-Phen Suits*, WALL ST. J., Dec. 22, 1999, at A3 (noting fen-phen users across the country were considering whether to opt out of the national settlement plan reached between American Home Products and plaintiffs' lawyers).

nity to reject the settlement if it is not satisfied with the number of opt-outs and opposition is expected from a variety of sources who deem their interests affected.¹²³ Court approval of this proposed settlement is pending.¹²⁴

Notwithstanding its overall value, the de facto cooperative strategy of a marketplace of litigation in state courts and consolidated discovery and settlement in federal court has multiple weaknesses. There is still redundant discovery. There are still conflicting rulings on discovery, evidence, and substantive law. There are still dueling class actions and other contrary proceedings. There are inequalities in the timing and outcomes of similarly situated individual cases.

More important is the problem of selection bias in the state forums that are providing the information upon which an eventual settlement can be based. It is an unrepresentative subset of state courts that are generating trials, settlements, and verdicts. This subset is typically, by virtue of both MDL plaintiff and defendant efforts, more plaintiff-oriented. Defendants usually feel more comfortable in the single, federal forum. Conversely, plaintiff's counsel independently seek a favorite forum, which may be the federal court or any one of the state courts. The defense strategy of attempting to have all state courts defer to the federal court cannot succeed if there are any significant exceptions, as was the case in the silicone gel breast implant litigation.¹²⁵ While the defense-oriented jurisdictions defer, the plaintiff-oriented jurisdictions proceed to provide data points, with a resulting asymmetry of information.

Another important problem with the de facto cooperative strategy is that the "ultimate global resolution" is typically not an ultimate global resolution. Multiple opt-out rights allow some containment and increased predictability, but not final resolution. This problem of lack of finality is quite significant for defendants. As long as a tail of potential liability overhangs a defendant's financial condition, many investors will discount the value of the company or otherwise increase its cost of capital. Given the high level of risk aversion to the mass tort litigation tail by major segments of the capital markets, the lack of finality can have a major impact on the financial strength, and even vi-

¹²³ See, e.g., *id.* (noting the decline of defendant's stock price in response to the suit).

¹²⁴ See *id.* (stating that a judge will decide whether to approve the settlement this spring).

¹²⁵ See *supra* notes 79-82 and accompanying text (describing the extent to which state courts deferred to federal courts during the silicone gel breast implant litigation).

tality, of a company.

VII. TOWARD A MORE FORMAL IMPLEMENTATION OF A COOPERATIVE STRATEGY

Given the problems with de facto implementation, is there a way to systematize the cooperative strategy more permanently? There are four basic proposals, in both stronger or weaker versions, that have some potential: (1) revise the MDL rule or approach to make the strategy explicit; (2) revise Rule 23 to allow for more comprehensive settlements; (3) provide institutional support for state judges and for cooperative efforts; and (4) revise the *Manual for Complex Litigation* to educate judges concerning cooperative institutional strategy.

The strongest version would involve new legislation. If the MDL statute were amended to allow the transferee judge to oversee pretrial discovery for both federal and state cases, it would be possible to reduce much of the redundant discovery. In addition, if the MDL statute were revised to override *Lexecon*, the MDL judge could try individual cases from a broad geographical distribution, thereby providing more systematic data points for evaluating the mass tort. Furthermore, if the MDL judge would remand a limited number of cases to federal and state courts for trial with a sound methodology of case selection, creating a more representative marketplace of litigation, then the current biases could be reduced. If the MDL judge would explicitly defer aggregation for settlement until after the litigation marketplace had spoken and toll the statute of limitations or otherwise eliminate incentives for the premature filing of cases, then the premature massness that preempts a liability determination could be lessened.

The chance of this entire package of case management techniques occurring, absent legislative and behavioral changes, is limited. The reasons for this skepticism include not only the fact that Congress has been opposed to rule changes of this kind, but also the inherent distrust that plaintiffs' counsel, particularly the boutique lawyers, would have of an MDL judge actually deferring to state judges for any purpose, much less for multiple trials.

A weaker, but more practical, version of this proposal would not require a new statute. The Judicial Panel on Multidistrict Litigation could have substantial influence in creating an environment conducive to implementation of a cooperative institutional strategy. The panel's initial decision to consolidate cases as well as its opinion in that regard are critical guideposts. In addition, the panel's programs

for transferee judges provide an excellent opportunity to educate both federal and, occasionally, state judges concerning the various strategies for managing a mass tort.

If the MDL panel expanded its current practice of not transferring cases until the marketplace of litigation had spoken, *à la* the repetitive stress cases, the dangers of premature aggregation could be reduced.¹²⁶ A broader sample of trial and settlement results would not eliminate outlier verdicts but would dilute their importance. This dilution would be critical to the generation of more accurate data points to inform any ultimate resolution of a mass tort litigation.

If the MDL panel made it explicit that the transferee judge is not to engage in aggregation other than discovery until the mass tort matured in the marketplace of state court litigation, there would still be some duplicative discovery. Hopefully, it would be only for a limited period of time and in limited circumstances. Furthermore, as experience has shown us, counsel tend to cooperate with each other in this regard anyway. If the MDL panel desired, it could bifurcate the discovery and settlement aspects of the transferee judge's role by withholding the settlement role from the transferee judge until after there was sufficient information from the litigation to inform further proceedings.

Under either scenario, the MDL judge would be able to sponsor settlement discussions and use the available federal procedural rules to bring the litigation to a conclusion. In the event that settlement was not successful, the MDL judge could exercise docket control in remanding cases in a systematic manner without opening the floodgates of litigation inequitably.

A second option is to revise Rule 23 to accommodate mass tort settlements. There have been multiple proposals that are quite elegant and effective,¹²⁷ but the current political realities are not auspicious.¹²⁸ Settling defendants will probably be forced to accept containment

¹²⁶ See *supra* note 101 and accompanying text (describing the MDL panel's refusal to transfer and consolidate the repetitive stress syndrome cases).

¹²⁷ See generally Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 *passim* (1997) (analyzing the constitutionality of proposed changes to Rule 23); H. Thomas Wells, Jr., *Fine-Tuning Class Action Rules*, BUSINESS LAW TODAY, May/June 1998, at 39, 40-41 (describing proposals to revise Rule 23).

¹²⁸ See Wells, *supra* note 127, at 41 ("As a result of the controversy surrounding its rather modest proposals, the advisory committee concluded that there were deep philosophical divisions on many of the issues. Thus, it ultimately only sought Standing Committee approval of two changes to Rule 23 . . .").

rather than peace. This was the approach taken in the revised settlement plan in the silicone gel breast implant litigation,¹²⁹ the HIV blood serum cases,¹³⁰ and apparently in the Fen/Phen cases.¹³¹ The concept is to turn an elastic mass tort into an inelastic mass tort, quantify the contained universe of remaining claims, set aside sufficient litigation and settlement resources, and move ahead. Unfortunately for defendants, the capital markets have been particularly risk averse if there is any contingent liability for a mass tort.¹³² Perhaps over time financial decision-makers can be convinced that the cost of obtaining global peace in mass tort litigation far exceeds the risks associated with this containment approach. The peace premium for corporate predictability may simply be unavailable at any price.

Thirdly, there is a need for institutional support for the state judiciary and a vehicle for cooperative efforts. The "charisma" typical of the bottom-up cooperative efforts of the last several decades needs to be "routinized" in order to sustain more permanency.¹³³ Given the number of available state judges to participate in a marketplace of litigation, there is not a judicial resource problem in toto, but there is a resource problem for each individual judge. If the State Justice Institute could fund the National Center for State Courts, for example, to establish an institutional mechanism similar to the now defunct Mass Tort Litigation Committee to share information and provide limited support, there could be a permanent method of insuring a more effective state marketplace of litigation. The role of such an institution would be that of a halfway house between bottom-up and top-down

¹²⁹ See *supra* text accompanying note 100 (noting consolidation in the silicone gel breast implant cases).

¹³⁰ See *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1020 (7th Cir. 1998) (denying any further challenges to the settlement plans that provided for a \$40 million fund for attorneys' fees and \$100,000 for each class member who agreed to release defendants from liability).

¹³¹ See *supra* notes 102-17 and accompanying text (discussing consolidation in the Fen/Phen cases).

¹³² For example, the markets reacted strongly to the Texas Fen/Phen verdict. See Langreth, *supra* note 114, at B1 (noting that American Home Products' market capitalization lost 20% of its value after the verdict); see also Langreth & Harris, *supra* note 122, at A3 ("American Home was under pressure to settle the . . . suits because it is in the midst of trying to merge with Warner-Lambert Co. . . .").

¹³³ See Max Weber, 1 *ECONOMY AND SOCIETY* 251 (Gunther Roth & Claus Wittich eds., 1968) ("For charisma to be transformed into an everyday phenomenon, it is necessary that its anti-economic character should be altered. It must be adapted to some form of fiscal organization to provide for the needs of the group . . .").

reform.¹³⁴ It would be particularly critical to implement the weaker version of the proposed MDL changes. State judges are currently not positioned on parity with MDL judges.¹³⁵ Their role could be strengthened if they could act collectively. At the same time, probably the most powerful impetus for independent judges to act in a cohesive fashion is peer pressure. By bringing critical actors together there would be increased chances of coherent process. In a weaker version, the MDL transferee judge could unilaterally provide the funding for state judges on an ad hoc basis for each new mass tort.

Finally, the *Manual for Complex Litigation* could provide a road map for this cooperative strategy. The various versions of the *Manual* have reflected a healthy tension between flexibility and predictability in case management.¹³⁶ Current practice suggests that each mass tort is different and thus the management of tort cases should be different. There is, however, an increasing demand, particularly by defendants, for predictability in the form of more concrete rules of case management and for more a rule-based role for judges.¹³⁷ Defendants suggest that the universe of plaintiffs' counsel should know in advance that a mass tort defendant will have a realistic opportunity to challenge scientific and other facts before such a large number of claims are amassed in a way that precludes any attempt by a defendant to "win" an alleged mass tort. If the Board of Editors are so inclined, a defini-

¹³⁴ One model of this more permanent institutionalization could involve a staff of several employees who would be responsible for (1) identifying potential mass torts; (2) notifying state supreme courts or their administrative offices of the nature of the alleged tort; (3) organizing one or more conferences for judges designated by each state supreme court; (4) funding the participants' travel expenses; (5) inviting applicable federal judges; (6) involving applicable federal entities such as the Federal Judicial Center; (7) designing a conference program so that the judges could familiarize each other concerning their activities related to the alleged tort; (8) establishing a depository of material of mutual benefit to the judges; (9) establishing a web page or other means of communication to update the judges concerning important developments; and (10) assisting judges in any other appropriate cooperative efforts. The fundamental goal of this type of institution would be to provide a vehicle or forum for the judges to decide among themselves if and how they would like to cooperate.

¹³⁵ See Schwarzer et al., *supra* note 3, at 1714 ("[F]ederal courts often have institutional advantages, greater resources, and more flexible tools for aggregating their own cases . . .").

¹³⁶ Cf. *MANUAL FOR COMPLEX LITIGATION 1ST*, *supra* note 40, with *MANUAL FOR COMPLEX LITIGATION 2D*, *supra* note 46. The first edition, for example, provides for standardized waves of discovery in a specified order, whereas the second edition leaves the ordering of discovery to each individual judge.

¹³⁷ See Letter from David M. Bernick to Francis McGovern, Professor at Duke University School of Law (Apr. 14, 2000) (on file with the *University of Pennsylvania Law Review*).

tive cooperative strategy could be included in a future *Manual*, in either the strong or weak form.

CONCLUSION

Whether judges intend or not, they are pursuing a case management strategy in mass tort litigation. Cooperation among judges in the sense of communication and coordination has worthwhile, but limited, benefits. Cooperation among judges in the sense of deferral of the state judiciary to a federal MDL judge is more problematic. Not only are there adverse implications for federalism, due process, and our adversarial litigation system, but it is inevitable that at least some state judges, typically in unrepresentative venues, will not defer, resulting in verdicts or settlements that will constitute skewed data points for informing a global resolution to the litigation. A strategy of cooperation at the institutional level—taking advantage of the state courts to create a marketplace of litigation and the federal courts to coordinate discovery and promote a national settlement—can create otherwise unobtainable joint gains. Under existing laws, there is no silver bullet to end horizontal inequity or litigation inefficiency, but these weaknesses can be diluted by pursuing a cooperative institutional strategy that will reduce error costs associated with unpredictable procedures, inaccurate information, agency failure, and federalism conflicts.