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In the Matter of Rhone-Poulenc Rorer. Shielding Defendants Under Rule 23

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I. INTRODUCTION

Hemophilia results from the absence or insufficiency of coagulating proteins, called "Factor VIII" and "Factor IX," in the hemophiliac's blood supply.¹ The insufficiency of these proteins creates a risk of spontaneous and trauma-induced bleeding into joints, muscles or body cavities.² Hemophiliacs are treated by infusions of a blood solid concentrate, obtained from many donors, called antihemophilic factor concentrate ("AHF").³ AHF contains the clotting factors, Factor VIII and Factor IX.⁴ Contamination of the manufactured blood occurs if any

1. Leon W. Hoyer, M.D., *Hemophilia A*, 330 NEW ENG. J. MED. 38 (1994).

2. *See id.* at 38-41.

3. *Wadleigh v. Rhone-Poulenc Rorer Inc.*, 157 F.R.D. 410, 413-14, (N.D. Ill. 1994), *mandamus granted, rescinded, class certification denied*, 51 F.3d 1293 (7th Cir.), *and cert. denied*, 116 S. Ct. 184 (1995).

4. *See id.*

of the donors are infected with the HIV virus.⁵ To prevent transmission of AIDS through the blood supply, manufacturers must treat contaminated blood with heat to kill the virus.⁶

Failure of blood manufacturers to test and treat the blood supply during the early 1980s left the plight of the hemophiliacs in the hands of fate. As history demonstrated, fate was not kind to many hemophiliacs. In July of 1982, doctors diagnosed three cases of opportunistic infections in hemophiliacs.⁷ During that same year, a Center for Disease Control (CDC) investigation report identified a number of unusual cases of AIDS, all having the common characteristic of receiving blood transfusions or using a blood-based product during the previous five years.⁸ By January 1983, reports identified several cases of AIDS among hemophiliacs.⁹ At this time, the CDC presented evidence to blood suppliers that surrogate testing would reduce the transmission of AIDS through blood.¹⁰ Surrogate testing is a process that identifies characteristics in blood that typically accompany the AIDS virus.¹¹ Because such testing both increases costs of production and reduces the available blood supply, blood suppliers were hesitant to implement such procedures.¹² In the spring of 1993, Stanford University Blood Bank instituted surrogate testing, but the blood banking industry did not immediately follow this example.¹³ Finally, on March 2, 1985, the FDA first licensed the enzyme-linked immunosorbent assay (ELISA) test that made screening blood for AIDS antibodies possible.¹⁴

In spite of strong evidence that AIDS is transmitted by blood transfusions, the blood banking industry responded slowly to the possibility of HIV transmission through blood.¹⁵ A U.S. Department of Health and Human Services (HHS) study concluded that this delayed response led to many additional HIV infections in hemophiliacs.¹⁶ Although studies

5. *See id.* at 414.

6. Kenard E. Nelson, M.D. et al., *Blood and Plasma Donations Among a Cohort of Intravenous Drug Users*, 263 JAMA 2194, 2197 (1990). But note, even with this treatment, cases of transmission have been reported. *Id.* at 2197.

7. *Kozup v. Georgetown Univ. Medical Ctr.*, 663 F. Supp. 1048, 1051 (D.D.C. 1987).

8. Andrea Rock, *Inside the Billion-Dollar Business of Blood*, MONEY, Mar. 1986, at 153.

9. Kathryn G. Lotfi, *Suppliers of AIDS-Contaminated Blood Now Face Liability*, 34 HOW. L.J. 183, 187 (1991).

10. *Id.* at 187-88. *See also* Lehman, *Blood Suppliers' Liability for AIDS Contaminated Blood*, 41 HEALTH LAW 107, 115 n.48 (1989).

11. *See id.*

12. Lotfi, *supra* note 9, at 188.

13. *See id.* at 189; Rock, *supra* note 8, at 167.

14. Lotfi, *supra* note 9, at 189.

15. *See id.*

16. INSTITUTE OF MEDICINE, HIV AND THE BLOOD SUPPLY, July 13, 1995, *summarized in*, AIDS LITIG. REP., at 14027 (July 28, 1995).

revealed significant evidence indicating that HIV was blood-borne, blood safety policies changed very little during these early stages.¹⁷ An estimated 10,000 persons with hemophilia—more than half the hemophiliac population—are currently infected with the HIV virus.¹⁸ By 1993, approximately 2,000 persons with hemophilia died from AIDS.¹⁹ Both the victims and the public at large were justified in wondering why the blood industry moved with such “tragic slowness” in response to the AIDS crisis.²⁰

In *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, a group of hemophiliacs who contracted HIV through contaminated blood products, their spouses, guardians, and personal representatives, brought an action against four blood manufacturers and the National Hemophilia Foundation.²¹ Acting on behalf of persons with hemophilia in the United States who became infected with the HIV virus due to their use of contaminated blood products, plaintiffs sought class certification of the suit under Rule 23 of the Federal Rules of Civil Procedure [hereinafter Rule 23].²²

The plaintiffs seeking class certification alleged that the defendant manufacturers were negligent in failing to take precautions to prevent or reduce viral contamination of their products after learning, in the 1970s, that viruses causing diseases such as hepatitis were transmitted through blood.²³ The plaintiffs further alleged that the blood manufacturers failed to screen their products and failed to warn the hemophilia community of the danger of contracting AIDS through use of their products.²⁴ According to the plaintiffs, the defendant blood manufacturers should have known both that the HIV virus was blood borne and that the virus could be transmitted through their products.²⁵ In addition, plaintiffs presented claims of products liability, breach of implied warranty, and conspiracy against the blood manufacturers, and further charged the National Hemophilia Foundation with negligence and breach of fiduciary duty.²⁶ The plaintiff class sought both compensatory and punitive

17. *See id.*

18. Symposium, *HIV Infection Among Women of Reproductive Age, Children and Adolescents: To Insure or Not to Insure Persons Infected with the Virus that Causes Aids*, 77 IOWA L. REV. 1617 (1992).

19. *See id.*

20. *See Rock, supra* note 8, at 154.

21. 157 F.R.D. at 410.

22. *Id.* at 413.

23. *Id.* at 414.

24. *Id.* at 413.

25. *Id.*

26. *Id.*

damages from all defendants.²⁷

At the district court level, Judge Grady granted partial certification to the nationwide class of plaintiffs after finding that the class met the requirements of Rule 23(a).²⁸ He refrained from certifying the entire controversy, under Rule 23(b), finding instead that individual questions of fact dominated the issues of proximate cause, strict liability, breach of implied warranty, and punitive damages.²⁹ Despite defendant opposition, Judge Grady granted certification on both the negligence and breach of fiduciary duty claims under Rule 23(c)(4)(A).³⁰ Although Judge Grady recognized that the fifty-one different jurisdictions throughout the United States employ two different standards of care in determining the issue of negligence,³¹ he found that the parties could address both standards of care.³² Judge Grady viewed a class determination of negligence as the superior method "for the fair and efficient adjudication of the controversy" because it avoided the cumulative presentation of evidence in separate trials.³³

The defendants responded by seeking a writ of mandamus from the Court of Appeals for the Seventh Circuit that would require Judge Grady to decertify the class.³⁴ Since a certification order is not a final decision within the meaning of 28 U.S.C. § 1291, the defendants could not have simply appealed at this time.³⁵ The Supreme Court has identified two requirements for obtaining a writ of mandamus.³⁶ First, the defendants must suffer irreparable harm from the certification order.³⁷ Second, they must suffer a violation of a clear and indisputable right or suffer from an abuse of judicial discretion by the district judge.³⁸

In *In re Rhone-Poulenc Rorer Inc.*,³⁹ the Seventh Circuit found that the defendants satisfied these two requirements.⁴⁰ As a result, the Seventh Circuit issued a writ decertifying the nationwide plaintiff class of

27. *Id.*

28. *Id.* at 415-18.

29. *Id.* at 422-27.

30. *Id.* at 422-26.

31. Judge Grady identified the two standards of care as the standard of ordinary care and the standard of professional care. *Id.*

32. *Id.*

33. *Id.* at 425.

34. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

35. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480-82 (1978).

36. *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976).

37. *Id.*

38. *Id.* See also *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

39. 51 F.3d at 1293.

40. *Id.* at 1295.

hemophiliacs.⁴¹ In its analysis, the Seventh Circuit found that because the challenged order would evade effective review, the defendants would suffer irreparable harm from class certification.⁴² Additionally, the court found that Judge Grady's certification plan exceeded the bounds of permissible judicial discretion in three ways.⁴³ First, the court identified problems in determining the future of defendants' companies in a single jury trial, where the feasible alternative of determining liability through a process of multiple trials existed.⁴⁴ Additionally, the court found that the plan violated the rule espoused in *Erie R.R. v. Tompkins* [hereinafter *Erie*],⁴⁵ by proposing to try the class action under a standard of care consolidated from the fifty-one different jurisdictions throughout the country.⁴⁶ Finally, the Seventh Circuit found that the plan created Seventh Amendment problems by allowing one jury to determine liability and then allowing another jury to determine proximate cause.⁴⁷

As a result of these concerns, the Seventh Circuit ordered decertification of the nationwide class of hemophiliacs.⁴⁸ Judge Rovner dissented on the grounds that the majority used its writ of mandamus powers to circumvent the rule that certification orders are not immediately appealable.⁴⁹ In addition, Judge Rovner disagreed with the majority's argument that Judge Grady's certification plan would prompt settlement.⁵⁰

Subsequently, the Seventh Circuit denied the hemophiliac class' request for an *en banc* rehearing,⁵¹ and the Supreme Court, without comment, denied the hemophiliac class' petition for certiorari.⁵²

In this Note, I shall analyze Judge Posner's majority opinion for the Seventh Circuit in *Rhone-Poulenc*. Part I outlines the origin and evolution of class action lawsuits as a means of dispute resolution. Part II criticizes Judge Posner's premise that individual trials are superior to a class action for the resolution of this controversy. Part III considers

41. *Id.* at 1304.

42. *Id.* at 1297-98.

43. *Id.* at 1299.

44. *Id.* at 1300.

45. 304 U.S. 64, 78-80 (1938).

46. *Rhone-Poulenc*, 51 F.3d at 1300.

47. *Id.* at 1304. According to Judge Posner in his majority opinion, this practice would violate the Seventh Amendment principle that the findings of one jury cannot be reexamined by another, subsequent jury. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1305.

51. *In re Rhone-Poulenc Rorer Inc.*, 1995 U.S. App. LEXIS 9693 (7th Cir. Apr. 27, 1995) (*en banc*).

52. *In re Rhone-Poulenc Rorer Inc.*, 51 F. 3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

whether the *Erie* doctrine allows a nationwide determination of liability. Finally, Part IV concludes that Judge Grady's plan is in accord with the Seventh Amendment.

II. HISTORY

The history of the class action suit has evolved through three stages. In the first stage, the original drafters of Rule 23 believed that class certification should be given a liberal rather than a restrictive interpretation, and urged the courts to err in favor of certification rather than against it.⁵³ Under this view, the Federal Rules of Civil Procedure would encourage just, speedy, and inexpensive resolutions.⁵⁴

The second stage emerged as a reaction to numerous certifications of class action suits in mass torts.⁵⁵ Many courts adopted the belief that such litigation was judicially unmanageable.⁵⁶ In addition, scholars called for a more restrictive interpretation of Rule 23 in order to protect individual interests from submersion in large scale proceedings by providing every individual his or her day in court.⁵⁷ The Advisory Committee encouraged such a restricted use of the class action, stating that mass injury cases were inappropriate for class action treatment due to the great likelihood that individual questions of damages and defenses to liability would arise.⁵⁸ In the years following, more courts refused to certify class actions in the mass tort context,⁵⁹ creating the appearance that the class action would no longer be used as a device for resolving mass litigation.

With the appearance of the mass tort dilemma created by the asbestos litigation, however, courts and scholars returned to a more liberal application of the class action.⁶⁰ First, due to the volume of litigation flowing from mass disasters, courts began to rethink the policy against class certification in such contexts.⁶¹ For example, in *Jenkins v. Raymark Industries Inc.*,⁶² the Court of Appeals for the Fifth Circuit,

53. FED. R. CIV. P. 23(b)(3), advisory committee's note (1966).

54. FED. R. CIV. P. 23.

55. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1754, at 52-54; *In re A.H. Robins*, 880 F.2d 709, 728-32 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

56. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344-46 (1995).

57. See *id.* at 1344.

58. FED. R. CIV. P. 23(b)(3), advisory committee's note (1966).

59. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989).

60. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986).

61. Coffee, *supra* note 56, at 1345-46.

62. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, reh'g denied, en banc, 785 F.2d 1034 (5th Cir. 1986).

upholding class certification in an asbestos suit, recognized the need to invent new methods to deal with the influx of mass tort cases in order to preserve judicial efficiency and prevent repetitive trials.⁶³

Second, by utilizing their Rule 23(c)(4)(A) authority to limit certification of a class to particular issues, courts were able to employ the class action as a dispute settlement device in more cases. In support of limited certification, the Advisory Committee Official Comment to Rule 23(c)(4)(A) recognized "that an action could be maintained as a class action as to particular issues only."⁶⁴ Additionally, between 1977 and 1993, the third, fourth, fifth, sixth, and ninth circuits all certified class actions with respect to common issues of liability, but not as to the case as a whole.⁶⁵

Lastly, the class action has gained popularity as a result of its usefulness as a settlement encouraging device. Support for using the class action in this way first appeared in *In re Agent Orange Product Liability Litigation*.⁶⁶ In that case, the Eastern District of New York applauded the idea that a class determination of the causation issue could enhance the possibility of settlement.⁶⁷ Although it still remains unclear whether Rule 23 allows class certification for settlement purposes, a number of courts and commentators believe that it does.⁶⁸ Further, in *In re A.H. Robins Co.*,⁶⁹ the Fourth Circuit concluded that Rule 23 allows the court to certify a class with respect to a particular issue when it proves "superior to other available methods for the fair and efficient adjudication of the controversy."⁷⁰ Thus, when certification of a class increases the possibility for a group settlement, Rule 23 authorizes certification.⁷¹

The underlying policy goals of both substantive tort law and civil procedure contributed to the underlying use of class certification under

63. *Id.* at 473.

64. FED. R. CIV. P. 23(c)(4)(A), advisory committee's note (1966).

65. *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456 (D. Wyo. 1995); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986); *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977).

66. 100 F.R.D. 718 (E.D.N.Y. 1983).

67. *Id.* at 721.

68. "In recent years, several federal judges have explicitly recognized the effect of class certification on the likelihood of prejudgment settlement in mass-tort suits, and have apparently allowed such recognition to influence their decision to certify class actions." Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461, 480 (1988).

69. 880 F.2d at 709.

70. *Id.* at 738 (quoting Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 835 (1985)).

71. *See id.*

Rule 23. Tort law seeks a fair and efficient resolution, attempts to compensate the victim of the wrong, and seeks to punish and deter the wrongdoer from future misbehavior.⁷² Similarly, the rules of civil procedure are driven by the policy goals of efficiency and fairness.⁷³

During the third stage, many judges, faced with a docket flooded with individual tort claims and the possibility of repetitive trials, began to emphasize the efficiency concerns of tort law and civil procedure.⁷⁴ In addition, the class action suit protected fairness concerns of tort law by ensuring resolution of the controversy and compensation to an individual litigant within a reasonable time period.⁷⁵

In summary, a movement toward a more liberal application of Rule 23 in the mass tort context emerged with the asbestos and breast implant litigation in an attempt to foster judicial efficiency. During this time, many courts ignored the Advisory Committee's warning that class certification is inappropriate in the mass tort context.⁷⁶ In addition, many decisions began reflecting judicial acceptance of class treatment for separate issues. Finally, many courts and commentators recognized the class action as a settlement fostering device.

Despite the number of cases employing a liberal application of the class action since the influx of mass tort actions began in the late 1980s, this trend may end. The more successful judges become at dealing with mass torts, the larger the mass tort filings become.⁷⁷ This steady filing of mass tort claims creates new dissatisfaction with the class action suit.⁷⁸ Moreover, this increase in the volume of litigation decreases the efficiency of the legal system, thereby undermining the very goals that many judges set out to accomplish.⁷⁹ Individuals may become dissatisfied with the class action system because of this increase in the volume of such suits. The inability to guarantee that the class certification controversy will be resolved within a reasonable time period, undermines the fairness to individual class members achieved in earlier stages of the class action.⁸⁰ This new emphasis on the fairness concerns of defend-

72. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995) [hereinafter *Mass Torts for Judges*]; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.15 (4th ed. 1992).

73. *Mass Torts for Judges*, *supra* note 72, at 1821.

74. *See id.* at 1822.

75. *See id.*

76. *A.H. Robins*, 880 F.2d at 734.

77. David Rosenberg, Comment, *Issues in Civil Procedure: Advancing the Dialogue a Symposium: Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 711 (1989).

78. *See id.*

79. *See id.* *See also* Coffee, *supra* note 56, at 1344-46.

80. Rosenberg, *supra* note 77, at 711-12.

ants, as illustrated in Judge Posner's decision in *Rhone-Poulenc*, may dictate a more restrictive application of the class action law suit. This would bring us into a fourth stage in the evolution of a class action law suit. However, as this Note will argue, such an evolution should not occur.

III. ANALYSIS

A. *Individual Trials Are Not the Superior Method for Resolving the Hemophilia Contaminated Blood Controversy*

In *In re Rhone-Poulenc Rorer Inc.*,⁸¹ Judge Posner argues that individual trials are the best method for the resolution of the hemophiliac blood supply controversy.⁸² This section discusses the assumptions Judge Posner uses to arrive at his conclusion and argues that these assumptions are flawed.

To obtain a writ of mandamus, the challenged order must inflict irreparable harm on the challenger, such that the possibility of effective judicial review at the close of the case is precluded.⁸³ Due to the magnitude of risk of bankruptcy that this class action places on the defendants, Judge Posner argues that they will face intense pressure to settle.⁸⁴ However, Posner estimates that such pressure is economically unfair because the defendants had already won twelve of the first thirteen law suits brought against them.⁸⁵ These victories, according to Posner, predicted how the defendant would fare in future litigation.⁸⁶ Estimating that without class certification defendants faced approximately 300 law suits and approximately 125 million dollars worth of damage payments in individual suits, and arguing that class certification would increase this potential liability to about 25 billion dollars, Judge Posner concluded that certification of the class would force the defendants to settle.⁸⁷ Because settlement eliminates the possibility of review, it also eliminates the possibility of judicial relief.⁸⁸

In his opinion, Judge Posner formulates the premise that the defendants' first twelve victories in thirteen cases were a representative sample of the defendants' overall liability [hereinafter "Representative Sample Premise"]. He uses this premise to conclude that Judge Grady abused his discretion in certifying a class for the determination of liabil-

81. 51 F.3d 1293 (7th Cir. 1995).

82. *Id.* at 1299-1300.

83. *Id.* at 1295.

84. *Id.* at 1297.

85. *Id.* at 1298.

86. *Id.*

87. *Id.*

88. *See id.*

ity.⁸⁹ Judge Posner further reasoned that because twelve juries failed to hold the defendants liable, the risk that a single jury in this class action could find the defendants liable is too great to allow certification, when individual trials were both a feasible and a superior alternative.⁹⁰ Arguing that a determination of liability by one jury in a class action could bankrupt the blood banking industry, Judge Posner concluded that "it . . . [would not be] a waste of judicial resources to conduct more than one trial, . . . to determine whether a major segment of the international pharmaceutical industry . . . w[ould] follow the asbestos manufacturers into Chapter 11."⁹¹

1. JUDGE POSNER'S PREMISE THAT THE DEFENDANTS' FIRST TWELVE
VICTORIES IN THIRTEEN TRIALS WAS A REPRESENTATIVE
SAMPLE OF DEFENDANTS' LIABILITY MAY
PROVE INCORRECT

The merit of these arguments depends on the validity of Judge Posner's premise that defendants' first twelve victories are a representative sample of the defendants' overall liability. First, if this sample is unrepresentative, then settlement would be chosen, not forced. If the defendants were in fact negligent, then they would probably welcome a settlement. Consequently, defendants would fail to establish that they suffered irreparable harm in order to satisfy their burden under the first requirement for a writ of mandamus. Additionally, if this sample is not representative, it does not necessarily follow that multiple individual trials are the superior method for resolving the issue of liability.

In formulating his Representative Sample Premise, Judge Posner assumes a continuation of victories by defendants in future individual trials.⁹² However, the cyclical theory of mass torts illustrates that this assumption may be false.⁹³ Under this theory of mass torts, a mass tort passes through different stages until reaching maturation.⁹⁴ Different stages of litigation warrant different judicial strategies.⁹⁵

During the initial stage of litigation, this theory advises judges to utilize a restrictive approach to certifying class actions.⁹⁶ Early in litigation, the defendant typically wins the majority of cases due to advan-

89. *Id.* at 1299-1300.

90. "This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries—and hurl the industry into bankruptcy." *Id.* at 1300.

91. *Id.*

92. *See id.* at 1298.

93. *See Mass Torts for Judges, supra* note 72, at 1841.

94. *Id.* *See also* Coffee, *supra* note 56, at 1359.

95. *Mass Torts for Judges, supra* note 72, at 1841.

96. *Id.* at 1842.

tages in available resources, information, law, and strategy.⁹⁷ In addition, the extensive discovery process involved in mass torts creates difficulties for plaintiffs' attorneys attempting to locate documents and information necessary for their case.⁹⁸ Plaintiffs may also encounter legal obstacles in attempting to develop new legal theories.⁹⁹ During this stage, defendants "may attempt to expedite weaker claims and delay the stronger ones in an effort to construct a string of precedent-setting favorable verdicts."¹⁰⁰ In this early stage of litigation, defendants may devote more time and money defending their product than each individual claim would normally require in an effort to prevent a progression into the second cycle.¹⁰¹

The cycle progresses to the second stage, in which the plaintiffs enjoy the advantage, only when the plaintiffs first succeed in obtaining favorable jury verdicts or negotiating a major settlement.¹⁰² This success suggests that they have developed a credible strategy on liability, causation, and damages and have surmounted existing legal obstacles.¹⁰³ During this stage, a popular consensus may arise in favor of the plaintiffs, thus strengthening the momentum of the shift in success.¹⁰⁴ As a result of this success, filings of new cases increase dramatically.¹⁰⁵ Plaintiffs' attorneys begin to exhaust their strong claims while the defendants' attorneys begin to develop novel and more successful strategies leading to increased success for the defendants.¹⁰⁶ This success leads to the final stage of the cycle.¹⁰⁷

In *In re Rhone-Poulenc*, the defendants created a string of precedent-setting verdicts in their favor.¹⁰⁸ Moreover, other defendant blood banks throughout the country continue to enjoy similar successes.¹⁰⁹ A great deal of the success enjoyed by blood manufacturers throughout the

97. *Id.*

98. *Id.*

99. *Id.*

100. Rosenberg, *supra* note 77, at 710.

101. *Id.*; see also *Mass Torts for Judges*, *supra* note 72, at 1841-42.

102. *Mass Torts for Judges*, *supra* note 72, at 1842.

103. *Id.*

104. *Id.*

105. *Id.* at 1843.

106. *Id.*

107. *Id.*

108. 51 F.3d 1293 (7th Cir. 1995). Since the Seventh Circuit's decision in *In re Rhone-Poulenc*, the defendants' record has changed to eleven wins in eleven fully tried cases. The one favorable verdict achieved by the plaintiffs was reversed and remanded by the Eleventh Circuit. *Christopher v. Cutter Lab.*, 53 F.3d 1184, *reh'g denied, en banc*, 65 F.3d 185 (11th Cir. 1995). The Seventh Circuit also remanded a defense verdict. *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (7th Cir. 1995).

109. See *Beaton v. American Assoc. of Blood Banks*, No. 93 CV 0393 (Colo. Dist. Ct. 1995) (finding that the defendant blood bank was not negligent in its blood screening procedures).

country stems from "blood shield statutes," which insulate blood manufacturers from strict liability claims.¹¹⁰ This protection emerged in *Perlmutter v. Beth David Hospital*.¹¹¹ In that case, the New York Court of Appeals found that where the blood transfusion services of the defendant hospital were secondary to other services provided by the hospital, the defendant was entitled to the traditional protection against strict liability enjoyed by medical service providers.¹¹² Following *Perlmutter*, every jurisdiction except New Jersey, Vermont, and the District of Columbia enacted "blood shield statutes."¹¹³ Some jurisdictions even included blood manufacturers as part of the class of persons insulated by these statutes.¹¹⁴ As a result of this widespread protection, some commentators have concluded that strict liability theories are unavailable to hemophiliacs suing blood manufacturers.¹¹⁵

Blood bank manufacturers have also experienced success in defending against negligence claims¹¹⁶ because they are generally held to the standard of professional care,¹¹⁷ rather than the stricter standard of ordinary care.¹¹⁸ Under the professional standard of care, the defendant manufacturer escapes liability by proving that it conformed to the general practices of other blood manufacturers in the industry at the time.¹¹⁹

110. Kathryn W. Pieplow, *Aids, Blood Banks and the Courts: The Legal Response to Transfusion-Acquired Disease*, 38 S.D. L. REV. 609, 622-23 (1993).

111. 123 N.E.2d 792 (N.Y. 1954), *reh'g denied*, 125 N.E.2d 869 (N.Y. 1955).

112. *Id.* at 795.

113. Pieplow, *supra* note 110, at 622-23.

114. *See, e.g.*, *Miles Lab., Inc. v. Doe*, 556 A.2d 1107, 1121 (Md. 1989) (finding that the compelling necessity for blood and blood products outweighs the known risk that products may contain some impurities, and therefore, holding that strict liability principles are not applicable against blood banks).

115. Joseph Kelly, *The Liability of Blood Banks and Manufacturers of Clotting Products to Recipients of HIV Infected Blood: A Comparison of the Law and Reaction in the United States, Canada, Great Britain, Ireland, and Australia*, 27 J. MARSHALL L. REV. 465, 468 (1994).

116. *See, e.g.*, *Kozup v. Georgetown Univ.*, 851 F.2d 437 (D.C. Cir. 1988) (affirming a summary judgment in favor of the defendant); *McKee v. Miles Lab., Inc.* 675 F. Supp. 1060, 1063-64 (E.D. Ky. 1987), *aff'd*, *McKee v. Cutter Lab., Inc.* 866 F.2d 219 (6th Cir. 1989) (finding that although the defendant pharmaceutical company did not use alternative testing to identify the HIV virus, it did not violate the standard of care within the profession, absent the industry's knowledge that HIV could be transmitted through blood).

117. Pieplow, *supra* note 110, at 629. *See also* *Jones v. Miles Lab., Inc.*, 700 F. Supp. 1127 (N.D. Ga. 1988) (finding that the defendant blood bank must conform to the standard of a reasonably prudent blood manufacturer); *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048 (D.D.C. 1987) (holding a blood bank to the standard of care of the applicable blood banking community); *Osborn v. Irwin Memorial Blood Bank*, 7 Cal. Rptr. 2d 101 (Cal. Ct. App. 1992) (employing a professional standard of care); *United Blood Serv. v. Quintana*, 827 P.2d 509 (Colo. 1992) (finding that the defendant blood bank must comport to the standard of professional care of the blood banking industry); *Doe v. American Red Cross*, 377 S.E.2d 323, 326 (S.C. 1989) (stating "we defer to the collective wisdom of a profession").

118. Kelly, *supra* note 115, at 468.

119. *See id.* at 472-73.

Because the entire blood banking industry generally began testing after many plaintiffs contracted the HIV virus, negligence actions under the professional standard of care have generally failed.¹²⁰ Both the unavailability of a strict liability cause of action and the lack of success achieved by plaintiffs in their negligence claims may indicate that plaintiffs will never enjoy enough success to propel the hemophilia blood controversy into the second stage of litigation.

In spite of the apparent roadblocks faced by hemophiliac plaintiffs, they have begun to achieve limited success. For example, despite Indiana's blood shield statute, an Indiana appellate court recently upheld a strict products liability claim against four defendant pharmaceutical companies.¹²¹ In *JKB v. Armour Pharmaceutical Corp.*, the Indiana Court of Appeals reversed a lower court's summary dismissal of a strict liability claim, refusing to extend the blood shield's statutory protection to blood bank companies.¹²² Although this is the first decision to exclude pharmaceutical companies from the protection of a blood shield law,¹²³ other states may follow this example.

In an effort to continue their success, hemophiliacs across the country continue to file both individual and class action suits against blood manufacturers.¹²⁴ Significantly, in several recent cases plaintiffs have emerged victorious.¹²⁵ For example, in *Snyder v. American Ass'n of*

120. Lotfi, *supra* note 9, at 184. Most victims bringing suits were probably infected during the period extending from 1981 through the development of the test for AIDS in 1985. *Id.* at 184, 189.

121. *JKB v. Armour Pharmaceutical Corp.*, 660 N.E.2d 602 (Ind. Ct. App. 1996).

122. *Id.*

123. *JKB v. Armour Pharmaceutical Corp.*, 660 N.E.2d 602 (Ind. Ct. App. 1996) (quoting plaintiffs' attorney Larry Jackson). AIDS LITIG. REP., at 15926 (Aug. 9, 1996).

124. *See, e.g., Jones v. Bayer Corp.*, No. 95-10489 CA 02 (11th Cir. 1995), AIDS LITIG. REP., at 13945 (July 14, 1995) (involving 500 hemophiliac plaintiffs filing a 16-count class action suit against both blood coagulant manufacturers and the National Hemophilia Foundation); *see also Morabito v. Rhone-Poulenc Rorer, Inc.*, No. 95-CV-4409 (Colo. Dist. 1995), PROD. SAFETY & LIAB. REP., at 1133 (Oct. 27, 1995) (involving five hemophiliacs filing a class action suit against the same five defendants involved in *Rhone-Poulenc* and using the same two theories of negligence); *Doe v. Armour Pharmaceutical Co.*, AIDS LITIG. REP., at 13947 (July 14, 1995) (filing the first class action suit after *Rhone-Poulenc* and alleging that the defendant pharmaceutical companies failed to warn patients despite their knowledge that their blood-clotting medications might have been contaminated).

125. For example, in *Advincula v. United Blood Services*, an Illinois court of appeals upheld a \$2.14 million jury verdict to the widow of a man who contracted AIDS from a tainted blood transfusion. *Advincula v. United Blood Services*, 654 N.E.2d 644 (Ill. App. 1st 1995). Unfortunately, hemophiliacs are also still experiencing setbacks. For example, in *Doe v. American Red Cross*, an Arizona district court recently reversed a prior partial class certification order in a hemophiliac class action suit charging negligence against a blood manufacturer. *Doe v. American Red Cross*, No. CIV 94-521 TUC RMB (D. Ariz. 1995), AIDS LITIG. REP., at 14792-93 (Dec. 22, 1995) (reversal of certification order summarized in AIDS LITIG. REP., at 16034 (Aug. 23, 1996)).

Blood Banks,¹²⁶ the court upheld a \$405,000 judgment, finding the defendant blood manufacturer negligent in failing to implement surrogate blood testing.¹²⁷ In its decision, a New Jersey appellate court observed the "sorry history of this nation's response to the AIDS epidemic during its first three years," and noted that "there was enough blame to go around" to negligent manufacturers.¹²⁸ Furthermore, in *Dipaolo v. New York Blood Center*,¹²⁹ a New York jury awarded Joey DiPaolo, the hemophiliac plaintiff, a \$1.5 million verdict after finding that the blood center failed to screen its blood adequately.¹³⁰ Mr. DiPaolo was so confident in his victory that six months later he asked the court to set aside the \$1.5 million jury award in order to allow him to challenge the sufficiency of his \$150,000 award for future pain and suffering.¹³¹ Subsequently, Mr. DiPaolo vacated his award and settled with New York Blood Center for an undisclosed amount.¹³²

In sum, the emerging victories and progressions in the hemophiliacs' claims against blood manufacturers suggest that Judge Posner may have incorrectly assumed that the defendants' victories in their first twelve of thirteen cases was a representative sample of their liability. Continued success in these areas may very well propel this mass tort into the second cycle of litigation, proving Judge Posner's assumption incorrect.

2. CONDITIONING CERTIFICATION ON THE LIKELIHOOD OF SUCCESS ON THE MERITS JEOPARDIZES FAIRNESS CONCERNS FOR PLAINTIFFS

In refusing certification, Judge Posner utilizes the flawed Representative Sample Premise to create a standard conditioning certification upon a judge's finding that the plaintiffs' class action has a probability of success on the merits.¹³³ By delaying certification until the plaintiffs have demonstrated their ability to succeed, this inquiry ensures certification of only mature mass torts.¹³⁴

126. 659 A.2d 482 (N.J. Super. Ct. App. Div. 1995), *aff'd*, 676 A.2d 1036 (N.J. 1996).

127. *Id.*

128. *Id.* at 495.

129. No. 2751/91 (NY Sup. Ct. 1996), AIDS LITIG. REP., at 15927 (Mar. 22, 1996).

130. *Id.*

131. AIDS LITIG. REP., at 15927 (Aug. 9, 1996).

132. *Id.*

133. Coffee, *supra* note 56, at 1438. See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

134. Such a standard would probably prevent "strike suits." A strike suit usually emerges in the context of a derivative action where the nuisance value of the suit creates settlement value, regardless of the merits of the suit. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

As discussed earlier in Section IA, however, plaintiffs are incredibly disadvantaged during the early stages of the maturation process.¹³⁵ “[O]ne obvious and inescapable fact about mass tort litigation must be placed at center stage in any public policy analysis: mass tort litigation typically involves seriously injured persons who lack insurance or substantial financial resources.”¹³⁶ Certification of class action suits helps plaintiffs with costly and uncertain cases obtain access to the legal system. Instead of refusing to represent these claimants, attorneys will welcome their addition to a large class.¹³⁷ Class actions are often necessary to protect the interests of individual plaintiffs due to the heavy burdens of individual adjudications.¹³⁸ In the Proposed Amendments to Rule 23, the writers recognized this necessity by including as a pertinent factor for considering certification: “the practical ability of individual class members to pursue their claims without class certification.”¹³⁹

Under the proposed standard, courts should consider that individual trials create inefficiency by requiring numerous plaintiffs to duplicate identical or substantially similar cases despite resolution in previous trials.¹⁴⁰ In contrast, defendants involved in duplicative trials may utilize their resources and defenses in different trials.¹⁴¹ As previously recognized by the Seventh Circuit, these results violate the purpose of Rule 23, which is to prevent defendants from enjoying considerable advantages by continually contesting liability in individual suits stemming from identical conduct.¹⁴²

As a result of these defense tactics, attorneys unfamiliar with the cyclical theory of litigation may refuse to take legitimate cases due to their perception that hemophiliacs simply do not have a case against blood manufacturers. After the Seventh Circuit’s decision in *Rhone-Poulenc*, and the current success of the nationwide defendant manufacturers,¹⁴³ attorneys could easily form such an opinion. Thus, claims against blood manufacturers may cease thereby precluding further success by the hemophiliac community. This eliminates the possibility that the litigation cycle of this tort will progress into the second stage of litigation. Because nationwide implementation of a standard requiring a showing of a probability of success on the merits could wholly deny

135. See *infra* Section IA.

136. Coffee, *supra* note 56, at 1355.

137. See *id.*

138. See *In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456, 466 (D. Wyo. 1995).

139. FED. R. CIV. P. 23(b)(3)(A), Proposed Amendment.

140. Rosenberg, *supra* note 77, at 710.

141. *Id.*

142. See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).

143. See *supra* notes 108-18 and accompanying text.

redress to plaintiffs with strong causes of action, the standard subverts the fairness goals of substantive tort law.

This standard also impedes both the fairness and efficiency goals of civil procedure by reducing the value of class action certification as a settlement fostering device.¹⁴⁴ Requiring plaintiffs to prove a probability of success on the merits of their claims will delay certification of any kind until plaintiffs can establish enough success to allow the maturation cycle of this tort to mature.¹⁴⁵ As a result, both plaintiffs and defendants will be forced to litigate individual suits until the tort matures, placing unnecessary burdens on the court system.

Recent cases support the proposition that the class action can and should be used as a device for fostering settlement. For example, in *A.H. Robins*,¹⁴⁶ after citing several opinions and academic comments that approvingly discussed certification of a class action for settlement purposes,¹⁴⁷ the Court of Appeals for the Fourth Circuit allowed consideration of the class action as a settlement fostering device.¹⁴⁸ Settlement through class certification may promote the fair resolution of a controversy by eliminating punitive damages and placing a limit on a defendant's liability without denying plaintiffs access to the court.¹⁴⁹ Certification for settlement purposes advances the goals of Rule 23 by promoting a fair and efficient resolution of the controversy.¹⁵⁰

Seriously undermining plaintiffs' negotiation power, Judge Posner needlessly subverts these Rule 23 goals. By denying certification on the likelihood of the defendants' success, Judge Posner's decision placed the defendants in a considerably stronger position. In *Rhone-Poulenc*, the plaintiff class was left with the choice of filing numerous individual

144. In fact, in decertifying the class, Judge Posner hoped to decrease certification as a settlement fostering device. See *Rhone-Poulenc*, 51 F.3d at 1298.

145. Coffee, *supra* note 56, at 1355.

146. *In re A.H. Robins, Inc.*, 880 F.2d 709, 736 (4th Cir. 1988).

147. See *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir. 1986); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983); Nielson, *supra* note 68, at 480. See also *supra* notes 64-68 and accompanying text.

148. *A.H. Robins*, 880 F.2d at 739. Recently, the Third Circuit upheld this principle in certifying a settlement class. *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

149. Symposium, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 900 (1995).

150. In the proposed amendments to Rule 23(b)(4), the writers encourage the use of the class action as a settlement fostering device by allowing certification even though "the requirements of subdivision (b)(3) might not be met." FED. R. CIV. P. 23(b)(4), Proposed Amendments. But note, in some cases, certification for settlement purposes may allow an unfair resolution of the controversy. See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1993), *aff'd*, 138 L. Ed. 2d 689 (1997) (protecting individuals who failed to timely opt-out of a class settlement reached on the same day as the case was filed, by finding that the proposed class did not satisfy the requirements of adequacy, representation, and typicality of claims).

suits, as Judge Posner predicted they would, or settling with the defendants. However, due to Judge Posner's finding that the defendants would prevail in a significant majority of its individual suits, a settlement at this time would be for considerably less than a settlement reached at the time of commencement.

Contrary to Judge Posner's hypothesis that individual plaintiffs' successes would produce judgments in the millions and encourage individual suits,¹⁵¹ the plaintiff class in *Rhone-Poulenc* settled. Judge Grady approved a \$640 million settlement in a combined settlement proposal for the *Rhone-Poulenc* class and the class involved in the litigation for *In re Factor VIII or IX Concentrate Blood Products Litigation*.¹⁵² This was a significantly lower amount than the potential 25 billion dollar recovery predicted by Judge Posner.¹⁵³

As Section I shows, the historical cycle of Rule 23 lacks justification for a preliminary inquiry into the merits of the plaintiffs' case as a condition for class certification. Instead, throughout the historical evolution of the class action as a dispute resolution device, courts routinely focused on the individual fairness concerns to plaintiffs, and later on the judicial efficiency considerations created by crowded court dockets.¹⁵⁴ In proposing such an inquiry, Judge Posner is engrafting changes to Rule 23 that are outside the language and history of Rule 23. These changes to Rule 23, if allowed to survive, will transform the class action from "a sword for plaintiffs" to "a shield for defendants,"¹⁵⁵ thus, enabling defendants to settle for considerably lower amounts than the plaintiffs might eventually receive when the tort matures.

3. EXISTING CASE LAW POSES SERIOUS OBSTACLES TO CONDITIONING CLASS CERTIFICATION ON THE LIKELIHOOD OF SUCCESS ON THE MERITS

In addition to the policy considerations that the Representative Sample Premise subverts, the Supreme Court decision, *Eisen v. Carlisle & Jacquelin*,¹⁵⁶ expressly prohibits the use of such a standard. In *Eisen*, the Court considered whether a judge may conduct a preliminary inquiry

151. *Rhone-Poulenc*, 51 F.3d at 1300. However, this probably still precludes plaintiffs with both limited resources and marginal cases from bringing suits against the defendants' blood banks. See, e.g., *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 466 (D. Wyo. 1995) (recognizing that without class certification, many clients with small claims will be precluded from bringing claims against large defendants).

152. *In re Factor VIII or IX Concentrate Blood Products Litigation*, No. 986 (J.P.M.L.) No. 93-C-7452 (N.D. Ill. Nov. 25, 1996), AIDS LITIG. REP., at 16547 (Dec. 13, 1996).

153. *Rhone-Poulenc*, 51 F.3d at 1298.

154. See *supra* Section I.

155. Coffee, *supra* note 56, at 1350.

156. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

into the merits of a case in deciding class certification.¹⁵⁷ The Court found nothing in either the language or history of Rule 23 granting the authority to conduct a preliminary inquiry into the merits of a suit in Rule 23 determinations.¹⁵⁸ Instead, the Court found that such a procedure contravenes Rule 23 by allowing a representative plaintiff to secure the benefits of a class action without first satisfying its requirements.¹⁵⁹

Proponents of the *Rhone-Poulenc* standard, conditioning certification on the likelihood of the success on the merits, would likely distinguish the facts in *Eisen* from the facts in *Rhone-Poulenc*. In *Eisen*, the Supreme Court based its decision on the protection of the defendant's rights.¹⁶⁰ In dismissing the class action, the Court noted that a preliminary determination of the merits could cause a substantial amount of prejudice to the defendant by indicating the defendant's guilt without a full and fair determination.¹⁶¹ This places an unfair burden on the defendant without providing adequate safeguards for the defendant's protection.¹⁶² Contrary to the *Eisen* case, in *Rhone-Poulenc*, Judge Posner did not substitute a preliminary inquiry for the requirements of Rule 23, but used the inquiry as an additional condition for certification.¹⁶³ Therefore, Judge Posner's standard provides more, not less, protection for defendants.¹⁶⁴

Any attempt to distinguish the two cases fails. In effect, Judge Posner's standard produces the same result as that produced in *Eisen*. Although the plaintiffs met the conditions of Rule 23, Judge Posner substituted a preliminary inquiry for the requirements of Rule 23 to decertify the class.¹⁶⁵ However, in substituting such an inquiry for the requirements of Rule 23, Judge Posner fails to cite support for this act.¹⁶⁶

In summary, Judge Posner uses the flawed Representative Sample Premise, that the hemophilic class is not likely to succeed on the merits of their case, to conclude that defendants would suffer irreparable harm as a result of certification and to find that individual trials are the supe-

157. *Id.* at 177.

158. *Id.*

159. *Id.*

160. *Id.* at 178.

161. *Id.*

162. *See id.*

163. *See Rhone-Poulenc*, 51 F.3d at 1296-98.

164. *See Coffee*, supra note 56, at 1438.

165. *See Rhone-Poulenc*, 51 F.3d at 1296-98.

166. *See In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 460 (D. Wyo. 1995) (noting the lack of legal support for Judge Posner's standard, refusing to grant a writ of mandamus to decertify a national pharmaceutical class action, and noting that although "[s]uch economic reasoning may carry substantial weight in the Seventh Circuit, but this Court must look to Fed. R. Civ. P. 23 and its interpretation by courts to determine the appropriateness of class certification").

rior method for the resolution of the case. This standard is both substantively and procedurally unfair to these plaintiffs. Not only does this standard considerably decrease the plaintiffs' access to courts by requiring all plaintiffs to sue individually, it diminishes the possibility of a classwide settlement. Finally, Judge Posner lacks the legal authority to condition certification on a preliminary inquiry into the merits of the case. Therefore, Judge Posner incorrectly found that Judge Grady abused his discretion in certifying a class action instead of utilizing individual trials.

IV. THE DIFFERENT NEGLIGENCE STANDARDS IN THE UNITED STATES PRECLUDE A NATIONWIDE DETERMINATION OF NEGLIGENCE

The second factor relied upon by Judge Posner in finding that Judge Grady abused his discretion pertains to Judge Grady's certification for a classwide determination of negligence.¹⁶⁷ Although the fifty-one jurisdictions in the United States may employ either the standard of ordinary care or the standard of professional care in a determination of negligence, Judge Grady found that the issue could be tried on a nationwide basis.¹⁶⁸ The parties could easily offer evidence regarding both the standard of ordinary care and the standard of professional care.¹⁶⁹

Judge Posner, in contrast, found that a nationwide determination of negligence would violate the rule formulated in *Erie R.R. v. Tompkins*.¹⁷⁰ In *Erie*, the Supreme Court held that a federal court sitting in diversity lacked the authority to apply a general common law rather than the common law of the state.¹⁷¹ After *Erie*, a federal court may only provide an alternative forum for the litigation of state law claims, it may not provide an additional and different forum.¹⁷² Employing this rationale, Judge Posner found that because the state common law negligence doctrines differ, even if only as to slight nuances, defendants' liability could differ from state to state.¹⁷³ For example, some states employ a professional standard of care fixed by the blood bank profession. In order to prevail under this standard, plaintiffs must prove that defendants acted inconsistent with those precautions utilized by other blood banking industries.¹⁷⁴ In contrast, other states employ the stan-

167. *Wadleigh v. Rhone-Poulenc Rorer Inc.*, 157 F.R.D. 410, 422-25 (N.D. Ill. 1994).

168. *Id.*

169. *Id.*

170. 304 U.S. 64 (1938).

171. *Id.*

172. *Rhone-Poulenc*, 51 F.3d at 1302.

173. *Id.* at 1301-02.

174. Kelly, *supra* note 115, at 472-73. See also Theodore Silver, *On A Hundred Years of*

dard of ordinary care which requires the defendant to have acted as a reasonable blood processor would have acted under similar circumstances.¹⁷⁵ These differing standards led Judge Posner to conclude that a class determination of the issue of negligence would violate the rule of *Erie*.¹⁷⁶ In order to make one nationwide determination, Judge Posner argued that a district court would have to create its own standard of care instead of employing the state standards of care as required by *Erie*.¹⁷⁷

The validity of a classwide determination of negligence turns on the *Erie* question. If Judge Grady's trial plan creates federal substantive law, as argued by Judge Posner, then the plan violates *Erie*. But, if the plan merely provides access to an alternate forum, as argued by Judge Grady, the *Erie* doctrine permits a nationwide determination of negligence.

In *Wadleigh*, Judge Grady found that the substantially identical definitions of standards in ordinary care jurisdictions allow a Restatement based jury instruction to prevent differences in state law from dominating the common issues.¹⁷⁸ Under the Restatement standard of care, to avoid negligence, an actor must conform to the standard of conduct "of a reasonable man under like circumstances."¹⁷⁹ Judge Grady found this the best method, noting that the different standards of care employed by differing jurisdictions would not impact the factual questions at issue.¹⁸⁰

Although the different jurisdictional definitions of ordinary care significantly mirror each other, judicial interpretations of these definitions differ substantially. For example, some courts instruct a jury that if

Harmful Error: The Historical Jurisprudence of Medical Malpractice, 1992 WIS. L. REV. 1193, 1213 (1992) (recognizing that in a state with the professional standard of care, a defendant may lawfully adopt and follow practices that are negligent and unreasonable under the standard of ordinary care).

175. Lotfi, *supra* note 9, at 198.

176. *Rhone-Poulenc*, 51 F.3d at 1302.

177. *Id.* As recognized by Judge Posner, Congress may constitutionally mandate a uniform standard of liability for blood manufacturers.

178. *Wadleigh*, 157 F.R.D. at 419-20.

179. This is so unless the actor is a child. RESTATEMENT (SECOND) OF TORTS § 283 (1977). The *Wadleigh* court found this definition substantially identical to the standard of care in Illinois. The Illinois standard of care is defined as "the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence." IPI, Civil, § 10.01. See also *Vuono v. New York Blood Ctr., Inc.*, 696 F. Supp. 743, 746 (D. Mass. 1988) (requiring the defendant fractionators to exercise that degree of care that a reasonable and prudent blood bank would or should have exercised under the same or similar circumstances); *Hernandez v. Nueces County Medical Soc'y Community Blood Bank*, 779 S.W.2d 867 (Tex App. 1989) (refusing to find evidence of the defendants' compliance with industry custom as conclusive on the issue of negligence; instead requiring a showing that the defendant acted consistent with that of other health care providers acting with ordinary care, skill, and diligence under the same or similar circumstances).

180. *Wadleigh*, 157 F.R.D. at 419-20.

the defendant proves that he acted as another reasonable person in like circumstances would have acted the jury should find that the defendant acted with due care.¹⁸¹ Other courts instruct the jury on what the defendant ought to have done, stating that what the defendant actually did, reasonable or not, is irrelevant.¹⁸² Under the former inquiry, a jury decides the question of ordinary care by "finding out what people have done" and determining whether the defendant acted in accordance.¹⁸³ In the latter inquiry, a jury decides what should be expected of the defendant class and labels that as reasonable.¹⁸⁴ A district judge formulating a jury instruction for a nationwide determination of negligence must choose between one of these views of the reasonable person. Consequently, this jury instruction would create substantive law, thereby violating *Erie*.

Likewise, jurisdictional variations of the professional standard of care differ to such an extent that differing standards of care emerge. At least two different types of professional standards of care exist. First, some jurisdictions employ a locality test in which doctors and others in the medical field are held to the standard of care of a professional in the same locality.¹⁸⁵ In a jurisdiction employing this test, juries compare the defendants conduct to the conduct of any local blood banks or to blood banks situated in localities similar to the jurisdiction in which the trial takes place.¹⁸⁶

A second type of standard of professional care requires a blood bank to exercise the degree of care exercised by the blood banking industry in similar circumstances.¹⁸⁷ Under this standard, courts generally require proof that the defendant "failed to conform to the generally recognized and accepted practices in his profession."¹⁸⁸ Additionally, the effect of a finding that the defendants did or did not conform to the standard of care differs from jurisdiction to jurisdiction. One variation

181. Lotfi, *supra* note 9, at 198.

182. *Id.* at 196.

183. Clarence Morris, Note, *Custom and Negligence*, 42 COLUM. L. REV. 1147-48 (1942).

184. *See id.*

185. RESTATEMENT (SECOND) OF TORTS (1977). The "community" or "locality" rule was established in Massachusetts as early as 1880 in *Small v. Howard*. The court held that a town practitioner is not bound to possess the high degree of skill of a city practitioner, but is merely bound to possess the skill ordinarily possessed by physicians and surgeons of ordinary ability and skill practicing in similar localities and lacking the opportunity for larger experience. 128 Mass. 131 (1880).

186. *Doe v. American Red Cross Blood Serv.*, 377 S.E.2d 323 (S.C. 1989).

187. Pieplow, *supra* note 110, at 637-38. *See also* *Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968) (overruling the "locality" standard and measuring the professional standard of care by the average competent practitioner in the same or similar circumstances, taking into account advances in the profession).

188. *Doe v. American Red Cross Blood Serv.*, 377 S.E.2d at 326.

treats such evidence as an irrebuttable presumption of due care.¹⁸⁹ For example, in *Doe v. American Red Cross Blood Services*,¹⁹⁰ the Supreme Court of South Carolina placed the burden on the plaintiff to prove that the defendant failed to conform to the generally recognized and accepted practices of his profession, and noted that a failure to meet this burden would result in a finding that the defendant did not breach the standard of care as a matter of law.¹⁹¹

An additional jurisdictional variation of the professional standard of care treats evidence of the defendant's conformity with industry practice as a rebuttable presumption.¹⁹² In *United Blood Services v. Quintana*, the Supreme Court of Colorado recognized the professional standard of care, but held that a finding that the defendant blood bank conformed to that standard was not conclusive proof of due care, instead creating a rebuttable presumption of due care.¹⁹³ The court cited Judge Learned Hand's opinion in *T.J. Hooper*¹⁹⁴ to avoid allowing a profession to set a measure of its own legal liability below a level of care easily obtained through practical procedures.¹⁹⁵ The court concluded, therefore, that in a professional negligence case, the trial court should permit the plaintiff to present evidence that the standard practices adopted by the industry and employed by the defendant were "unreasonably deficient by not incorporating readily available practices and procedures substantially more protective against the harm caused to the plaintiff than the standard of care adopted by the defendant's school of practice."¹⁹⁶ In such a jurisdiction, upon the presentation of competent evidence that the standard of care employed by the defendant was unreasonable, the issue of whether the defendants employed due care becomes a question for the jury.¹⁹⁷

A third variation of the general nationwide professional negligence

189. Pieplow, *supra* note 110, at 635.

190. *Doe v. American Red Cross Blood Serv.*, 377 S.E.2d at 326.

191. *Id.* at 326.

192. Pieplow, *supra* note 110, at 636.

193. *United Blood Serv. v. Quintana*, 827 P.2d 509, 521 (Colo. 1992).

194. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662, (1932) (finding that the reasonable prudence of an industry cannot act as the only measure of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices," and therefore courts must "in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." *See also* *Helling v. Carey*, 519 P.2d 981 (Wash. 1974) (holding that sometimes courts must overrule the standard of care employed by a whole profession where, as here, a simple and inexpensive glaucoma test would prevent irreversible eye damage, and therefore, the utility of employing the test outweighs any costs associated with its use).

195. *Quintana*, 827 P.2d at 520.

196. *Id.* at 521.

197. *See id.*

standard utilizes professional customs as relevant to, but not conclusive on, the issue of breach.¹⁹⁸ In *Smith v. Paslode Corp.*, the Eastern District of Missouri defined the professional standard of care as the “care commonly exercised by the ordinarily skillful, careful and prudent blood bank in its procurement, processing, distribution and use of blood products under the same or similar conditions.”¹⁹⁹ However, the court noted that a finding that a particular defendant failed to comport with the professional standard of care is insufficient to support a finding of negligence.²⁰⁰ Under Missouri law, the standard of care of a single professional may be higher or lower than the standard of the profession collectively.²⁰¹ Consequently, a jury must examine the defendant’s conduct in accordance with the facts existing and actually known by the professional at the time in question.²⁰²

Different juries instructed under the various standards of care will make significantly divergent factual determinations from jurisdiction to jurisdiction. A jury sitting in a “locality” jurisdiction will compare the defendant blood bank’s conduct to the conduct of a blood bank from a similar locality—one facing similar obstacles to advancement in the profession—to decide whether the defendant acted in accordance with such companies.

Under the nationwide professional standard of care employed in South Carolina, a jury must consider whether the defendant acted in accordance with the recognized and accepted practice of his profession. This requires the jury to make a finding of fact as to the defendant’s conduct relative to the nationwide professional practice. Because this factual finding is conclusive, the jury’s inquiry ends there.

In Colorado, however, in addition to making similar findings of facts in regard to the defendant’s conduct in relation to the professional practice, the jury must also determine whether the defendant’s adherence to the professional practice was reasonable in light of the harm caused to the plaintiff. This inquiry entails a comparison of the plaintiff’s injuries with the professional standard of conduct, creating an extra step for the jury process. Such an inquiry requires the presentation of evidence and expert testimony as to the unreasonableness of the defendant’s actions, creating the possibility of jury confusion.²⁰³ A consolidated trial might

198. Pieplow, *supra* note 110, at 636.

199. *Smith v. Paslode Corp.*, 799 F. Supp. 960, 969 (E.D. Mo. 1992).

200. *Id.*

201. *See id.*

202. *See id.* at 969. This suggests that Missouri does not consider what the professional should have known, but only what the professional actually did know.

203. Under Fed. R. Civ. P. 19, joinder requires litigants to avoid confusing the issues and misleading the jury.

overcome such jury confusion by separating out the jurisdiction in which this extra inquiry was required and applying the first finding to some jurisdictions, and both findings to other jurisdictions. Even if a jury could accomplish that task, the Missouri standard still poses a significant obstacle to consolidation.

Under the Missouri standard, it appears impossible to determine negligence on a class basis. The language employed by the court in *Paslode* suggests that such a determination must occur on a case by case basis because facts peculiar to the particular professional might give rise to an even lower standard than that of the collective profession.²⁰⁴ As discussed earlier, the *Paslode* decision suggests that an individual blood bank's liability could turn on the particular knowledge that it possessed, rather than on the knowledge it as a company should have possessed.²⁰⁵ In this case, this would entail at least five individual findings of the particular facts existing and known by the five individual defendants at the time in question.

Due to the significant differences in the standard of professional care in the different jurisdictions in the United States, Judge Grady's proposal that a standard set of forms could be drafted creating a uniform standard of professional care would violate *Erie*. The number of different standards of professional care make it extremely difficult to incorporate the numerous standards into one trial. Moreover, even if it were possible to instruct the jury as to each different standard, individual questions of fact and the law peculiar to different jurisdictions will dominate.²⁰⁶ This requires the negligence issue to be unmanageable on a class basis and not be the "superior" method for the fair and efficient adjudication of the controversy.²⁰⁷

This conclusion, however, does not preclude the alternative of partial class certification. As illustrated earlier, individual trials are not a superior alternative to a class resolution.²⁰⁸ Consequently, certification of partial statewide classes for resolution of the liability issue is the best available option. This solution retains the advantages of achieving substantive fairness and judicial efficiency while avoiding the *Erie* violations encountered by Judge Grady's plan.

204. See *Paslode*, 799 F. Supp. at 969.

205. See *id.*

206. Fed. R. Civ. P. 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

207. Fed. R. Civ. P. 23(b)(3) also requires that the "class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

208. See *supra* Section II.

V. JUDGE GRADY'S TRIAL PLAN IN *WADLEIGH* IS IN ACCORD WITH SEVENTH AMENDMENT REQUIREMENTS

Judge Posner bases his final argument for decertification on the theory that a bifurcated trial violates the Seventh Amendment proscription that the findings of one jury cannot be reexamined by a subsequent jury.²⁰⁹ According to Posner, Judge Grady's plan, which granted partial certification under Rule 23(c)(4)(A) for the determination of negligence on a classwide basis, creates a Seventh Amendment violation by failing to allow the class action jury to make a final determination of liability.²¹⁰ Under this plan, after the jury in the class action made its initial determination of negligence, subsequent juries in individual trials will determine the issues of comparative negligence and proximate cause.²¹¹ Although Judge Posner recognized that bifurcated trials are authorized by Rule 42(b) of the Federal Rules of Civil Procedure,²¹² he argued that comparative negligence and proximate cause overlap the original determination of negligence or liability, thereby allowing the subsequent juries to review the original findings of the class jury.²¹³ In order to determine comparative negligence, a subsequent jury will compare the defendant's negligence to that of the plaintiff.²¹⁴ In order to determine proximate cause, the subsequent jury will determine if the injuries suffered by the plaintiff were reasonably foreseeable to the defendant.²¹⁵ To determine either of these issues, Posner argued that the subsequent jury must review the earlier findings of the class jury, leading him to hypothesize that the two juries could come to inconsistent conclusions.

A second or subsequent jury might find that the defendants' failure to take precautions against infection with Hepatitis B could not be thought the proximate cause of the plaintiffs' infection with HIV, a different and unknown blood-borne virus. How the resulting inconsistency between the juries could be prevented escapes us.²¹⁶

In his discussion of the Seventh Amendment, Judge Posner misinterprets the element of proximate cause. In determining proximate cause, the jury decides whether the risk of harm to plaintiffs was within the scope of the risk that was foreseeable to defendants.²¹⁷ In contrast,

209. *Rhone-Poulenc*, 51 F.3d at 1303.

210. *Id.*

211. *Id.*

212. *Id.* at 1302.

213. *Id.*

214. *See, e.g., Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); WILLIAM L. PROSSER ET AL., *TORTS: CASES AND MATERIALS* 575 (8th ed. 1991).

215. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928).

216. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995).

217. *Id.*

in determining liability the jury decides whether the actions taken by the defendant were unreasonable as defined by the particular jurisdiction.²¹⁸ Under Judge Grady's plan, the class jury will decide whether the defendant acted as it should have or in accordance with the practice of the blood manufacturing industry, while subsequent juries will decide whether, given the unreasonableness, the particular risk of harm suffered by the plaintiffs was foreseeable. The former inquiry focuses on the conduct of the defendants or others similarly situated, while the latter inquiry focuses on the harm suffered by the plaintiffs. Consequently, as Posner realizes, a subsequent jury may consider whether the defendants' failure to take precautions against infection with Hepatitis B created a reasonably foreseeable risk of contracting the HIV virus.²¹⁹ This inquiry, therefore, turns on the jury's definition of the scope of the risk. If the jury defines the risk of harm, which defendants should have exercised due care to prevent, as all viral infections from blood, then they will probably find that defendants' failure to use due care to avoid this risk was the proximate cause of plaintiffs' injuries. However, if the jury defines the risk of harm, which defendants should have exercised due care to prevent, as the risk of HIV infection, then it probably will find that defendants' conduct was not the proximate cause of plaintiffs' injuries, regardless of whether defendant exercised due care. Such an inquiry is completely separate from the issue of whether the defendant was negligent in failing to take precautions against viral infection, and leaves the Seventh Amendment unharmed. In determining proximate cause after the class jury determines negligence, subsequent individual juries would not reexamine the previous findings of the class jury.

Likewise, the inquiry necessary for a jury to determine comparative negligence remains distinct from the inquiry necessary for the class jury to determine negligence. If the class jury finds that the defendant acted unreasonably, subsequent individual juries must then decide if the plaintiff also acted unreasonably or without due care. If so, given the prior determination of the defendant's unreasonable conduct, the jury then decides who acted more unreasonably.²²⁰ This inquiry picks up where the class jury left off, avoiding Seventh Amendment violations.

In arguing that Judge Grady's plan violates the Seventh Amendment, Judge Posner fails to address conflicting case law supporting the constitutionality of bifurcated trials. For example, *In Re Benedictin Liti-*

218. As discussed *supra*, Part III, although different jurisdictions define "unreasonable" differently, juries determining negligence will still decide if defendants breached the standard of unreasonableness as defined by that jurisdiction.

219. *Rhone-Poulenc*, 51 F.3d at 1303.

220. See *supra* note 208 and accompanying text.

gation²²¹ upheld a trifurcated trial plan. In that case, the plaintiffs objected to trifurcation of their trial on the grounds that by trying only the issue of proximate causation, trifurcation violated their Seventh Amendment right to trial by jury.²²² However, the Sixth Circuit held that the issue of causation could be separated from the issue of defendant's liability without violating the Seventh Amendment.²²³ In its consideration of the issue, the court noted that the Federal Rules of Civil Procedure, specifically Rule 42(b), contemplated the possibility of bifurcating a negligence case.²²⁴

Although the Sixth Circuit recognized that the Federal Rules of Civil Procedure authorize the use of bifurcated trials, in *Rhone-Poulenc* Judge Posner failed to address this conflicting authority. For example, the comments to Rule 23(c)(4)(A) state that "an action may be brought or maintained as a class action with respect to particular issues."²²⁵ Numerous courts have utilized this provision to partially certify a class action as a major dispute resolution device, without concern for Seventh Amendment violations.²²⁶ In effect, Judge Posner's analysis of Rule 23 eviscerates subsection (c)(4)(A), and unnecessarily eliminates a highly effective instrument for managing mass torts without providing legal justification for undermining the federal rules in this way.

In conclusion, Rule 42(b) and Rule 23(c)(4)(A) specifically authorize bifurcated trials. Moreover, the third, fourth, fifth, sixth, and ninth circuits have all used class certification to determine common issues of liability—none finding any constitutional infirmities whatsoever with this approach.²²⁷ Thus, the overwhelming weight of current legislative and case law demonstrates that a separate determination of liability from the issues of proximate cause and comparative negligence does not violate the Seventh Amendment.

VI. CONCLUSION

A nationwide implementation of Judge Posner's new standard requiring plaintiffs to show a likelihood of success on the merits seri-

221. *In re* Benedictin, 102 F.R.D. 239, 305 (S.D. Ohio 1984).

222. *Id.* at 306.

223. *Id.* at 307 (citing 9 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2388, at 280 (1971 & Supp. 1987)).

224. *In re* Benedictin, 102 F.R.D. 239, 307 (S.D. Ohio 1984).

225. *See supra* notes 61-68 and accompanying text.

226. *In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456, 460-61 (S.D. Wyo. 1995).

227. *See, e.g., id., citing In re School Litigation*, 789 F.2d 996 (3d Cir. 1986); *In re A.H. Robins Comp., Inc.*, 880 F.2d 709, 734 (4th Cir. 1988); *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 473 (5th Cir. 1986); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *Arthur Young & Co. v. United States District Court*, 549 F.2d 686 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977).

ously jeopardizes plaintiffs' rights, and compromises both substantive tort and civil procedure goals of fairness and efficiency. While Judge Grady's trial plan should have been modified to avoid *Erie* violations, it should not have been discarded. After the elimination of the *Erie* violations, Judge Grady's certification of the class action is both valid and the superior method for a resolution of the controversy. Judge Posner should not have decertified the class. Likewise, other circuits should not follow the Seventh Circuit's lead and allow the nation to enter into a fourth stage in the evolution of the class action suit. Instead, these circuits should continue to provide plaintiffs with a means of redress for their injuries by granting certification orders in nationwide mass tort actions.

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